IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0964

ANTERO RESOURCES CORPORATION, formerly known as ANTERO RESOURCES APPALACHIAN CORPORATION,
Defendant Below, Petitioner

v.

L&D INVESTMENTS, INC., a West Virginia corporation, RICHARD SNOWDEN ANDREWS, JR., MARION A. YOUNG TRUST, CHARLES A. YOUNG, DAVID L. YOUNG, and LAVINIA YOUNG DAVIS, successors of Marion A. Young, CHARLES LEE ANDREWS, IV, and FRANCES L. ANDREWS,
Plaintiffs Below, Respondents

MIKE ROSS, INC.,
Cross-Claim Defendant Below, Respondent.

BRIEF OF RESPONDENT MIKE ROSS, INC.

Civil Action No. 13-C-528-2
In the Circuit Court of Harrison County, West Virginia
(Honorable Thomas A. Bedell, Chief Judge)

COUNSEL FOR RESPONDENT AND CROSS-CLAIM DEFENDANT MIKE ROSS, INC.

Benjamin L. Bailey (WVSB #200)
Rebecca D. Pomeroy (WVSB #6597)
Christopher D. Smith (WVSB #13050)
BAILEY & GLASSER LLP
209 Capitol Street
Charleston, West Virginia 25301
Telephone: 304-345-6555; Facsimile: 304-342-1110
bbailey@baileyglasser.com
bpomeroy@baileyglasser.com
csmith@baileyglasser.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION

Antero's appeal is a classic case of selective citation, focusing only on a few phrases and facts favorable to Antero and conspicuously omitting crucial facts and phrases that demonstrate that Antero's appeal suffers from several fundamental flaws. Indeed, Antero's appeal omits crucial details from four key documents—the July 14, 2014 Agreement; Plaintiffs' Complaints; the Settlement Agreement between Antero and Plaintiffs; and Antero's own briefing below—that undermine Antero's appeal. These documents—and bedrock West Virginia law—foreclose Antero's assignments of error, and their appeal.

First, to the extent Antero asserts that the lower court erred by awarding MRI a $4,000,000 credit, this argument overlooks the fact that Antero briefing below *agreed* that MRI was entitled to this credit. Judicial estoppel bars Antero from asserting a position that it advocated below is error on appeal.

Second, Antero outright ignores that the July 14, 2014 Agreement states it was intended to "indemnify Antero for any overpayment and any interest due or accrued on the overpayment as a result of the competing claim of L&D Investments, Inc." Indeed, it fails to mention this provision in its brief likely because it undercuts Antero's argument that the July 14, 2014 Agreement entitles it to wholesale reimbursement of royalties or because the lower court expressly considered this provision in arriving at its ruling. But it cannot ignore this limited indemnity provision—West Virginia law says that every provision in a contract must be given effect. Its contention that the lower court erred in considering and giving effect to this provision cuts against this bedrock principle of law.

Finally, Antero mischaracterizes the claims in Plaintiffs' Complaint and the Settlement Agreement between Plaintiffs and Antero, trying to portray them as limited to a royalty settlement, in an attempt to shoehorn that settlement into the indemnification provisions of the July 14, 2014 Agreement. Plaintiffs' Complaint asserted a wide array of claims beyond the limited mis-directed royalties claims for which MRI was obligated to indemnify Antero. And Antero settled that entire bevy of claims and potential liability in its Settlement Agreement with Plaintiffs without specifying how its funds were allocated. Antero's improper attempts, however, to recast Plaintiffs' complaints and its settlement agreement so that it can recover under an indemnity theory should therefore be summarily ignored.

Accordingly, because Antero's assignments of error are readily dispelled by evidence that its appeal deliberately omits or outright ignores, the portions of the lower court's order that it challenges must be upheld. Moreover, the portions of the Order challenged in MRI's appeal should be overturned.

II. STATEMENT OF THE CASE

Antero Resources Corporation ("Antero") asserts that the Court erred by (1) rewriting the terms of an indemnification agreement between Antero and Mike Ross, Inc. ("MRI") and (2) awarding Plaintiffs below a "double recovery." Both of these errors, however, are premised on a selective reading of several key documents in this case.

MRI generally agrees with Antero regarding the basic facts of this case. In 2013, Plaintiffs in the underlying action brought suit, alleging that Antero Resources Corporation ("Antero") wrongfully paid MRI gas royalties that belonged to Plaintiffs. J.A. 51-88. However, Antero's brief reads as though the only claim asserted or damage sought by Plaintiffs below was for mis-paid royalties. But, as Antero surely knows, Plaintiffs sought far more than lost royalties, asserting

claims for misappropriation, trespass, fraud, deceit, conversion, slander of title, unauthorized pooling of mineral interests, and punitive damages in addition to the claims for the royalties paid to MRI. J.A. 51-99; 1558-1562.

Shortly after the underlying case began, Antero halted royalty payments to MRI. J.A. 2868. Despite its brief cessation of payment, Antero never disputed that it owed royalty payments to the owner of the contested mineral estates. *See e.g., id.* Simply put, Antero recognized when it entered into the Agreement that it had an existing, underlying obligation to pay royalties to whomever owned the mineral estates at issue in the case which at that time Antero believed was MRI. In fact, Antero obtained a title opinion in September 2013 on the subject property in which its counsel—counsel from the very same firm hired to litigate the underlying dispute—concluding that MRI was the rightful owner of the royalties. *See, e.g.*, J.A. at 2989 (recommending that Antero "obtain a modification or pooling agreement from Mike Ross, Inc., or its successors or assigns, before beginning operations that pool the captioned oil and gas with other property").[1]

On July 14, 2014, Antero used this existing obligation as a bargaining chip to create a one-way legal obligation on MRI to indemnify Antero for Antero's existing legal duty. In that Agreement, Antero promised to perform its pre-existing duty and

> resume making royalty payments to Mike Ross, Inc. with the understanding that Mike Ross, Inc. will indemnify Antero for any overpayment and any interest due or accrued on the overpayment as *a result of the competing claim of L&D Investments, Inc.*

J.A. 2868 (emphasis added). The Agreement expressly conditioned resumption of Antero's duty to MRI on an agreement by MRI

[1] This was not the only title opinion obtained by Antero regarding the property. Another title opinion that is not contained in the record offered similar results on ownership as to the one cited above.

> to reimburse Antero in full for any amount of royalties paid in excess of what Mike Ross, Inc. may actually own along with the full amount of interest due or accrued on the overpayments in the event that L&D Investments, Inc. or any other party, is deemed to own an interest in the subject minerals for which Mike Ross, Inc. now claims.

J.A. 2869.

On February 21, 2017, the lower court entered an order declaring MRI to be the rightful owner of the mineral interests at issue in the case. J.A. 1302-1367. After the lower court refused to alter or amend its judgment through an order issued on April 5, 2017, certain Plaintiffs and a co-defendant claiming to own roughly 36% of the 80% of the mineral estates at issue, appealed to this Court. *L&D Investments, Inc. v. Mike Ross, Inc.*, 241 W. Va. 46, 56, 818 S.E.2d 872, 882 (2018). This Court reversed and determined that the tax deeds conveying those appellants' interests were void and directed the lower court to find that the 36% was owned by appellants. *Id.* But this Court's ruling did not resolve the validity of the entire mineral estates below; instead, its holding addressed only the claims of petitioners, leaving the ownership of the remaining mineral estates belonging the parties who did not appeal in question. *See, e.g.,* J.A. 1646-1665. MRI continued to assert that it rightfully owned the portion of the mineral estates that was not addressed by this Court's prior opinion and moved for summary judgment on June 7, 2019, asking the lower court to declare it the rightful owner of the remainder of the mineral estates. *Id.* It was not until October 30, 2019, that the ownership of the remainder of the mineral estates was fully resolved. On that date, the lower court denied MRI's motion for summary judgment and determined that the entirety of the tax sales were void, that ownership of the mineral estates belonged to Plaintiffs. J.A. 2158-2235.

On November 1, 2019, MRI tendered Plaintiffs an offer of judgment pursuant to Rule 68 of the West Virginia Rules of Civil Procedure. J.A.2252. Pursuant to this offer, MRI offered Plaintiffs $4,000,000 in exchange for "a full release of all claims asserted by Plaintiffs against MRI and, similarly, an agreement by MRI to forego any further claims in this case." *Id.* Importantly, because the offer of judgment sought a "full release of all claims," it sought to extinguish the claims for wrongfully received royalties asserted by Plaintiffs. On November 8, 2019, Plaintiffs accepted the offer, extinguishing, among other claims, the claim for wrongfully received royalties. J.A. 2266.

Shortly thereafter, on December 16, 2019, Antero settled all of the claims asserted against it by Plaintiffs. Those claims included misappropriation, trespass, fraud, deceit, conversion, slander of title, unauthorized pooling of mineral interests, and punitive damages in addition to the claims for the royalties paid to MRI. J.A. 2373. In its settlement agreement, Antero agreed to pay Plaintiffs a lump sum of $7,000,000, with $4,000,000 of that going into an escrow account so Antero could determine whether the $4,000,000 would be offset by MRI's offer of judgment. J.A. 2373-2374. Antero did not, however, designate which, if any portion, of the settlement was being allocated to pay for misdirected royalties despite the fact that initial drafts of its settlement agreement allocated specific portions of the settlement for particular claims. *Id.* Additionally, Antero neither invited MRI to participate in settlement of the claim nor sought MRI's input in determining which portion of the settlement was to be directed toward misdirected royalties and which portion was directed toward Plaintiffs' other claims.

Although this settlement should have been the end of things, Antero tardily began pressing a crossclaim against MRI. Indeed, on November 12, 2019, after discovery was closed, four days after MRI resolved its claims with Plaintiffs through an offer of judgment on the eve of trial, and

five years after signing the Agreement, Antero asserted a new crossclaim seeking repayment under the July 14, 2014 Agreement. J.A. 2278-2284. Unable to resolve the crossclaim, MRI and Antero filed competing motions for summary judgment on that crossclaim. *See, e.g.*, 2851-2872. Importantly, Antero urged the lower court to treat the Agreement not as an indemnification agreement protecting Antero against competing royalty claims by Plaintiffs but as an Agreement that entitled it to wholesale reimbursement of royalties paid to MRI. *See* J.A. 2642-2664.

And that is where MRI's agreement with Antero's recitation of the facts ends. Antero's assignments of error are premised on selective citation of four key documents in this case: (1) the July 14, 2014 Agreement; (2) Plaintiffs' various Complaints; (3) Antero's own settlement agreement with Plaintiffs; and (4) Antero's summary judgment briefing. MRI will address each of these in turn.

a. The Indemnification Agreement between Antero and MRI

Antero myopically focuses on the portion of the July 14, 2014 Agreement that states that MRI will "reimburse Antero in full for any amount of royalties paid in excess of what [MRI] may actually own along with the full amount of interest due or accrued on the overpayments in the event that L&D Investments, Inc., or any other party, is deemed to own an interest in the subject minerals" in a misguided attempt to transform the indemnification agreement into a wholesale reimbursement agreement. J.A. 2869. But, as a portion of the Agreement that Antero cagily omits plainly indicates, the Agreement was intended to "indemnify Antero for any overpayment and any interest due or accrued on the overpayment as a result of the competing claim of L&D Investments, Inc." J.A. 2868. Put simply, MRI agreed to indemnify Antero only for any mis-directed royalty payments for which Antero was determined to be liable to L&D Investments.

Antero's reading—a reading that wholly omits the provision stating that the Agreement existed to indemnify Antero for liability as a result of the claims of L&D Investments, Inc.—is an altogether more pernicious reading, which enables Antero to foist the entirety of the burden of settling this case onto MRI. Indeed, under the reading urged by Antero, MRI will have paid eleven million dollars to resolve this matter (a four million dollar offer of judgment that resolved the misdirected royalties claim, and a $6,914,943.75 "reimbursement" to Antero for the royalties resolved by the offer of judgment) while Antero pays essentially nothing (indeed, the amount it paid to settle with Plaintiffs is conspicuously less than the reimbursement and interest it now seeks from MRI). That is not how the July 14, Agreement works, and Antero should not be permitted to turn an agreement intended to "indemnify Antero" into one under which Antero receives an improper windfall.

The lower court recognized as much, determining that Antero's preferred reading "would undoubtedly bestow an unjust enrichment on Antero." J.A. 3108. Therefore, the lower court determined that under a proper reading of the contract, "Antero's contractual indemnification claim against MRI arising from their Agreement is premised on Antero's liability for any unpaid (i.e.; otherwise improperly paid to MRI) royalties to an appropriately entitled royalty interest owner in the Subject Property." J.A. 3106-3107.

b. Plaintiffs' Complaints

Antero curiously contends that L&D received "a total of $11,000,000 on what should have been net settlements of $7,000,000, resulting in a windfall to L&D of $4,000,000.00." Pet. Br. 5. But Antero is improperly categorizing Plaintiffs' claims. Plaintiffs have never cabined their claims to the recovery of mis-paid royalties. Indeed, each and every iteration of Plaintiffs' complaint has asserted a bevy of claims and an accompanying bevy of damages, including misappropriation,

trespass, fraud, deceit, conversion, slander of title, unauthorized pooling of mineral interests, and punitive damages in addition to the claims for the royalties paid to MRI. J.A. 51-99; 1558-1562. Despite this, Antero wrongly contends that Plaintiffs could only recover mis-paid royalties, and anything above the amount of mis-paid royalties is a windfall. That is, of course, wrong. Nothing Plaintiffs alleged limited their damages.

Antero's reason for so characterizing Plaintiffs' claims is, however, obvious. Indeed, under the indemnification agreement between Antero and MRI, MRI only agreed to indemnify Antero for "any overpayment and any interest due or accrued on the overpayment as a result of the competing claim of L&D Investments, Inc." J.A. 2868. Put simply, anything beyond misdirected royalties is not recoverable under the agreement between MRI and Antero, giving Antero ample incentive to so categorize Plaintiffs' claims. But, as the settlement agreement between Plaintiffs and Antero recognizes, Antero's settlement was intended to cover each claim asserted by Plaintiffs—not merely misdirected royalties. J.A. 2373.

c. Settlement Agreement between Antero and Plaintiffs

Antero contends that "As part of the settlement [between Antero and Plaintiffs], Antero agreed to pay L&D a total of $7,000,000.00, which represented $5,621,285.25 owed to L&D in royalties and $1,378,714.75 in interest." Pet. Br. 3. Tellingly, this citation does not refer to the settlement agreement itself; instead, it refers to an offer of settlement by Antero, wherein Antero characterized the settlement as representative of royalty payments. *See* J.A. 2964. The *actual* settlement agreement simply stated that "Antero will pay Plaintiffs the sum of $7,000,000, as per counsel's emails attached hereto as Exhibit No. 1." J.A. 2373. Importantly, the emails referenced as an exhibit made it clear that the settlement was not only for royalties and was instead for "unpaid royalties . . . loss of value/interest, tort claims, contract claims, or any other known or unknown

claims except for the separate settlement regarding the pooling issues." J.A. 2384. Indeed, the Plaintiffs plainly stated that "Plaintiffs arrived at the final settlement figure of $7,000,000 to compensate *for all claims and all expected damages that could have been returned by the jury and did not itemize each such damage item as some were intangible dependent only on the jury's determination after hearing all evidence.*" *Id.* (emphasis added). Therefore, to the extent Antero attempts to characterize the settlement as one paying entirely royalty claims in an attempt to shoehorn the settlement into the indemnification agreement between Antero and MRI, that attempt fails in the face of the evidence it neglected to cite.

d. Antero's Summary Judgment Briefing

Antero's assertion that the lower court erred when it determined that "Mike Ross, Inc., was only required to pay Antero Resources Corporation $2,914,943.75 of the $6,914,943.75" is a dramatic about face. In its briefing below, Antero "agree[d] that MRI should be entitled to receive a credit for the $4,000,000 MRI paid to Plaintiffs." J.A. 2653. Antero's agreement makes sense—MRI already paid Plaintiffs through its offer of judgment and it should receive a corresponding credit. It should not be required to indemnify Antero for any portion of damages it already tendered to Plaintiffs.

III. SUMMARY OF ARGUMENT

Antero's assignments of error fall apart upon minimal review of the record below.

First, to the extent Antero contends that the lower court improperly gave MRI a $4,000,000 credit, that argument is foreclosed by judicial estoppel. Below, Antero explicitly agreed that MRI was entitled to this credit, and it cannot assert the lower court erred by adopting a position that it advocated for.

Next, Antero's assertion that the lower court erred by finding that the July 14, 2014 Agreement entitled Antero only to reimbursement for liability stemming from mis-directed royalty payments is plainly refuted by the language of the contract. Indeed, the contract stated that it was put in place to "indemnify Antero for any overpayment and any interest due or accrued on the overpayment as a result of the competing claim of L&D Investments, Inc." J.A. 2868. Antero ignores this provision and advocates a reading of the contract without it. But West Virginia law requires courts to give effect to all provisions of a contract—not just provisions that a party likes.

Additionally, MRI extinguished Antero's right to indemnification when it resolved the only claim for which Antero was entitled to indemnification. Antero has no right to indemnification beyond the limited right described in the July 14, 2014 Agreement.

Finally, Antero's attempts to limit or cap Plaintiffs' sought damages or misconstrue the settlement agreement between Antero and Plaintiffs in an attempt to bring those damages within the July 14, 2014 indemnification obligations should be summarily ignored because they misconstrue Plaintiffs' claims and the settlement agreement.

IV. STATEMENT REGARDING ORAL ARGUMENT

Antero's appeal involves the straightforward interpretation of settled West Virginia contract and indemnity law. While oral argument on this sort of appeal is usually unnecessary and a memorandum decision is appropriate, MRI requests oral argument to help demonstrate that the snarled record in this case readily refutes Antero's assignments of error.

V. ARGUMENT

a. Standard of Review

In the proceedings below, the lower court partially granted Antero's Motion for Summary Judgment and denied MRI's Motion for Summary Judgment. Therefore, this case must be reviewed under a de novo standard of review because a "circuit court's entry of summary judgment is reviewed de novo." *Painter v. Peavy*, 192 W. Va. 189, 190, 451 S.E.2d 755, 756 (1994).

b. Antero is judicially estopped from arguing that the lower court improperly gave MRI a $4 million credit.

Antero's argument that MRI improperly received a $4 million credit is inconsistent with its position below and is barred by judicial estoppel.

> Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.

W. Virginia Dep't of Transp., Div. of Highways v. Robertson, 217 W. Va. 497, 499, 618 S.E.2d 506, 508 (2005). Indeed, despite now asserting that the lower court erred by awarding MRI a $4 million credit, *Antero actually asserted that MRI was entitled to a $4 million credit below*. Indeed, in its Motion for Summary Judgment on MRI's cross-claim, Antero expressly stated that it "agree[d] that MRI should be entitled to receive a credit for the $4,000,000 MRI paid to Plaintiffs." J.A. 2653.

This Court should bar Antero from claiming error where MRI received the very credit Antero agreed that MRI was entitled to receive below, because all elements of judicial estoppel

are satisfied. First, Antero's *assignment* of error is plainly and directly controverted by its assertion that MRI was entitled to a credit below. Second, both proceedings involve the same adverse parties, Plaintiffs and MRI. Third, Antero made the argument in a summary judgment motion that it (improperly) won. Finally, allowing Antero to assert error when it agreed that MRI was entitled to a credit adversely affects the integrity of the judicial process. Parties should not be able to assert error when a court adopts a position that they advocated for. Accordingly, this Court should bar Antero from asserting its first assignment of error under the doctrine of judicial estoppel.

c. The lower court correctly determined that an agreement that, by its express terms, was intended to "indemnify Antero for any overpayment and any interest due or accrued on the overpayment as a result of the competing claim of L&D Investments, Inc." entitled Antero only to indemnification for incurred liability—not wholesale reimbursement.

While MRI contends that the July 14, 2014 Agreement is unenforceable,[2] if it is an enforceable agreement, the lower court correctly determined that it only entitled Antero to a "contractual indemnification claim against MRI arising from their Agreement is premised on Antero's liability for any unpaid (i.e.; otherwise improperly paid to MRI) royalties to an appropriately entitled royalty interest owner in the Subject Property." J.A. 3106-3107. Indeed, the lower court's holding follows the lodestar principles of West Virginia contract law. When interpreting a contract for indemnity, "the primary purpose is to ascertain and give effect to the intention of the parties." *Sellers v. Owens-Illinois Glass Co.*, 156 W. Va. 87, 92–93, 191 S.E.2d 166, 169 (1972). To that end, "the language of such a contract must clearly and definitely show an intention to indemnify against a certain loss or liability." *Id.* at 92. Moreover, as with any contract, the court must "give effect to each provision of the contract." *Am. Nat'l Prop. & Cas. Co. v. Clendenen*, 238 W. Va. 249, 267, 793 S.E.2d 899, 917 (2016).

[2] MRI's arguments establishing that the July 14, 2014 are available in its opening brief in Case No. 20-0967.

And that is precisely what the lower court did when it determined

> from the totality of considerations now upon the record herein that the overall intent and understanding of Antero and MRI at the time they entered into their July 14, 2014 *Agreement* to be as such contractual language therein reflect, to-wit: In the event any royalty payments made by Antero to MRI were ultimately found to be improper via judgment rendered in these proceedings, such payments would be relinquished by MRI so that they could then be[] properly accounted for and dispersed to accurately identified royalty owners according to legally determined royalty ownership proportions along with any interest that might otherwise actually be accruing thereon as a result of trial verdicts and related pronounced judgments rendered thereon and upon which interest would legally accrue in statutorily required fashion.

J.A. 3109. Indeed, the lower court's finding effected the plain, contractual explanation of the parties that the Agreement was intended to "indemnify Antero for any overpayment and any interest due or accrued on the *overpayment as a result of the competing claim of L&D Investments, Inc.*" J.A. 2868 (emphasis added). Put simply, under the agreement, MRI agreed to repay Antero for any mis-paid royalties—but not any other type of claim or damage—liability arising from the competing claim of L&D Investments.

Despite noting that West Virginia law requires courts to consider "facts and surrounding circumstances" when interpreting a contract for indemnity, Antero wholly ignores that explanatory provision in the July 14, 2014 Agreement, failing to mention it a single time in their briefing. Pet. Br. 8 (citing *Sellers v. Owens-Illinois Glass Co.*, 156 W. Va. 87, 92–93, 191 S.E.2d 166, 169 (1972)). Instead, Antero focuses solely on a provision of the agreement stating that MRI will pay "Antero in full for any amount of royalties paid in excess of what Mike Ross, Inc. may actually own along with the full amount of interest due or accrued on the overpayments in the event that L&D Investments, Inc., or any other party, is deemed to own an interest in the subject minerals for which Mike Ross, Inc. now claims." *See, e.g.*, *id* at 9. But that is not how West Virginia contract

law works—parties are not entitled to read one favorable provision and exclude those they do not like. *See, e.g., Am. Nat'l Prop. & Cas. Co.*, 238 W. Va. at 267, 793 S.E.2d at 917. The contract must be read to give every provision purpose, and the early clause stating that MRI will "indemnify Antero for any overpayment and any interest due or accrued on the overpayment as a result of the competing claim of L&D Investments, Inc." makes it crystal clear that the Agreement was put in place to protect Antero from liability stemming from mis-paid royalty claims—not recoup royalties wholesale or damages arising out of other claims. J.A. 2868.

Antero bends over backwards to avoid mentioning this provision, arguing that the lower court's determination was divorced from the language of the contract and premised on "perceived equities." Pet. Br. 10. That is inaccurate. In arriving at its decision that the contract was put in place to indemnify Antero for liability from mis-paid royalty claims, the lower court specifically noted the provision Antero so cagily avoids. *See* J.A. 3102 ("The Agreement also contemplates and further speaks of, inter alia: Indemnification (i.e.; any overpayment and any interest due or accrued on the overpayments as a result of the competing claim of L&D Investments, Inc."). Therefore, Antero's four-page argument attributing the lower court's decision to an improper balancing of the equities is a red herring intended to distract this Court from the very words of the contract that Antero refuses to acknowledge.

Antero's attempts to distract the Court from the fact that the Agreement plainly states that it was put in place to indemnify Antero from a specific subset of liability—mis-paid royalties—makes sense for two reasons. First, by asserting that the Agreement calls for wholesale reimbursement of royalties, Antero foists its obligation to pay royalties onto MRI. Indeed, MRI specifically resolved the mis-paid royalties claims with Plaintiffs through its offer of judgment. Despite the fact that MRI re-directed the mis-paid royalties to their rightful owner, Antero

nevertheless seeks to recoup royalty payments from MRI. That plainly gives Antero an improper windfall by enabling it to recover royalties that it was otherwise obligated to pay.

Beyond the fact that Antero avoids the indemnification language in an improper attempt to profit, it also attempts to cast the Agreement as a reimbursement agreement to obfuscate the fact that it failed to include MRI in settlement discussions or to earmark its settlement agreement with Plaintiffs, which drastically increases its burden to recover under a theory of indemnification. To recover under an express indemnity theory when a case has been settled, this Court has announced two differing standards: an "actual liability" standard and a "potential liability standard." *See, e.g., Valloric v. Dravo Corp.*, 178 W. Va. 14, 357 S.E.2d 207 (1987). The actual liability is exacting, requiring the party seeking indemnification to demonstrate that they were actually entitled to recover for indemnity in the case. The potential liability standard is laxer, and to prevail, "the indemnitee must in his indemnity suit show that the original claim is covered by the indemnity agreement. Then he must demonstrate that he was exposed to liability which could reasonably be expected to lead to an adverse judgment. Finally, he must prove that the amount of the settlement was reasonable." Syl. Pt. 4, *id.* at 15. However, in order to invoke the potential liability standard, the party seeking indemnification must show that the "party having a duty to indemnify has been notified or been made a party to the underlying proceedings and given an opportunity to participate in its settlement negotiations." Syl. Pt. 2, *id.* The opportunity to participate in settlement negotiations with the party seeking indemnification is crucial because "notice and an opportunity to defend are the indispensable due process satisfying elements." *Id.* at 19. Therefore, if the party from whom indemnification was sought was not part of settlement negotiations, the laxer standard does not apply.

Here, Antero is only entitled to indemnification for liability arising from mis-paid royalties under the Agreement. However, Antero failed to invite MRI to participate in settlement negotiations with Plaintiffs, and Antero's settlement agreement with Plaintiffs specifically noted that "Plaintiffs arrived at the final settlement figure of $7,000,000 to compensate for all claims and all expected damages that could have been returned by the jury and did not itemize each such damage item as some were intangible dependent only on the jury's determination after hearing all evidence." *Id.* Therefore, the heightened standard for indemnification applies, and Antero's attempts to recast the Agreement are an attempt to avoid that fact.

At bottom, Antero contends that the lower court erred because it read the contract as a whole and gave it its intended reading instead of reading only the part of it that favors Antero. That is not error—reading it as a whole is adherence to a black letter principle of West Virginia law. Accordingly, should this Court determine that the July 14, 2014 Agreement is an enforceable contract, the portion of the lower court's order determining that the Agreement entitled Antero to indemnification "premised on Antero's liability for any unpaid (i.e.; otherwise improperly paid to MRI) royalties to an appropriately entitled royalty interest owner in the Subject Property" must be upheld.

d. MRI's Offer of Judgment extinguished the claim for mis-paid royalties for which Antero was entitled to indemnification.

Under West Virginia law, "[i]t is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury." Syl. Pt. 7, *Harless v. First Nat'l Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982); *see also McDavid v. U.S.*, 213 W. Va. 592, 601, 584 S.E.2d 226, 235 (2003) (noting that it is "axiomatic" that only one recovery is permitted for each loss). In the case below, Antero asked MRI to indemnify it for payments wrongfully made

to MRI instead of Plaintiffs. MRI, however, already made full payment, in the form of its accepted offer of judgment, to Plaintiffs to compensate them for royalty payments it received from Antero that should have been paid to Plaintiffs. As MRI argued below, Antero was not entitled to recover for an injury for which Plaintiffs also recovered. Upon Plaintiffs' acceptance of the $4,000,000 offer of judgment to resolve "all claims" against MRI, which included all the royalty claims, the misdirected payments claim was extinguished. Antero's claim for indemnification, which the lower court recognized was premised on "liability for any unpaid . . . royalties to an appropriately entitled royalty interest owner," cannot proceed where they are derivative of the injury for which Plaintiffs already recovered. Indeed, permitting this claim to proceed undercuts the salutary public purpose of an offer of judgment, which should have given MRI finality. Therefore, Antero's argument that it may recover for an extinguished claim is unavailing.

While Antero argues that express indemnity claims survive a settlement, that misses the point. While a claim for indemnity may survive settlement, a party is not entitled to recover under a theory of indemnity unless that party can establish that the other party is contractually obligated to pay for the claim for which indemnity is sought. Antero cannot do so for two reasons. First, as described above, the mis-directed royalties claim was resolved by MRI's accepted offer of judgment. Second, even if the claim was not resolved, Antero failed to earmark its settlement or include MRI in its settlement discussions with Plaintiffs. Antero is not entitled to indemnification where it cannot show that its settlement with Plaintiffs resolved only the limited set of claims for which MRI owed it indemnity.

e. If MRI's offer of judgment did not extinguish the mis-paid royalties claims, the lower court correctly determined that MRI is entitled to a $4 million credit to account for its offer of judgment.

MRI contends that West Virginia's bar on double recovery prevents Antero from seeking indemnification from a claim MRI satisfied with its offer of judgment to Plaintiffs because Antero may not recover amounts wrongfully paid to MRI where MRI has already tendered the wrongful payments to their rightful owner. Even if this Court determines that MRI must indemnify Antero for amounts paid to MRI that were actually due to Plaintiffs, MRI must be given a credit to account for the $4 million judgment entered and paid in favor of Plaintiffs against MRI to ensure that MRI is not providing impermissible "double satisfaction for a single injury." See, e.g., 22 Am. Jur. 2d Damages § 32 ("[A] double or duplicative recovery for a single injury is invalid. The double recovery rule is derived primarily from principles of unjust enrichment."). Because MRI satisfied $4 million of the misdirected payments through its offer of judgment to Plaintiffs, it must be given a $4 million credit to account for that payment to avoid being forced to pay for the same injury twice.

f. Antero improperly claims that its settlement provides Plaintiffs a windfall to avoid the fact that its settlement resolved more than misdirected royalties payments for which it is entitled to indemnity.

Antero, again cagily omitting crucial language, contends that Plaintiffs will receive a windfall if Plaintiffs receive "$11,000,000.00 on claims worth $7,000,000.00." But Antero's attempts to cap Plaintiffs' recovery at $7,000,000.00—an amount that it contends "represent[s] the unpaid royalties and interest"—is a flat misstatement of Plaintiffs' claims. Plaintiffs in this case sought to recover a wide range of torts and damages which carried significant potential exposure from a monetary perspective, and nowhere did they cabin their attempted recovery to mis-directed royalty payments. Indeed, just weeks before the trial, Antero was forced to disclose its title opinion which

demonstrated Antero's counsel recommended Antero obtain a pooling agreement, which Antero ignored. Similar cases returned jury verdicts in excess of $10 million. *See TXO Prod. Corp. v. All. Res. Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992) (upholding a $10 million award of damages in a slander of title case). Rather than face that potential liability, Antero chose to settle with Plaintiffs, but did not allocate which portions of the settlement proceeds were attributable to which of Plaintiffs' varied claims.

Instead, Antero entered into a lump sum settlement with Plaintiffs, but now attempts to limit Plaintiffs' damages to mis-directed royalties to obfuscate the fact that it failed to earmark a settlement covering a wide variety of claims, most of which MRI did not agree to indemnify Antero for.[3] This sleight of hand should be summarily ignored.

CONCLUSION

Antero's appeal is premised on selective citation. The court below plainly interpreted the July 14, 2014 Agreement correctly to the extent it determined that Agreement only provided indemnity for claims arising from mis-paid royalties, and Antero's assertion that the lower court erred by considering a provision that it would prefer the lower court ignore fails. Moreover, Antero's attempts to ignore claims asserted by Plaintiffs and the breadth of the settlement agreement between Antero and Plaintiffs in an attempt to shoehorn that settlement agreement into

[3] To the extent Antero intends to argue that its settlement offer, which it misleadingly cites as setting for the terms of the actual settlement on page four of its brief, somehow modifies or alters the terms of the actual settlement agreement, that argument is barred by West Virginia's longstanding parol evidence rule. *Kanawha Banking & Tr. Co. v. Gilbert*, 131 W. Va. 88, 101, 46 S.E.2d 225, 232–33 (1947) ("[W]here the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements of any of the parties to it made contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain its terms, in the absence of fraud, accident or mistake in its procurement.").

the July 14, 2014 Agreement's indemnification provision similarly fail. Accordingly, Antero's assertions of error are unavailing, and the portions of the Order that it challenges should be upheld.

MIKE ROSS, INC.

By Counsel

Benjamin L. Bailey (WVSB No. 200)
Rebecca D. Pomeroy (WVSB No. 8800)
Christopher D. Smith (WVSB No. 13050)
BAILEY & GLASSER, LLP
209 Capitol Street
Charleston, WV 25301
Telephone: 304.345.6555; Facsimile: 304.342.1110
bbailey@baileyglasser.com
bpomeroy@baileyglasser.com
csmith@baileyglasser.com

CERTIFICATE OF SERVICE

I, Benjamin L. Bailey, do hereby certify that on the 3rd day of May 2021, I have caused to be served a true and accurate copy of the foregoing **Brief of Respondent Mike Ross, Inc.** upon the below listed counsel of record by depositing a true copy thereof in the United States Mail, postage prepaid, in envelopes addressed to them at their office addresses as follows:

David J. Romano, Esq. Romano Law Office 363 Washington Avenue Clarksburg, WV 26301 *Counsel for L&D Investments, Inc.*	W. Henry Lawrence, Esq. Justin A. Rubenstein, Esq. Steptoe & Johnson, PLLC 400 White Oak Blvd. Bridgeport, WV 26330 *Counsel for Antero Resources Corporation*
Charles F. Johns, Esq. Shaina Massie, Esq. Steptoe & Johnson, PLLC 400 White Oak Blvd. Bridgeport, WV 26330 *Counsel for Consol Energy, Inc. and CNX Gas Company, Inc.*	Timothy M. Miller, Esq. Matthew S. Casto, Esq. Katrina Bowers, Esq. Babst, Calland, Clements, Zomnir, PC BB&T Square 300 Summers Street, Suite 1000 Charleston, WV 25031 *Counsel for SWN Production Company, LLC and Enervest Operating, LLC*
Ancil G. Ramey, Esq. Steptoe & Johnson, PLLC P.O. Box 2195 Huntington, WV 25722-2195 *Counsel for Antero Resources Corporation*	

Benjamin L. Bailey (WVSB No. 200)