No. 21-0613

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

L&D INVESTMENTS, INC., a West Virginia corporation,
RICHARD SNOWDEN ANDREWS, JR.,[1]
MARION A. YOUNG TRUST,
CHARLES A. YOUNG, DAVID L. YOUNG, and
LAVINIA YOUNG DAVIS, Successors of Marion A. Young Trust,
CHARLES LEE ANDREWS, IV, and
FRANCES L. ANDREWS

Plaintiffs Below, Petitioners

v.

ANTERO RESOURCES CORPORATION, et al

Defendants Below, Respondents.

On Appeal from the Circuit Court of Harrison County, West Virginia
Civil Action No. 13-C-528-2

PETITIONERS' BRIEF

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[1] Plaintiff RSA Jr. died during these proceedings and his Son RSA III, his Father's Executor, was substituted in his stead.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

West Virginia Cases:

Cases from Other Jurisdictions:

Constitutional Provisions, Rules and Statutes

Other Sources:

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INTRODUCTION

Petitioners, L&D Investments, Inc., Richard Snowden Andrews, Jr., Marion A. Young Trust, Charles A. Young, David L. Young, and Lavinia Young Davis, Successors of Marion A. Young Trust, Charles Lee Andrews, IV, and Frances L. Andrews, all of whom were Plaintiffs below ("Plaintiffs"), are the owners of mineral property in Harrison County, West Virginia, known as the Andrews Mineral Tract [hereafter "Tract"]. Richard Snowden Andrews initially purchased the Tract in two purchases, one in 1859 comprising 819 acres and the another 231

acres in 1889. The individual Plaintiffs are all descendants of Richard Snowden Andrews who were determined in this litigation to be the rightful owners of the mineral Tract as the surface was severed and transferred in 1903. After eight years of litigation, which is still ongoing, Plaintiffs were successful in recovering their mineral Tract, but also recovered in settlement $11.5 million dollars for previously diverted gas royalties and damages for other causes of action. In addition, Plaintiffs recovered, for the benefit of certain "Unknown Heirs"[2] the sum of $2,229,526.72 including recovering the "Unknown Heirs" ownership in the mineral Tract which is still generating royalty payments, and will continue to do so.

Having successfully proved the ownership of the disenfranchised Andrews Heirs, and having also generated a fund for them, Plaintiffs filed their Request for attorneys' fees and costs pursuant to the Common Fund Doctrine. Plaintiffs sought a reasonable attorneys' fee and proportionate litigation costs expended in recovering the "Unknown Heirs" mineral property and their wrongfully diverted royalties. However, the Circuit Court denied Plaintiffs' request, finding as a matter of law that the Common Fund Doctrine was inapplicable. Unfortunately, the Circuit Court's decision was, as a matter of law, reversible error.

The Circuit Court's order misapplied the Common Fund Doctrine as interpreted by this Court and practically every other jurisdiction in the United States. This legal Doctrine, which is recognized throughout the United States, provides that a party, and his or her attorney, who creates

[2] "Unknown Heirs" refers to those Andrews Heirs who rightfully owned the 1000 acre mineral tract from which more than $100 million dollars of natural gas was produced; all of the Andrews Heirs that could be found in the United States and the United Kingdom became Plaintiffs or otherwise responded, and those that could not be found are the "Unknown Heirs."

a common fund which benefits persons not parties to the litigation, are entitled to reasonable attorneys' fees and proportionate litigation costs for their efforts in generating and securing such common fund benefitting the absent nonparties. The Circuit Court's misapplication of the law left the Plaintiffs with no award of attorneys' fees or proportionate litigation costs after more than 7 years of litigation needed to recover the "Unknown Heirs" mineral ownership and royalties. For reasons more fully set forth below, Plaintiffs request that the Circuit Court's order be reversed, and the case be remanded with directions for the Circuit Court to determine a reasonable attorneys' fee and proportionate litigation costs as guided by this Court's precedent.

ASSIGNMENTS OF ERROR

Plaintiffs assignments of error for this Court's review are as follows:

1. The Circuit Court erred, as a matter of law, by holding that the Common Fund Doctrine was not applicable as the cause of action was not a class action or involved a "trust fund."

2. The Circuit Court's failure to make finding of facts regarding a reasonable award of attorneys' fees and proportionate litigation costs commensurate with Counsels' efforts in recovering the common fund benefitting the "Unknown Heirs" and also establishing the "Unknown Heirs" undivided 13.7777% ownership in the mineral Tract, was error as a matter of law.

3. Each of the holdings by the Circuit Court, constitute reversible error.

STATEMENT OF THE CASE

This case began as a simple quiet title action involving Plaintiffs, each of whom ultimately were found to own an interest in the mineral Tract at issue in this litigation. The case eventually morphed into a complex case, requiring eight years of litigation, including several appeals to this Court, and is still ongoing. In addition to this appeal, there has been one prior appeal to this Court, which resulted in the reversal of the Circuit Court's granting of summary judgment to the Defendants regarding ownership.[3] There is currently consolidated appeals pending which will be argued at the January 2022 Term of this Court.[4] The complexity of the case ballooned when significant tort claims were discovered and asserted by amended complaints to the original action. The Plaintiffs became aware during discovery that some of the Defendants had acted fraudulently and engaged in deliberate conduct regarding the taking of the mineral property and its generated gas royalties belonging to the Plaintiffs and the "Unknown Heirs. There was evidence that these Defendants knew of these deliberate transgressions but forged ahead regardless. See fn 11, *infra.*

The Defendants eventually settled their claims for $11.5 million dollars, with Antero Resources being the last Defendant to settle on November 15, 2019, the Friday before Trial was to begin on November 18.[5] The Plaintiffs successfully asserted and negotiated as part of the

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[3] *L&D Investments, Inc. v. Mike Ross Inc.*, 241 W.Va. 46, 818 S.E.2d 872 (2018).

[4] *Antero Resources Corp., et al. v. Mike Ross Inc., et. al.*, Appeal No. 20-0964 and *Mike Ross, Inc. v. Antero Resources Corp., et al*, Appeal No. 20-0967.

[5] Antero settled by paying $7 million dollars subject to its cross-claim against Defendant Mike Ross Inc. ("MRI"); MRI had earlier filed a Rule 68 Offer of Judgment for $4 million dollars on November 8, 2019 which was accepted by Plaintiffs. The cross-claims between Antero and MRI, also tangentially involve

settlement,[6] the payment into court of royalties due to the "Unknown Heirs" in the total amount of $2,229,526.72,[7] not including interest/loss of use which was later sought by Plaintiffs' Counsel by Motion to the Circuit Court.[8] As a result of the Plaintiffs' efforts, the "Unknown Heirs" continue to receive monthly royalties which are currently being paid to the Circuit Court's Receiver. The "Unknown Heirs" have received since the settlement, an additional $74,565.42 as of September 30, 2021, from which the Plaintiffs did not seek any fees or costs. These royalties will continue to accumulate for a significant time without any fees or costs being taken from such continuous common fund.[9] Plaintiffs later filed on December 8, 2020 their Motion to require the Defendants to pay prejudgment interest/loss of use to the "Unknown Heirs[10] on their unpaid royalties that were held and used by the Defendants for their own business model." [11]

Plaintiffs as Antero asserts a setoff from either MRI or Plaintiffs in their Appeal No. 20-0964.

[6] JA:709 at ¶ 3.

[7] Orders depositing royalties to Receiver owed to "Unknown Heirs." [JA-351-61; JA-366-69].

[8] JA:370-76.

[9] Marcellus wells have greater decline in production than shallow wells but the overall amount of production is much greater for 20 years or more. https://geology.com/royalty/production-decline.shtml [last retrieved 11/10/21].

[10] JA: 370

[11] JA: 311 at fn 14 "The apparent reality seen by this Court of these remaining matters being litigated herein between Antero and MRI demonstrate that they entered into a contractual relationship whereby Antero willingly scratched Mike Ross's corporate back by providing MRI millions of dollars in capital (i.e..; royalty payments) for his business operations so that other mineral interest purchases and acquisitions could be made rather than placing such payments in a suspense account pending final determinations.

Upon further ordered and completed discovery herein post-remand, this Court's review of the record clearly indicates that both Antero and MRI, at the very least, strongly suspected or, at worst, knew that the royally ownership position MRI claimed under its 2003 Tax Deed was legally unsound and any enforcement thereof highly suspect as early as 2007. (emphasis added)

As for the specific motivation(s) these two entities had for effectuating such financial activity while full well knowing the import of this instant litigation, that is only known to these entities and their respective legal counsel."

The interest/loss of use for all of the "Unknown Heirs" unpaid royalties from all Defendant mineral producers ranged from $965,890.00 to $2,970,343.00 depending on the date interest would begin accumulating.[12] The Motions seeking recovery of the "Unknown Heirs"' ownership and royalties, the Orders directing deposit with the Circuit Court, and Plaintiffs' Motion seeking pre-judgment interest/loss of use were all undertaken by Plaintiffs' Counsel prior to the Circuit Court appointing the Guardian *ad litem* ("GAL"). The Circuit Court appointed the GAL in response to the Defendants' objection that Plaintiffs' Counsel could not officially "represent" the "Unknown Heirs" regarding Plaintiffs' Motion to recover interest/loss of use. [13] The Defendants objected to the Circuit Court's inquiry whether a GAL should be appointed but Plaintiffs concurred that if Plaintiffs' Counsel could not represent the "Unknown Heirs" in seeking recovery of interest/loss of use, then a GAL was warranted, and the Court thereafter appointed a GAL. Ultimately, the GAL responded to Plaintiffs' Motion for interest with a brief supporting the "Unknown Heirs" entitlement to interest.[14] Importantly, the GAL's brief was limited to recovering the "Unknown Heirs" interest,[15] as the "Unknown Heirs" ownership and unpaid royalties had already been fully recovered as part of the Plaintiffs' settlement.[16] These royalties resulted from Plaintiffs having proved, after the remand by this Court, that the "Unknown Heirs" were entitled to 13.777% of all past and future royalties produced from the 1,000 acre Andrews Mineral Tract,

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[12] JA:372.
[13] JA:574 at 575.
[14] JA:496.
[15] JA: 497-98.
[16] JA:709-10; JA:351-69; JA:441.

which was embodied in the "Stipulation and Order on Ownership" entered on March 20, 2020 as part of the settlement, all of which occurred prior to the appointment of the GAL.[17] However, the Circuit Court ultimately denied Plaintiffs' and the GAL's request for interest/loss of use for the "Unknown Heirs." [JA 673-86].

The following facts that supported Petitioners' application of the Common Fund Doctrine were and are undisputed:

1. Plaintiffs' Counsel undertook the litigation on a contingent fee basis with the risk of no compensation or reimbursement for litigation costs if unsuccessful;

2. Plaintiffs' Counsel made all reasonable efforts to identify the "Unknown Heirs" and provide them with notice consistent with Rule 4(d) and (e) including certified mail to multiple last known or available addresses and by publication;[18] resulting in Plaintiffs' Counsel successfully locating six of the Andrews Heirs comprising 33.333% of the Andrews Tract ownership; [19]

3. None of the "Unknown Heirs" made an appearance in the litigation, *pro se* or by counsel, either because they were not located or did not respond if served;

4. Plaintiffs' Counsel diligently litigated this case from December 2013 until settlement and payment of the "Unknown Heirs" royalties in October 2020, just shy of seven years of litigation, including successfully appealing the Circuit Court's granting of Defendants' Motion for Summary Judgment

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[17] JA: 721 As part of the settlements, the Circuit Court subsequently entered an Order confirming the ownership of the Andrews Mineral Tract as stipulated by the Parties. (JA:247-52).

[18] JA: 103-110 & 165-212.

[19] Ownership of 46.666% of the Andrews Mineral Tract was owned by individuals who had been known to the Mineral Producer Defendants; [JA 247], and they were made Parties to the case with representation by their own Counsel; the remaining 13.777% ownership belongs to the "Unknown Heirs".

regarding the Plaintiffs and "Unknown Heirs" ownership interest in the Andrews Tract; *L&D v. Mike Ross, Inc., supra* ;

5. As a result of Plaintiffs' Counsel's efforts, Plaintiffs recovered a common fund of $2,229,526.72 representing the unpaid royalties owed to the "Unknown Heirs" and established the "Unknown Heirs" 13.777 percentage of ownership in the 1000 acre Andrews Tract;

6. The "Unknown Heirs" continue to receive monthly royalties, which are currently being paid monthly to the Circuit Court's Receiver, resulting in the "Unknown Heirs" having received an additional $74,565.42 as of September 30, 2021, from the Andrews Tract since the settlement; these royalties will continue for a significant time in the future; and,

7. The risks of this litigation confronting Plaintiffs' Counsel were significant as demonstrated by the duration of the litigation, the dismissal and resulting appeal, the number of Defendants and numerous adverse counsel, the thousands of pages of discovery and a myriad of depositions and other complex litigation challenges which all of these facts are without dispute or challenge by the GAL.[20]

The only contested issue is one of law, and not fact. That being whether Plaintiffs' Counsel recovered "a common fund" benefitting the "Unknown Heirs" and therefore is entitled to a reasonable attorneys' fee and proportionate costs expended in litigating the case, and whether the *Willim II* case[21] is controlling precedent. The clear answers are yes and no. **YES**, Plaintiffs' Counsel did recover a common fund of $2,229,526.72, which has now been enlarged to $2,384,668.70 from continued royalty payments, and **NO**, the *Willim II* case is not controlling as the facts in *Willim II* are completely apposite from those in the case at Bar as the issue in *Willim II*

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[20] JA: 73

[21] *Security National Bank v. Willim,* 155 W.Va. 1, 180 S.E.2d 46 (1971); *Willim* had a predecessor case, *Security Nat. Bank & Trust Co. v. Willim,* 153 W.Va. 299 (1969) which did apply the Common Fund Doctrine; they sometimes are referred herein as *Willim I* (1969) and *Willim II* (1971).

was not the Common Fund Doctrine, but rather one of implied contract. *Willim II* at 13, 53. In fact, *Willim I* did address the application of the Common Fund Doctrine and determined that it required payment of attorney's fees and costs from the common fund created in that companion case. See Brief § I (C), *infra*.

Thus, the decision of the Circuit Court finding that the Common Fund Doctrine did not apply relying upon *Willim II* was clearly erroneous as a matter of law.

PROCEDURAL HISTORY

The initial Complaint in this case was filed on December 10, 2013.[22] As described above, the litigation morphed into a complex case with multiple amended complaints and cross-claims,[23] on going now for almost eight years of protracted litigation, including several appeals to this Court.[24] This case has generated over 827 pleadings (including 210 discovery filings), over 12,000 documents (not including title documents) retrieved from various Clerk's Offices regarding title and ownership; 13 depositions taken by Plaintiffs (resulting in over 2,500 transcript pages); detailed research and time intensive drafting of pleadings and responses.[25] Plaintiffs' Counsel and

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[22] JA:001.

[23] JA:116-152 (Complaint with Exhibits); JA:153-161 (First Amended Complaint); JA:162-JA:164 (Second Amended Complaint).

[24] *See L&D Investments, Inc. v. Mike Ross, Inc.*, 241 W.Va. 46, 818 S.E.2d 872 (2018) (reversing the Circuit Court's granting of summary judgment to the Defendants); and *Antero Resources Corp., et al. v. Mike Ross Inc., et al.*, Appeal Nos. 20-0964 & 20-0967 (which on October 6, 2021 this Court granted a request for Rule 19 Argument).

[25] JA:1-54 (docket sheet); The Stipulated Chain of Title which Plaintiffs' Counsel generated consisted of almost 900 pages of deeds, affidavits of heirship, leases, assignments, birth and death records, tax documents and other title information. (JA:60-61).

his associate attorneys expended a conservative estimated 6,500 hours in pursuit of this litigation to secure settlements with all of the Defendants.[26]

On October 26, 2021, the Circuit Court directed, pursuant to Plaintiffs' settlements and the agreed "Stipulation and Order On Ownership" which confirmed the "Unknown Heirs" ownership interests as well as all other owners.[27] That Stipulation was the foundation for the Circuit Court to direct that "the various funds relating to royalties belonging to the 'Unknown Heirs' should be paid into the Registry of the Court until the further Order of the Court." The deposits were $2,109,240.88 (on behalf of Antero); $88,663.22 (on behalf of CNX); and $29,567.64 (on behalf of CGAS), $2,054.98 (on behalf of ECA).[28]

During a January 8, 2021 status conference, the Circuit Court requested the parties submit legal authority addressing whether the lower court had the authority to appoint a Guardian *ad litem* or separate counsel for the "Unknown Heirs" to assist in recovering the appropriate amount of royalties and interest.[29] The parties submitted their responses on January 19, 2021.[30] On January 27, 2021, the Circuit Court appointed attorney Michael A. Jacks as Guardian *ad litem* ("GAL") to represent the "Unknown Heirs." The GAL filed a Response in Support of Motion for Award of Prejudgment Interest to the "Unknown Heirs" in which he noted that the matter "has been fiercely litigated since 2013, and at the time of the appointment, the majority of issues had been resolved"

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[26] *Id.*
[27] See fn 17, *supra.*
[28] JA:348; JA:351; JA:354; JA:358-59, JA:366-67.
[29] JA:437-39.
[30] JA:442.

acknowledging that Plaintiffs' Counsel had already carried the heavy water in the case and recovering the common fund.[31] On April 7, 2021, Plaintiffs filed their reply brief in support of their Motion for payment of prejudgment interest to the "Unknown Heirs" and in support of the GAL's similar position.[32]

During a February 12, 2021 status conference, Plaintiffs' Counsel advised the Circuit Court of Plaintiffs' intention to file a motion for attorney's fees and costs pursuant to the Common Fund Doctrine to be paid from the recovered royalties being held by the General Receiver of Harrison County on behalf of the "Unknown Heirs." [33]

On March 12, 2021, Plaintiffs filed their verified Request for Attorney's Fees and Costs which requested the award of reasonable attorney's fees and proportionate litigation costs from the mineral production and sales monies owed to the "Unknown Heirs" and any subsequent interest if awarded by the Court. Plaintiffs also did not seek any fees or costs from the royalties which were continuously being paid to the Receiver from current Andrews Tract production.[34] Specifically, Plaintiffs' Counsel requested one-third [1/3] of the $2,229,526.72 of royalties recovered for the "Unknown Heirs" which was $743,175.57 for attorneys' fees and $15,942.56 for the "Unknown

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[31] JA:497. Based on the calculations by the appointed expert witness, the GAL sought prejudgment interest in the amounts of $900,574.21 from Antero, $93,480.69 from CNX, and $23,373.86 from CGAS. JA:510.

[32] JA:571-72.

[33] JA: 463

[34] JA:55-62. Plaintiffs' Counsel limited their request for attorneys' fees to those unpaid royalties recovered to date and did not seek attorney's fees from future royalties that have been generated, and will be generated in the future, for the "Unknown Heirs" as a result of Plaintiffs' efforts in this litigation.

Heirs" proportionate share of litigation costs, for a total of $759,118.13.[35] Plaintiffs' Motion also detailed the complexity of the case and Plaintiffs efforts in generating the common fund. [36]

On March 29, 2021, the GAL for the "Unknown Heirs" filed a Response to Plaintiffs' Request for Attorney's Fees.[37] The GAL admitted that: (1) "the Unknown Heirs have obtained a financial benefit through the activities of Plaintiffs' Counsel"; (2) "Defendants would not have willingly paid any royalties to the Unknown Heirs absent the efforts of Plaintiffs' Counsel, including pursuing and winning a complex appeal"; and (3) "Plaintiffs' counsel has advanced the time and expenses necessary to pursue this litigation, which is how contingency fee cases are ordinarily pursued."[38] The GAL advised the court that he was not able to determine what amount of attorney effort was dedicated to the "Unknown Heirs" recovery, or how much effort would have been for Plaintiff L&D. The Circuit Court made no finding regarding either of such statements most likely as such was irrelevant to the application of the Common Fund Doctrine regarding the recovery attained for the "Unknown Heirs." Ultimately, the GAL took no hard position regarding Plaintiffs' request for attorney's fees and costs other then arguing that *Willim* II limited common fund requests to class actions and trust actions. Essentially, the GAL punted the ball into the "lap of the Court" to "balance the interests and make the difficult decisions."[39]

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[35] The Circuit Court's own practice when awarding attorneys' fees in similar matters utilized the generally accepted percentage method of fee calculation as opposed to the load star method, *Davis v. Ruskin* case, [JA: 64], which the percentage method applied the law set forth in *Hayseeds, Inc. v. State Farm*, 177 W.Va. 323, 352 S.E.2d 73, 80 (1986).
[36] JA:60-61
[37] JA:71-75.
[38] JA:73.
[39] JA:74-75.

Ultimately, on July 1, 2021, the Circuit Court, relying almost exclusively on *Willim II*, found as a matter of law that "this instant litigation is not a 'common fund case' or otherwise sufficiently suited for exercising its equitable authority as might be applied to the instance circumstances herein" and refused Plaintiffs' Request for Attorney's Fees and Costs by awarding nothing.[40] For the reasons noted below, the decision of the Circuit Court holding that the Common Fund Doctrine did not apply in this case was error.

SUMMARY OF ARGUMENT

The Circuit Court's finding that the Common Fund Doctrine was not applicable constituted reversible error, as it deprived Plaintiffs of any proportionate fees and costs from the common fund generated by Plaintiffs and their Counsel which specifically benefitted the "Unknown Heirs" which was unjust enrichment. The Circuit Court misconstrued the purpose of the Common Fund Doctrine and the legal standard to apply in this case was ineluctably obvious. Those who benefit from monies recovered by others in litigation to which they were not a party, but were a beneficiary of the efforts of others similarly situated, must pay their fair share of the costs or they are being unjustly enriched.[41]

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[40] JA:98-99; JA:100. On the same day, the Circuit Court denied the Plaintiffs' Motion to Require the Payment of Pre-Judgment Interest to the "Unknown Heirs" for "... Unpaid Royalties Withheld and Used by the Mineral Producing Defendants." and the similar Motion by the GAL. (JA:673-85).

[41] "... this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).

The $2,229,536.72 fund created by Plaintiffs and their Counsel satisfied the parameters of the Common Fund Doctrine. The Circuit Court erroneously relied on this Court's opinion in *Willim II* which is clearly distinguishable as the claim rejected in the *Willim II* opinion was based on implied contract and not a Common Fund Doctrine claim.[42] The Circuit Court erroneously found that the Common Fund Doctrine was limited to "trust fund commonality... and bond proceeds of similarly situated trusts (Sprague)....[and] case authority involves only a variety of class actions."[43] However, the overwhelming case law, including *Willim I* and public policy supports a common benefit award in this case. Plaintiffs request that the Circuit Court's order be reversed, and the case be "remanded to" the Circuit Court "with directions to award reasonable attorneys' fees" and proportionate litigation expenses to Plaintiffs' counsel "for services rendered" in recovering the mineral Tract and the unpaid royalties on behalf of the "Unknown Heirs." *Willim I* at 306, 559.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to R.A.P. 10(c)(6), oral argument is warranted as the dispositive issues would be significantly aided by oral argument pursuant to Rule 19. Petitioner does not believe that this

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[42] *Willim II*, at 13, 53 ("Inasmuch as the record discloses that Mrs. Rowe deliberately elected not to employ an attorney, **and inasmuch as the appellees, in the present case, are not asserting a claim against the 'common fund'**, the trust estate, the appellees, in essence, appear to be asserting a claim against Mrs. Rowe on the basis of an implied contract to pay the reasonable value of legal services performed in her behalf or for her benefit.")[emphasis added]; additionally the 1969 appeal of the *Willim* case confirmed the Common Fund Doctrine on facts identical as in this case; the 1969 *Willim* case, which reversed the Circuit Court and granted fees, did so based on the common fund doctrine, and will be discussed in more detail *infra*.

[43] JA: 99-100.

case is appropriate for a memorandum decision. This Court should, after argument, clarify in a published decision, that West Virginia's common law jurisprudence continues to recognize the Common Fund Doctrine consistent with the vast majority of other State and Federal jurisdictions, and confirm the criteria required for the application of such common law policy.

STANDARD OF REVIEW

"Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review."[44] The interpretation of the Common Fund Doctrine's applicability is a question of law. The determination of a reasonable amount to award for attorney's fees and costs is in the sound discretion of the trial court guided by our settled law regarding fee awards.

ARGUMENT

I. The Circuit Court's Failure to Apply the Common Fund Doctrine to Plaintiffs' Claim for Attorney Fees and Litigation Expenses Was Reversible Error.

This Circuit Court's rejection of the Common Fund Doctrine was without any legal basis and thus was reversible error. That Common Law Doctrine provides authority for a court to require contribution by a beneficiary for attorney fees and cost from a common fund generated by others "which enures to the common benefit of all."[45] Here, Plaintiffs' Counsel recovered assets

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[44] *Rector v. Ross*, 859 S.E.2d 295 (W.Va. 2021), syl. pt. 1.

[45] *Roach v. Wallins Creek Collieries Co.*, 111 W. Va. 1, 160 S.E. 860, 863 (1931).

of the "Unknown Heirs" creating a $2,229,536.72 fund that benefitted the "Unknown Heirs", all of whom were part of a similar class of beneficiaries like the Plaintiffs, i.e. Heirs of Richard Snowden Andrews, the original owner of the mineral Tract. Under the Common Fund Doctrine a fee award was appropriate, and the Circuit Court erred as a matter of law in concluding otherwise, in doing so, and if not rectified, the "Unknown Heirs" will be unjustly enriched.

A. The Common Fund Doctrine is Well Established in the Jurisprudence of United States Common Law.

The Common Fund Doctrine was first recognized in the United States in by the Supreme Court in 1881 in *Internal Imp. Fund Trustees v. Greenough.*[46] In *Greenough,* the state of Florida had conveyed to trustees more than ten million acres of state-owned land to provide security for a bond issue of the Florida Railroad Company. Vose, a large holder of the Railroad Company's bonds, sued to set aside as collusive, the trustees' sale of hundreds of thousands of acres at nominal prices. After eleven years of litigation at his own expense (only three more years than the litigation in this matter), Vose had recaptured the assets and secured large payments to the bondholders. Vose then presented a claim for reimbursement of his lawyers' fees. The Court concluded that Vose was entitled to reimbursement noting:

> [Denying reimbursement] would not only be unjust to [Vose], but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; ... [t]hey ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.[47]

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[46] 105 U.S. 527 (1881).
[47] *Greenough.* at 532.

Subsequent decisions of the United States Supreme Court confirm that *Greenough* was not an aberration. In *Central Railroad & Banking Co. v. Pettus*,[48] the Supreme Court extended the Common Fund Doctrine to include a claim to a common "fund' asserted, not by a client, but directly by the attorneys. In *Pettus*, a creditors' bill was brought as a class action to reach the assets of the debtor, a railroad. After the action succeeded, the lawyers sought to recover for the services they had provided to inactive class members. The Court rejected the objection that the petitioning attorneys had already received the agreed fee for their services from their clients. The Court approved the fee finding that the action was a class action brought in part for the protection of the class members and, as in the *Greenough* case, "every ground of justice" called for payment by those who "accepted the fruits" of the labors of others.[49]

Similarly, in *Sprague v. Ticonic National Bank*,[50] the Supreme Court confirmed the breadth of the Common Fund Doctrine. *Sprague* involved a clearly identified fund, bonds that had been set aside and earmarked as the subject of an express trust previously created. There were fourteen beneficiaries with no allocation of any bonds to any of them. Sprague sued and established her own right as one of the beneficiaries entitled to lien the proceeds of the bonds which had been sold by a receiver. Having established her right to share in the proceeds along with the other beneficiaries, she then sought an allowance for her counsel fees, to be paid out of the common proceeds. Notably, Sprague had not brought her action as a class action so that the

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[48] 113 U.S. 116 (1885).
[49] 113 U.S. at 127.
[50] 307 U.S. 161 (1939).

other thirteen beneficiaries had not had their rights established by the decree in her favor which is contrary in the case at Bar as Plaintiffs did secure both title and unpaid royalties and future royalties for the "Unknown Heirs." Justice Frankfurter found the lack of a class was not bar to the application of the Common Fund Doctrine:

> Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation — the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree — hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.[51]

In the 1980 decision of *Boeing Co. v. Van Gemert*, the Supreme Court has recognized that these 100-year-old decisions remain good law:

> "Since the decisions in *Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885), ***this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.*** See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); cf. *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). ***The common-fund doctrine reflects the traditional practice in courts of equity,*** *Trustees v. Greenough, supra* 105 U.S., at 532–537, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S., at 257–258, 95 S.Ct., at 1621–1622. ***The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.*** See, *e. g.*, *Mills v. Electric Auto-Lite Co.*, 396 U.S., at 392, 90 S.Ct., at 625. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees

[51] *Id.* at 164-67.

proportionately among those benefitted by the suit. See *Id.*, at 394, 90 S.Ct., at 626." [52] (emphasis added)

The common benefit rule has been consistently followed by the Supreme Court and almost every State and Federal jurisdiction in the United States.[53] Indeed, the doctrine is now codified in the Restatement (Third) of Restitution and Unjust Enrichment and Section 29 entitled "Common Fund" provides:

> "A claimant may require those beneficiaries for whom the claimant is not acting by agreement to contribute to the reasonable and necessary expense of securing the common fund for their benefit, in proportion to their respective interests therein, as necessary to prevent unjust enrichment."[54]

Plaintiffs' request for fees and costs was based solely on the "Unknown Heirs" recovery and nothing more. It was "in proportion to their respective interests" and did not include future royalties which continue.

The Third Restatement also makes clear that liability for fees generated from a common fund arises independent of the existence of a class action:

> "The recovery authorized by § 29 does not depend on whether the underlying litigation—by which a common fund is secured for multiple beneficiaries—takes the procedural form of a class action. *From the restitution standpoint, it is irrelevant whether legal proceedings that secure a common benefit were brought in the name of an individual plaintiff or on behalf of a class."*[55] (emphasis added)

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[52] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

[53] *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257–58, 95 S. Ct. 1612, 1621–22 (1975).

[54] Restatement (Third) of Restitution and Unjust Enrichment § 29(2) (2011).

[55] *Id.* at com. c (emphasis added).

While this Court has not had occasion to cite to Section 29, it has repeatedly cited to the Restatement of Restitution.[56]

This Court has long recognized the Common Fund Doctrine as an exception to the "American Rule" that ordinarily litigants must bear their own attorney fees and costs of litigation. However, in the 1882 case of *Anderson v. Piercy*, this Court recognized that "it was proper, that all the costs paid by the executor of John Piercy as well as his reasonable attorney fees should be paid out of the common fund."[57] In *Weigand v. All. Supply Co.*, Syllabus point 8 holds:

> Where a fund is brought into a court of equity through the services of an attorney, who looks to that alone for his compensation, although his interest cannot technically be called a "lien," he is regarded as the equitable owner of the fund, to the extent of the reasonable value of his services; and the court administering the fund will intervene for his protection, and award him a reasonable compensation, to be paid out of it.[58]

And the syllabus of *Roach,* noted the power to require one party to contribute to another's counsel fees exists where "the plaintiff, suing in behalf of himself and others of the same class, discovers or creates a fund which inures to the benefit of all."[59]

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[56] *See, e.g., Heartwood Forestland Fund IV, LP v. Hoosier*, 236 W. Va. 480, 486, 781 S.E.2d 391, 397 (2015) (citing Restatement (Third) of Restitution and Unjust Enrichment § 10 (2011)); *Realmark Devs., Inc. v. Ranson*, 208 W. Va. 717, 721, 542 S.E.2d 880, 884 (2000) (citing Restatement, *Restitution* § 53 (1937)); *Prudential Ins. Co. of Am. v. Couch*, 180 W. Va. 210, n.4 214, 376 S.E.2d 104, 108, n. 4 (1988) (citing Restatement, *Restitution* § 18 (1937));

[57] 20 W. Va. 282, 341 (1882).

[58] *Id.* at 44 W. Va. 133, 28 S.E. 803 (1897); *see also Cecil v. Clark*, 69 W. Va. 641, 72 S.E. 737, 738 (1911) (attorney jointly interested with clients in fund recovered in a suit may be allowed a commission as receiver, in the absence of an agreement to handle the fund without compensation).

[59] 111 W. Va. 1, 160 S.E. at 860; *see also Sec. Nat. Bank & Tr. Co. v. Willim*, 153 W. Va. 299, 304, 168 S.E.2d 555, 558 (1969) (same; quoting *Roach*); *Sec. Nat. Bank & Tr. Co. v. Willim*, 155 W. Va. 1, 14,

B. The $2,229,526.72 Fund Recovered by Plaintiffs and their Counsel Satisfied the Requirements for a Fee Award Under the Common Fund Doctrine.

In this case, as explained above, Plaintiffs and their Counsel generated a significant recovery for the benefit of the "Unknown Heirs" including a common fund of $2,229,526.72. The Plaintiffs diligently litigated this case on behalf of themselves and the "Unknown Heirs", all of whom were a similarly situated class of mineral owners of the Andrews Tract.[60] The "Unknown Heirs" obviously did not retain their own counsel or disclaim the efforts of Plaintiffs' Counsel. The "Unknown Heirs" were aligned with the Plaintiffs and not adverse to them, and the "Unknown Heirs" recovered mineral property and unpaid royalties on the same basis as the Plaintiffs. As noted by the GAL, absent the efforts of Plaintiffs and their Counsel, the "Unknown Heirs" would not have recovered any of the proceeds or mineral property; yet the Circuit Court's order permits them to enjoy this substantial recovery without any deduction for the substantial fees and costs necessary to generate such common fund. Such a result would be the classic unjust enrichment that the Common Fund Doctrine was designed to prevent. These facts present the classic case for the proportionate recovery of attorney fees and litigation expenses under the Common Fund Doctrine, and the Circuit Court erred in concluding otherwise.

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180 S.E.2d 46, 53 (1971) (same). *Willim II,* which was heavily relied upon by the Circuit Court below is discussed *infra,* Part I.C.

[60] While the common fund of $2,229,526.72 is the most fungible recovered asset, Plaintiffs also recovered the "Unknown Heirs" 13.7777% ownership of the entire 1000 acre mineral estate which in itself has a significant monetary value from which the Plaintiffs have sought no fees or costs.

West Virginia precedent permits the recovery of attorney fees and litigation expenses under the Common Fund Doctrine when "the plaintiff, suing in behalf of himself and others of the same class, discovers or creates a fund which inures to the benefit of all."[61] That these requirements were met was undisputed in this case.

First, no Party or the GAL nor the Circuit Court, disputed that Plaintiffs recovered a significant fund which inured to the benefit of Plaintiffs and the "Unknown Heirs" due solely to the efforts of Plaintiffs and their Counsel. Indeed, as the GAL conceded:

> [I]t is clear that the Unknown Heirs have obtained a financial benefit through the activities of Plaintiffs' counsel, and through seven (7) years of his substantial. professional, and successful efforts in this litigation. It is clear that the Defendants would not have willingly paid any royalties to the Unknown Heirs absent the efforts of Plaintiffs' counsel, including pursuing and winning a complex appeal to the West Virginia Supreme Court. It is also apparent from the Motion that Plaintiffs' counsel has advanced the time and expenses necessary to pursue this litigation, which is how contingency fee cases are ordinarily pursued.[62]

Second, it is also clear that the Plaintiffs recovered not only the monetary fund, but also the mineral property, by pursuing the case on behalf of themselves and all other Andrews Heirs who were similarly situated as Plaintiffs. As the Third Restatement notes, what is necessary is that the persons be similarly situated:[63]

> "Persons similarly situated: Restitution is available under § 29 *when benefits are secured to persons similarly situated, in such relation to the common fund that a benefit to one is necessarily accompanied by a benefit of the same character to another*. Common or parallel interests giving rise to this relationship exist

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[61] Syl. 6 [unnumbered], *Roach,* 111 W. Va. 1, 160 S.E. at 860.

[62] JA:73.

[63] One cannot describe a more similar group than blood related persons who are the successor owners of a single parcel of mineral real estate.

between multiple owners, multiple creditors, and multiple claimants in a great variety of situations."[64] (emphasis added)

The Plaintiffs and the "Unknown Heirs" meet this test.

The GAL also relied on the Circuit Court's upholding the Defendant mineral producers argument in resisting Plaintiffs Motion for Interest for the "Unknown Heirs" that Plaintiffs' Counsel may not have standing to directly represent and pursue the Motion on behalf of the "Unknown Heirs." Such decision by the Circuit Court was the basis for appointing the GAL. Incongruously however, the Circuit Court later "boot strapped" that ruling as being relevant to the application of the Common Fund Doctrine.[65] It was not. The denial of Plaintiffs' Counsel to seek interest for the "Unknown Heirs" had no bearing on the application of the Common Fund Doctrine for already recovered mineral property and unpaid royalties. The Doctrine is not based on standing as the standing to seek fees from a common fund one has generated provides its own standing by the very act of creating the common fund in the first instance. If the progenitor of such common fund had to demonstrate an attorney-client relationship, or other fiduciary relationship, other than demonstrating that the beneficiaries of the common fund were similarly situated as the Plaintiffs, then there would likely never be any recovery based on the Common Fund Doctrine. Because the beneficiaries of a common fund do not participate, or as here, could

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[64] Third Restatement, Restitution § 29, Cmt. d. Some of the Third Restatement examples are indistinguishable from this case. *Id.* at Illustration. 11 (Common Fund Doctrine applicable when bank customer of insolvent bank brings suit which results in recovery available for distribution to the non-party interested trust customers as a group being benefitted by additional $1 million dollar recovery in their favor, otherwise they are unjustly enriched).

[65] JA:94 and fn 3 therein.

not be found, there is no mechanism to formally "represent" such beneficiaries. However, such circumstances does not inhibit the beneficiaries from enjoying the fruits of the bounty generated by the attorney who has created such common fund. The GAL's argument to the contrary was without any legal support and the Circuit Court was in error to transpose its finding regarding the Plaintiffs Motion for interest to the application of the Common Fund Doctrine. The Restatement acknowledges the fallacy of such position as the Doctrine explicitly allows a claimant to "require those beneficiaries *for whom the claimant is not acting by agreement* to contribute" their fair share of attorney fees and expenses.[66] Thus, the GAL and the Circuit Court's reliance on its prior order that Plaintiffs Counsel could not seek interest for the "Unknown Heirs" was misplaced and error.

C. This Court's Opinion in *Willim II* is Easily Distinguished from the Case at Bar as the Claim Rejected in *Willim II* was Based on Implied Contract not the Common Fund Doctrine.

The GAL argued, and the Circuit Court adopted, the holding in *Willim II,* as grounds to reject the application of the Common Fund Doctrine in this case. [67] However, *Willim II* is easily distinguished by its own language..

First, in *Willim II,* the attorney for the beneficiary of the trust estate sought recovery of attorney fees from an individual distributee or beneficiary who had specifically rejected

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[66] Third Restatement, § 29(2) (emphasis added); *see also Boeing, supra* (Common Fund Doctrine applies when "a litigant or a lawyer who recovers a common fund *for the benefit of persons other than himself or his client...* " (emphasis added)).

[67] JA:73-74; JA:98-99.

becoming a client but decided to rely on the Trustee to resolve the litigation for her.[68] Importantly, this Court found that the request for fees in *Willim II* did not fall within the definition of a common fund case, but was actually an action for implied contract. This Court stated:

> "Inasmuch as the record discloses that Mrs. Rowe deliberately elected not to employ an attorney, and inasmuch as the appellees, in the present case, are not asserting a claim against the 'common fund', the trust estate, the appellees, in essence, appear to be asserting a claim against Mrs. Rowe on the basis of an implied contract to pay the reasonable value of legal services performed in her behalf or for her benefit. Our attention has not been called to any legal authority or precedent for recognizing an implied contract in the circumstances of this case." [69]

This Court rejected the implied contract claim because the beneficiary from whom payment of attorney's fees was sought, was aware of the litigation but specifically refused counsel's invitation to become a client and relied on the Bank Trustee instead.[70]

Importantly, the *Willim II* Court distinguished its prior decision in *Willim I* wherein this Court recognized and approved a common benefit award to counsel whose efforts created a common fund which benefitted all of the beneficiaries of the entire estate:

> The position of Messrs. McCamic and Schrader in this case in their assertion of a right to a court award of attorneys' fees to them differs from all other similar assertions made in the course of the protracted litigation in relation to the Caroline C. Hughes will and trust estate in that all prior court awards have been made from the entire trust estate on the theory that the trust estate, and hence all the distributees thereof, have benefitted from the services for which the court awards have been made.[71]

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[68] *Willim II* at 11, 51, "1. The appellant 'openly rejected individual representation...".

[69] *Willim II,* 13, 53.

[70] *Id.*

[71] *Willim II,* 9, 50-51.

This case at Bar properly triggers the Common Fund Doctrine approved by the *Willim I* Court. Here, the Plaintiffs were not adverse to the "Unknown Heirs", their work created both a common fund for the benefit of all the "Unknown Heirs" but also recovered the mineral property itself. Moreover, Plaintiffs seek recovery from the very fund they created. Thus, contrary to the Circuit Court's ruling, both the *Willim I* and *Willim II* decisions support Plaintiffs common benefit claim here.

D. The Common Fund Doctrine is Clearly Not Limited to Rule 23 Class Actions as the Circuit Court Determined.

The Circuit Court incorrectly relied upon an unsupported belief that a common fund fee request was only proper in class actions and trust type litigation.[72] Such is categorically incorrect. Contrary to the suggestion of the GAL, which was adopted by the Circuit Court, the existence of a formal class action is not required for the application of the Common Fund Doctrine. Class actions were relatively uncommon when the doctrine was initially recognized. Indeed, West Virginia Rule 23 was not adopted until 1960.[73] Courts applying the Common Fund Doctrine have universally rejected the suggestion that a formal class action is required. For example, in *Sprague*, the United States Supreme Court held: "But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the

[72] JA:99-100 at ¶ 12.
[73] *See* W.Va. C. Civ. Pro 23, Credits (rule first effective July 1, 1960).

beneficiaries of his litigation."[74] And the Restatement notes, "[f]rom the restitution standpoint, it is irrelevant whether legal proceedings that secure a common benefit were brought in the name of an individual plaintiff or on behalf of a class."[75]

Other state courts agree,[76] along with numerous federal courts.[77] The rationale is simple. Often class members are unknown or not located just as were the "Unknown Heirs". Such is typical. But it does not suspend the application of the Common Fund Doctrine as the recovered funds are available to those absent class members just as the $2,229,626.72 common fund recovered by Plaintiffs' Counsel will be available to the "Unknown Heirs" for many years to come.[78] To deny Plaintiffs' Counsel recovery of a reasonable attorney's fees and litigation costs

[74] 307 U.S. at 167, 59 S. Ct. at 780.

[75] Third Restatement, Restitution § 29, com. c.

[76] *See, e.g., Valder L. Offs. v. Keenan L. Firm*, 212 Ariz. 244, 249, 129 P.3d 966, 971 (Ct. App. 2006) ("We reject the notion that because this is a wrongful death action, rather than a class action, the [common fund] doctrine may not be applied."); *Morris B. Chapman & Assocs., Ltd. v. Kitzman*, 193 Ill. 2d 560, 573, 739 N.E.2d 1263, 1272 (2000) ("We reject this contention [that the Common Fund Doctrine is limited to class actions and insurance subrogation cases]. We consider it well established that the Common Fund Doctrine has been applied in many types of cases covering a large range of civil litigation, not just to class actions and insurance subrogation cases." (citations and internal quotations omitted)).

[77] *See, e.g., In re GM Ignition Switch Litigation*, 477 F.Supp.3rd 170, 183, 192 (S.D. N.Y. 2020) (common benefit fund applied in an MDL including all cases filed in the federal court, unfiled cases and state court cases that used common benefit work product finding "the work performed by Lead Counsel has undoubtedly been of tremendous value to those who asserted related claims against New GM, regardless of forum); *In re Roundup Products Liability Litigation*, 2021 WL 3161590 at *2 (N.D. Cal. 2021) (common benefit fund applied in an MDL noting that "common benefit funds are often created in MDLs so that if lead counsel succeeds in a way that benefits all the plaintiffs, they can be compensated from the fund."); *Independent Living Center of Southern California, Inc. v. Kent*, 909 F.3d 272, 285 (9th Cir. 2018) (remanding an action seeking an injunction regarding the rate of reimbursement for health care providers under California's Medicaid program for determination of attorneys' fees finding that "the procurement of $70 million retroactive relied on behalf of Medi-Cal providers, many of whom were not plaintiffs in the case, undoubtedly conferred a benefit onto them irrespective of a final settlement or adjudication.").

[78] Essentially the "Unknown Heirs" will have 7 years to recover their share of the $2,229,626.72 as well as the ongoing accumulated royalties; W.Va. Code §55-12A-9.

from the "Unknown Heirs" recovery would allow them an unjust windfall. Preventing such windfall is the purpose of the Common Fund Doctrine.

E. Public Policy Supports a Common Benefit Award in this Case.

The Common Fund Doctrine is premised on the belief "that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."[79] This is a laudable public policy that mandates an award here.

To confirm the Circuit Court's interpretation of the Common Fund Doctrine would create a policy discouraging both litigants and their counsel from pursuing any benefits for persons like the "Unknown Heirs" who are not parties to the litigation, thus, leaving no one to advocate on their behalf. Such a policy would encourage Plaintiffs to ignore the interest of such wronged persons like the "Unknown Heirs." It also could result in unnecessary duplicative litigation by such beneficiaries who subsequently discover that they were entitled to benefits not recovered by someone in the position of the Plaintiffs. That is one of the purposes Plaintiffs sought in this quiet title action and which the Common Fund Doctrine incentives to be completed rather than ignored.

Early in this case, Plaintiffs and their Counsel, advocated for the "Unknown Heirs." The Plaintiffs' interests were clearly aligned with the interests of the "Unknown Heirs." Plaintiffs and their Counsel conducted the litigation in a manner similar to a class action to recover all the

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[79] *Boeing, supra.*

royalties owed to the "Unknown Heirs" as part of the settlement and then by also seeking pre-judgment interest for those same "Unknown Heirs." Such efforts were time consuming and with significant risk and without such efforts the "Unknown Heirs" would not be in a position to receive substantial monies that were generated by the Plaintiffs and their Counsel. Public policy should encourage this type of advocacy, not penalize it, as such promotes fairness, full restitution, and total conclusion of litigation. The Circuit Court's ruling would do just the opposite.

CONCLUSION

The Common Fund Doctrine is clearly applicable to the $2,229,626.72 fund created by the Plaintiffs' Counsel on behalf of the "Unknown Heirs." The Circuit Court erred as a matter of law in rejecting the application of the Common Fund Doctrine to the facts of this case when such Doctrine is well established in the jurisprudence of United States common law. The Circuit Court further erred by heavily relying on *Willim II* as support to totally reject Plaintiffs' Counsel from recovering fees and costs. Such error is palpable when *Willim I* and *Willim II* are read together as then the application of the Common Fund Doctrine becomes ineluctably clear in this case. Furthermore, public policy implores the Common Fund Doctrine being applied in this case.

Therefore, Plaintiffs respectfully request that this Court reverse the Order of the Circuit Court of Harrison County denying Plaintiffs' request for reasonable attorney's fees and litigation costs from the common fund, and remand this case to the Circuit Court with directions to

determine a reasonable attorney fee and proportionate litigation expenses consistent with the precedence of this Honorable Court and other jurisdictions.

Respectfully submitted,
Plaintiffs Below/Petitioners,

L&D Investments, Inc.,
Richard Snowden Andrews, III,
Marion A. Young Trust,
Charles A. Young,
David L. Young, and
Lavinia Young Davis,
Successors of Marion A. Young Trust,
Charles Lee Andrews, IV, and
Frances L. Andrews
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CERTIFICATE OF SERVICE

I, David J. Romano, do hereby certify that on the 15th day of November, 2021, I served the foregoing "PETITIONERS' BRIEF" and "JOINT APPENDIX upon the below listed counsel of record by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to him at his office address:

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David J. Romano