IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 22-0470

POLLY FAYE GRIFFIN,	:	
	:	
Petitioner,	:	
	:	
v.	:	CIVIL ACTION NO. 18-C-138
	:	On Appeal from the
CHEVRON U.S.A., INC., ET AL.,	:	Marshall County Circuit Court
	:	Hon. David W. Hummel, Jr.
Respondents.	:	

REPLY BRIEF OF PETITIONERS CHARLOTTE WHITE AND POLLY FAYE GRIFFIN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

ASSIGNMENT OF ERROR

I. THE CIRCUIT COURT ERRED IN DENYING PETITIONERS' MOTIONS FOR SUMMARY JUDGMENT AND IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF RESPONDENTS WILLIAM E. TOLAND AND AMANDA N. WHITE-TOLAND.

A. STATEMENT OF THE CASE.

Petitioners incorporate by reference the Briefs filed by Polly Faye Griffin on September 21, 2022 and Charlotte White on September 22, 2022. All parties agree Fred and Hazel White acquired a one-half (1/2) interest in the oil and gas pursuant to the deed conveyed to them from Elmer and Elsie Ressenger in 1943 ("White Deed"), wherein the Ressengers "excepted and reserved the one-half of the oil and gas within and underlying said tract of land." The other half interest was conveyed to Fred and Hazel White by that deed. After Fred White's death, Hazel White solely owned that one-half interest.

Thereafter, when Hazel White conveyed the surface estate to Timmie and Vickie McMillan in 1976, the deed included language clearly indicating that she "excepted and reserved the one-half (1/2) of the oil gas within and underlying said tract of land." Not only is the language of that deed clear and unambiguous, it's consistent with what she actually owned at the time - a one-half (1/2) interest in the oil and gas. Clearly, she intended to reserve her one-half (1/2) interest in the oil and gas rights because she leased those oil and gas rights six (6) years later pursuant to an Oil and Gas Lease dated August 30, 1982.[1] Moreover, when Hazel White died in 1986, her one-half (1/2) interest in the oil and gas rights was included in the Appraisement of her Estate.

[1] The owners of the surface of the property did not lease any purported oil and gas rights until Respondents did in 2010. If the one-half (1/2) interest in the oil and gas was conveyed from Hazel White to the McMillans, or their successors-in-interest, they would have signed an oil and gas lease instead of Hazel White.

Importantly, the deed from Hazel White expressly contains a reference to the prior deed from the Ressegers by stating: "This conveyance, is, however, **subject to** the exceptions, reservations, covenants, conditions, restrictions, and easements, if any, granted by or acquired from the party of the first party and her predecessors in title to said land." In this case, the prior deed which initially reserved one-half (1/2) of the oil and gas was specifically referenced, a reservation of the remaining one-half (1/2) of the oil and gas is explicitly stated in the White Deed, and **all prior exceptions and reservations are excepted from the Warranty**, Therefore, the clear intent of the White Deed was to except the remaining one-half (1/2) of the oil and gas from the conveyance.

i. Statement of Relevant Facts.

The White Deed provides: "There is also excepted and reserved the one half (1/2) of the oil and gas within and underlying the said tract of land, together with the right to lease, drill for, operate and produce the same and such other rights as may be necessary and incidental to the production and marketing of said oil and gas." Appx. Vol 3, p. 215-218.

However, the White Deed also provides:

> "This conveyance, is, however, subject to the exceptions, reservations, covenants, conditions, restrictions, and easements, if any, granted by or acquired from the party of the first party and her predecessors in title to said land." *Id.*

This additional language is not included in the prior deed from the Ressegers. Appx. Vol. 3, p. 212-214. The plain and unambiguous language of the White Deed excepts from the grant all prior exceptions and reservations. This fact is ignored by Respondents William E. Toland and Amanda N. White-Toland ("Toland"). However, this distinction is important since it is *not* contained in the prior deed (referred to as the Resseger-White Deed in *Respondents Toland's Brief*) and resolves the coal portion of the White Deed. Appx. Vol. 3, p. 212-214; p. 215-218.

Further, Petitioners contend this Court should not consider any extrinsic evidence. Regardless, the extrinsic evidence of record supports Petitioners' position. First, it is undisputed Fred White and Hazel L. White owned one-half (1/2) oil and gas mineral estate at the time of the out-conveyance of one (1) acre to Consolidation Coal Company (the "Consol Deed"). Appx. Vol. 3, p. 237-239. The Consol Deed includes an exception and reservation of one-half (1/2) of the oil and gas. *Id.*; *see also Respondents' Brief*, p. 5, ¶ 18.

Thereafter, Consolidation Coal Company was taxed for "1.00 A BOWMAN FRED WHITE **SURFACE**." Appx. Vol. 3, p. 240-241. (Emphasis added). Consolidation Coal Company's tax assessment clearly indicates that it did obtain any interest in the oil and gas minerals. *Id.*

Second, as Respondents Toland admit, after the White Deed and the Consol Deed, Fred White and Hazel L. White were taxed for "1/2 INT 82 A BOWMAN O&G ROY." Appx. Vol. 3, p. 242. Prior to the White Deed, Hazel White was taxed for "82 BOWMAN & ½ INT O&G ROY." Appx. Vol. 3, p. 247.

Third, the McMillans' tax assessment after the conveyance to them from Hazel White in 1976 does not reference the oil and gas or minerals. Appx. Vol. 3, p. 245. Further, the surface owners were not taxed on the oil and gas or minerals from 1974 to 1984. Appx. Vol. 3, p. 247-260. However, during this period, the one-half (1/2) oil and gas interest owned by Hazel White was assessed. Appx. Vol. 3, p. 288-330. In their Brief, Respondents Toland admit, "As of 1993, the Property's tax assessment – identified as '79.992 A BOWMAN' – did not have a separate mineral value associated with it." *See Respondents' Brief*, p. 6, ¶ 26.

Finally, Hazel White leased her oil and gas rights in 1973, before the conveyance to the McMillans. Appx. Vol. 3, p. 331-333. Hazel White also leased her oil and gas rights after the

conveyance to the McMillans in 1982 and 1986. Appx. Vol. 3, p. 334-335; 336-337. Importantly, neither the McMillens, nor their successors-in-title, attempted to lease the oil and gas underlying the property at issue until the Respondents Toland in 2010.

B. ARGUMENT.

i. The White Deed is clear and unambiguous.

The White Deed is **not** ambiguous and was meant as a present reservation of the one-half (1/2) interest in the oil and gas. Respondents Toland's only basis for their allegation the White Deed is ambiguous is based on evidence beyond the White Deed. This contention is contrary to long-standing West Virginia precedent. It is well established a Court is limited to examining the four corners of the deed when construing deed language and "[e]xtrinsic evidence will not be admitted to explain or alter the terms of a written contract which is clear and unambiguous." *Faith United Methodist Church and Cemetery of Terra Alta v. Morgan*, 231 W.Va. 423, 745 S.E. 2d 461 (2013), Syl. Pt. 6; *quoting Paxton v. Benedum-Tress Oil Co.*, 80 W.Va. 187, 94 S.E. 472 (1917), Syl. Pt. 9. Importantly, extrinsic evidence cannot be admitted to ***create*** an ambiguity. *Sticklin v. Meadows*, 209 W.Va. 160, 544 S.E. 2d 87 (2001) (emphasis added); *see also Interstate Fire & Cas. Co. v. Dimensions Assur. Ltd.*, 843 F. 3d 133 (4th Cir., 2016) ("We may not look to extrinsic sources to create an ambiguity.").

It is undisputed Hazel L. White owned a one-half (1/2) interest in the oil and gas mineral estate when she was conveyed the property to the McMillans. An important distinction is the fact the White Deed also provides an exception of all prior exceptions and reservations, which includes the coal exception and the one-half (1/2) oil and gas exception by their predecessors-in-title – the Ressegers. The White Deed states: "This conveyance, is, however, subject to the exceptions, reservations, covenants, conditions, restrictions, and easements, if any, granted by or

acquired from the party of the first party and her predecessors in title to said land." Appx. Vol. 3, p. 217-218.[2]

West Virginia law is unmistakable: "a clear and unambiguous contract *must* be applied **without** reference to extrinsic evidence." Lowe v. Albertazzie, 205 W.Va. 47, 54, 516 S.E. 2d 258 (1999) (emphasis added). Accordingly, "[i]n the construction of a deed...the function of a court is to ascertain the intent of the parties *as expressed in the language used by them.*" Zimmerer v. Romano, 223 W.Va. 769, 679 S.E. 2d 601 (2009) (emphasis added). "The writing is the repository of what the parties meant[.]" *Watson v. Buckhannon River Coal Co.*, 95 W.Va. 164, 120 S.E. 390 (1923).

For more than 100 years, this Court has recognized: "The legitimate purpose of all construction of instruments in writing is to ascertain the intention of the party or parties making the same, and, when this is determined, effect will be given thereto, unless to do so will violate some established rule of property." Gibney, et al. v. Fitzsimmons, et al., 45 W. Va. 334, 342, 23 S.E. 189 (1898).

In this case, the Court should look no further than the four corners of the White Deed itself. "The polar star which should guide courts in the construction of deeds is the intention of the parties making the instrument." Belcher v. Powers, 212 W. Va. 418, 573 S.E. 2d 12 (2002), *quoting* Totten v. Pocahontas Coal & Coke Co., 67 W. Va. 639, 642, 68 S.E. 373 (1910); *see also* Gastar Expl. Inc. v. Rine, 239 W.Va. 792, 806 S.E. 2d 448 (2017).

By including the exception and reservation of one-half (1/2) of the oil and gas, Hazel White clearly intended to except and reserve for herself the one-half (1/2) of the oil and gas. As explained by this Court in Wellman v. Tomblin, 140 W. Va. 342, 84 S.E. 2d 617 (1954), the

[2] The exception of the out-conveyance in the White Deed is commonly used to show the actual acreage being conveyed. The out-conveyance, like the oil and gas interest, was not included in the grant to the McMillans.

Grantor's intentions are as expressed by the deed. A review of the four corners of the White Deed provides: 1) a reference to the prior deed from the Ressegers, being Deed Book 228, Page 190; 2) an explicit reservation of one-half (1/2) of the oil and gas within and underlying said tract of land; and 3) most importantly states: "This conveyance, is, however, subject to the exceptions, reservations, covenants, conditions, restrictions, and easements, if any, granted by or acquired from the party of the first part and her predecessors in title to said lands." Appx. Vol. 3, p. 215-218. Thus, the clear intent of the White Deed is to except the one-half (1/2) of the oil and gas from the conveyance.

This Court held in *Wellman*: "If a conveyance is of land conveyed by prior deed to which reference is made, **the Grantee** cannot contend that more passed than was intended in the recited deed." (Emphasis added). Thus, neither the McMillians (Respondents Toland's predecessors-in-title), nor Respondents Toland as the current surface owners, can contend they received one-half (1/2) of the oil and gas when the White Deed contained a reference to the prior deed and an explicit reservation of the oil and gas that remained after the initial reservation by the Ressegers.

Respondents Toland attempt to create an ambiguity within the four corners of the White Deed based on the prior deed from the Ressergers. However, "[e]xtrinsic evidence will not be admitted to explain or alter the terms of a written contract which is clear and unambiguous." *Faith United, supra*, Syl. Pt. 6; *quoting Paxton*, at Syl. Pt. 9; *see also Interstate Fire & Cas. Co.* ("We may not look to extrinsic sources to create an ambiguity."). Contrary to Respondents Toland's belief, the White Deed read as a whole harmonizes the coal portion by virtue of the exception of all prior exceptions.

Respondents' reliance on *Gastar Exploration, Inc.*, 239 W. Va. 792, 806 S.E. 2d 448 (2017) is misplaced. In *Gastar*, this Court found the 1977 deed is ambiguous and "of such

doubtful meaning that reasonable minds disagree as to the deed's intent." *Gastar*, at 796. As explained above, the White Deed is clear as to Hazel White's intent.

Most importantly, the deed in *Gastar* from the Yoho's to the McCardle's was a word-for-word recitation of the prior oil and gas exception and did ***not*** include the additional language that is included at the end of the White Deed.[3] *Id.*

Respondents Toland's reliance on *Paxton*, 80 W.Va. 187, 94 S.E. 472 (1917) is also misplaced. *Paxton* is easily distinguishable from the facts of this matter. The issue in *Paxton* was whether the language of the deed at issue meant to convey 1/16th of the oil or ½ of the oil by stating "1/16th of all the oil and ½ of all the gas" in the grant. This Court held this language was a grant of one-half of the oil in place. *See Paxton*, at *194. In fact, even though this Court found the language of the deed to be ambiguous, parol evidence was not considered because the ambiguity was not a latent ambiguity. *See id.*, at *197-198. Thus, only when a deed is capable of two constructions will the deed be construed against the grantor. *See id.*, at *195. That is not the case herein.

ii. Extrinsic evidence supports an exception by Hazel White.

As explained above, this Court should not examine any extrinsic evidence. However, in the event this Court determines the White Deed is ambiguous and extrinsic evidence is relevant, the extrinsic evidence supports Petitioners' position.

a. The tax assessments are consistent.

This Court in *Gastar* held: "Because the deed was ambiguous, the circuit court should have considered the parties' conduct after delivery of the deed — namely that the grantors to the deed stopped paying taxes on the oil and gas interest while the grantee started paying taxes."

[3] "This conveyance, is, however, subject to the exceptions, reservations, covenants, conditions, restrictions, and easements, if any, granted by or acquired from the party of the first part and her predecessors in title to said lands." Appx. Vol. 3, p. 217-218.

Gastar, at 796. This Court based its decision on the fact the Yoho's, who purported to except and reserve the remaining one-half (1/2) oil and gas interest in the conveyance to the McMillans, paid taxes on the oil and gas before the conveyance, but not afterwards. *Gastar*, at 801. However, the opposite occurred herein.

In this case, the assessment of Consolidation Coal Company's property after the conveyance from Fred and Hazel White favors Petitioners. It is undisputed Hazel White owned one-half (1/2) of the oil and gas at the time of the Consol Deed. Just as the White Deed, the Consol Deed includes an exception and reservation of one-half (1/2) of the oil and gas. Appx. Vol. 3, p. 237-239.

Thereafter, Consolidation Coal Company was taxed for "1.00 A BOWMAN FRED WHITE **SURFACE**." Appx. Vol. 3, p. 240-241. (Emphasis added).[4] This tax assessment after the Consol Deed does not mention oil and gas or minerals whatsoever and clearly states "SURFACE." *Id.*

Further, after the White Deed and the Consol Deed, Hazel White was taxed for "1/2 INT 82 A BOWMAN O&G ROY." Appx. Vol. 3, p. 242, 243. The difference in acreage is easily explained by the fact the White Deed conveyed the Property but explicitly excepted and reserved the out-conveyance of one (1) acre from the prior Consol Deed.

Unlike *Gastar*, Hazel White was taxed for "82 BOWMAN & ½ INT O&G ROY" **prior** to the White Deed and for "1/2 INT 82 A BOWMAN O&G ROY" **after** the White Deed. Appx. Vol. 3, p. 236; 242; 243; 288-330.

Moreover, the McMillans, and their successors-in-title, tax assessments after the White Deed in 1976 does not reference the oil and gas or minerals. Appx. Vol. 3, p. 247-279; *see also*

[4] Before the Trial Court, Respondents Toland admitted this tax assessment clearly indicates Consolidation Coal Company did not obtain an interest in the oil and gas minerals." Appx. Vol. 3, p. 187.

Respondents' Brief, p. 19 ("The McMillans' tax assessment simply reads '81 A BOWMAN.'"). Also, the surface owners were not taxed on the oil and gas or minerals from 1974 to 1984. *Id.* However, during this period, Hazel White was taxed for her oil and gas interest. *Id.* Thereafter, as provided in Respondents' Brief, "As of 1993, the Property's tax assessment – identified as '79.992 A BOWMAN' – did not have a separate mineral value associated with it." Appx. Vol. 3, p. 261; *see also Respondents' Brief*, p. 6, ¶ 26.

Respondents cannot have it both ways. They wish for this Court to apply Gastar, in which this Court relied on the tax assessments of the oil and gas, and for this Court to ignore the tax assessments of the oil and gas to Hazel White after the White Deed for the one-half (1/2) oil and gas she excepted and reserved. Under Gastar, because Hazel White was taxed on her oil and gas interest after the White Deed, the extrinsic evidence supports her ownership.

As explained above, Hazel White was taxed on her one-half (1/2) interest in the oil and gas before and after the White Deed. This is exactly the opposite of the facts in Gastar. *See id.*, at 797.[5]

b. Additional extrinsic evidence supports Petitioners.

In this case, Hazel White's one-half (1/2) oil and gas interest was listed in the Appraisement of her Estate as "1/2 Ing 82 A Bowman O & G Roy." Appx. Vol. 3, p. 44. Hazel L. White also **leased** her oil and gas interest to John Richmond for development in 1982, only six (6) years after the White Deed. Appx. Vol. 3, p. 334-335.[6] Importantly, neither the McMillens,

[5] "The record contains sixty-two pages of land tax records showing the parties' conduct before and after delivery of the 1977 deed. These tax records show that, before the Yohos conveyed the property in 1977, the Yohos paid taxes on the one-half oil and gas interest. After the Yohos conveyed the property to Ms. McCardle in 1977, Ms. McCardle paid the taxes on the same one-half oil and gas interest while the Yohos stopped paying the taxes altogether." *See id*, at 801.

[6] Hazel L. White leased the White Interest again on January 3, 1986 after the 1982 Oil and Gas Lease expired. Appx. Vol. 3, p. 336-337.

nor their successors-in-title, attempted to lease the oil and gas until the Respondents in 2010. This pertinent extrinsic evidence, coupled with the tax assessments to Hazel White for her interest in the oil and gas, support Hazel White intended to retain the one-half (1/2) oil and gas interest in the White Deed.

Respondents admit the leases by Hazel White strongly support Petitioners' position. *See Respondents' Brief*, p. 20. However, Respondents Toland attempt to distract this Court by referencing other oil and gas leases signed by Fred White and Hazel L. White for separate property. The oil and gas leases and oil and gas reservations in the chain of title for other properties not at issue in this case are entirely irrelevant. The fact remains the extrinsic evidence for the property as issue evidence Hazel White's intent to retain the oil and gas.

ii. After the White Deed, no oil and gas remained to be conveyed with the surface estate.

Lastly, Respondents Toland attempt to argue since the subsequent owners of the surface after the White Deed did not claim any interest in the oil and gas, the exception in the White Deed had no effect. Clearly, none of the other owners of the surface believed they had an interest in the oil and gas or they would have asserted their claim or leased their interest just like Hazel White. However, only Hazel White leased the one-half (1/2) interest and no other owner of the surface even attempted to do so until the Respondents in 2010. Obviously, this is because there was no oil and gas to keep after the White Deed. Additionally, each subsequent deed after the White Deed included the same blanket exception of all prior exceptions and reservations that is first included in the White Deed. Appx. Vol. 3, p. 219-235.

Although Petitioners maintain the White Deed is unambiguous, if this Court were to determine the White Deed is ambiguous as to the intent of the parties, it would be permitted to

consider extrinsic evidence, including the documents identified above which strongly support Petitioners' ownership of one-half (1/2) of the oil and gas.

C. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

The facts of the case are established by numerous documents included in the Appendix, but lend themselves to a narrow issue, that is, based upon those documents, who are the lawful owners of these oil and gas rights.

Cases involving the ownership of oil and gas rights have become of critical importance to owners of real property in West Virginia.

Therefore, Petitioners contend this appeal should be scheduled for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

D. CONCLUSION

Petitioners' predecessor-in-title, Hazel White, excepted and reserved the one-half (1/2) oil and gas mineral estate by virtue of the White Deed. It is undisputed: 1) Hazel White owned one-half (1/2) oil and gas mineral estate prior to conveying the Property; 2) the White Deed contains an explicit oil and gas exception and reservation; 3) the White Deed contains a reference to the prior deed; and 4) the language of the White Deed contains an exception of the prior one-half (1/2) exception and reservation of the oil and gas and the coal that was excepted from the conveyance to Hazel White.

Hazel White subsequently leased her interest in the oil and gas, and her oil and gas interest was listed in the Appraisement of her Estate. Moreover, the Marshall County Assessor assessed a tax **before and after** the White Deed accordingly. Clearly, Hazel White intended to except and reserve the one-half (1/2) of the oil and gas.

Therefore, this Court should conclude that the Circuit Court erred in denying Petitioners' Motions for Summary Judgment and erred in granting Respondents' Motion for Summary

Judgment, and this Court should find as a matter of law the heirs of Hazel White are the lawful owners of the oil and gas rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of the foregoing Reply Brief of Petitioners Charlotte White and Polly Faye Griffin was made upon the following as indicated below by mailing a true copy thereof by US Mail postage prepaid them this 21st day of November, 2022.

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