IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0459 and 22-0470

POLLY FAYE GRIFFIN,

Petitioner,

v.

WILLIAM E. TOLAND and
AMANDA N. WHITE-TOLAND,

Respondents.

&

CHARLOTTE WHITE,

Petitioner,

v.

WILLIAM E. TOLAND and
AMANDA N. WHITE TOLAND,

Respondents.

CIVIL ACTION NO. 18-C-138
On Appeal from a final order of the
Circuit Court of Marshall County
Hon. David W. Hummel, Jr.

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

I. STATEMENT OF THE CASE

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, the respondents William E. Toland and Amanda N. White-Toland (collectively, the "Tolands") make this statement of the case to provide a full recitation of the facts relevant to the assignment of error stated by the petitioners, Polly Faye Griffin ("Griffin") and Charlotte White[1] ("White") (collectively, "Petitioners").

At issue in this case is ownership of an undivided one-half interest in the oil and gas minerals in place (the "Minerals"[2]) underlying an 82.3-acre[3] parcel of real estate situate in Meade District, Marshall County, West Virginia, which is identified by the Marshall County Assessor's Office as District, Tax Map, and Parcel numbers 9-2-9 (the "Property").

On one hand, Petitioners assert that they and/or other heirs, successors, and/or assigns of Hazel L. White own the Minerals. On the other hand, the Tolands, the current surface owners, claim ownership of the Minerals.

The facts relevant to this appeal are as follows:

A. The Property's Chain of Title

1. Before November 18, 1943, all of the coal, oil, and gas underlying the Property was owned by Elmer Resseger and Elsie V. Resseger.[4] Appx. Vol. 3 p. 208-211.

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[1] For purposes of clarity, it should be noted that petitioner Charlotte White incorrectly identifies herself as a respondent in these consolidated appeals.

[2] For purposes of clarity, the "Minerals" refers to the undivided ***one-half*** interest in the oil and gas minerals at issue in this case.

[3] For purposes of clarity, the Tolands own 79.992 acres of the original 82.3-acre parcel by virtue of out-conveynaces made by their predecessors-in-title. The Tolands make claim only the portion of the Minerals underlying their 79.992 acres.

[4] Elmer Resseger acquired the Property from Mae Carmichael, Essie Booth, Clara V. Blake, and Ota B. Richmond by deed dated April 28, 1843 and recorded in Marshall County, WV Deed Book 225, at page 273. No reservation of the coal, oil, or gas was made in the aforementioned deed. There is no prior deed reference in the aforementioned deed. Mae Carmichael, *et al.* obtained the Property by virtue of the intestate death William Carmichael. William Carmichael acquired the Property by virtue of the testate death of his father, George Carmichael, whose Will is of record in Marshall County, WV Will Book 5, at 428. George Carmichael made no disposition of any coal, oil, or gas in his Will. Appx. Vol. 3 p. 208-211.

2. By deed, dated November 18, 1943, by and between Elmer Resseger and Elsie V. Resseger, as grantors, and Fred White and Hazel L. White, as grantees (the "Resseger-White Deed"), the Ressegers conveyed the Property to the Whites with the following reservation language:

> Excepting and reserving, however, from the operation of this grant all the coal within and underlying said tract of land together with all the rights and privileges necessary and useful in the mining, removing and manufacturing of the said coal, including the right of mining the same without leaving any support for the overlying strata and without liability for any injury which may result to the surface from the breaking of said strata, the right of ventilation and drainage, and of access to the mines for men and materials: the shafts or openings for such purposes, however, to be in ravines and waste places upon said land, and not nearer than 20 rods of the principal building thereon. Also the right of mining, ventilating, draining and transporting the coal of other lands through the mines and opening in and upon the lands above described, and general freed and discharged from all servitude to the overlying land and everything therein and thereon and with the right to the grantors, their successors and assigns, to purchase at any time any number of acres of said land by paying therefor at the rate $100.00 per acre.
>
> Reserving to the land owner the right to drill and operate through said coal for oil and gas.
>
> There is also excepted and reserved the one half of the oil and gas within and underlying 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. 212-214.

3. Thus, after the Resseger-White Deed, the Ressegers retained all of the coal and an undivided one-half interest in the oil and gas minerals underlying the Property, and the Whites acquired an undivided one-half interest in the oil and gas minerals—*i.e.* the Minerals. *Id.*

4. By Deed, dated June 29, 1976, by and between Hazel L. White, as grantor, and Timmie John McMillan and Vickie Lynn McMillan, as grantees (the "White-McMillan Deed"), Hazel L. White conveyed the Property to the McMillans. Appx. Vol. 3 p. 215-218.

5. The White-McMillan Deed states that Hazel L. White conveyed to the McMillans "the same property conveyed to Fred White and Hazel L. White, his wife, as joint tenants with the right of survivorship, by Elmer Resseger and Elsie V. Resseger, his wife, by [the Resseger-White Deed]." Appx. Vol. 3 p. 215-216.

6. The White-McMillan Deed contains the following "excepted and reserved" language when referring to a prior out-conveyance:

> There is excepted and reserved from the above-described property the following described parcel of real estate conveyed to Consolidation Coal Company, a Delaware corporation, by Fred White and Hazel L. White, his wife, by deed dated the 4th day of November, 1975[.]

Appx. Vol. 3 p. 216.

7. The White-McMillan Deed also contains the following "excepted and reserved" language (the "Deed Language"):

> Excepting and reserving, however, from the operation of this grant all the coal within and underlying said tract of land together with all the rights and privileges necessary and useful in the mining, removing and manufacturing of the said coal, including the right of mining the same without leaving any support for the overlying strata and without liability for any injury which may result to the surface from the breaking of said strata, the right of ventilation and drainage, and of access to the mines for men and materials: the shafts or openings for such purposes, however, to be in ravines and waste places upon said land, and not nearer than 20 rods of the principal building thereon. Also the right of mining, ventilating, draining and transporting the coal of other lands through the mines and opening in and upon the lands above described, and general freed and discharged from all servitude to the overlying land and everything therein and thereon and with the right to the grantors, their

> successors and assigns, to purchase at any time any number of acres of said land by paying therefor at the rate $100.00 per acre.
>
> Reserving to the land owner the right to drill and operate through said coal for oil and gas.
>
> There is also excepted and reserved the one half of the oil and gas within and underlying 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. 217.

8. Essentially, the Deed Language is used both in the Resseger-White Deed and the White-McMillan Deed. *Compare* Appx. Vol. 3 p. 213 and Appx. Vol. 3 p. 217.

9. Because Hazel L. White did not own the coal and never did, the coal portion of the Deed Language is of no force or effect and is a nullity. *Id.*

10. By Deed, dated January 20, 1982, by and between Timmie John McMillan and Vickie Lynn McMillan, as grantors, and Harry E. Morgan, Jr. and Virginia M. Morgan, as grantees, the McMillans conveyed the Property to the Morgans. Excepting only minor, non-substantive changes, the exact same Deed Language appears in this deed. Appx. Vol. 3 p. 219-221.

11. By Deed, dated December 13, 1985, Virginia M. Morgan, as grantor, conveyed her interest in the Property to Harry E. Morgan, Jr., as grantee. The exact same Deed Language appears in this deed. Appx. Vol. 3 p. 222-223.

12. By Deed, dated October 23, 1991, Harry E. Morgan III[5], as grantor, conveyed his interest in the Property to Michael F. Morgan, as grantee. The exact same Deed Language appears in this deed. Appx. Vol. 3 p. 224-226.

[5] The missing link in the chain of title from Harry E. Morgan, Jr. to Harry E. Morgan III is explained in the Supplement to Respondents William E. Toland's and Amanda N. White-Toland's Motion for Summary Judgment. Appx. Vol. 5 p. 560-643.

13. By Deed, dated October 7, 1992, Tammy L. Fritz, as grantor, conveyed her interest in the Property to Michael F. Morgan, as grantee. The exact same Deed Language appears in this deed. Appx. Vol. 3 p. 227-229.

14. By Deed, dated November 7, 2008, Michael F. Morgan, as grantor, conveyed the Property to Raymond E. White, Cindy L. White, Amanda N. Toland, and William E. Toland, as grantees. The exact same Deed Language appears in this deed. Appx. Vol. 3 p. 230-232.

15. By Deed, dated November 5, 2010, Raymond E. White and Cindy L. White, as grantors, conveyed the Property to William E. Toland and Amanda N. White-Toland, as grantees. The exact same Deed Language appears in this deed. Appx. Vol. 3 p. 233-235.

16. In effect, the same Deed Language, with only minor, non-substantive differences, was made in every subsequent deed in the chain of title. Appx. Vol. 3 p. 212-235.

B. Inconsistent and Contradictory Tax Assessments

i. Conveyance to Consolidation Coal Company

17. As of 1973, the Property was taxed in the name of Fred and Hazel L. White and as "83 BOWMAN & 1/2 INT O&G ROY." Appx. Vol. 3 p. 236.

18. By Deed, dated November 4, 1975, Fred White and Hazel L. White, as grantors, conveyed 1 acre of the Property to Consolidation Coal Company, as grantees. The exact same Deed Language appears in this deed. Appx. Vol. 3 p. 237-239.

19. Thereafter, beginning in 1975, Consolidation Coal Company was taxed and continues to be taxed on this 1-acre as "1.00 A BOWMAN FRED WHITE SURFACE." Appx. Vol. 3 p. 240-241.

20. However, beginning in 1975, Fred and Hazel L. White's interest in the Property was thereafter taxed as "82 BOWMAN & 1/2 INT O&G ROY." Appx. Vol. 3 p. 242.

21. Consolidation Coal Company's 1975 tax assessment indicates that it did not obtain any interest in the oil and gas minerals. However, Fred and Hazel L. White's 1975 tax assessment indicates that it owns a 1/2 oil and gas interest in 82 acres, rather than 83 acres. *Compare* Appx. Vol. 3 p. 240 and Appx. Vol. 3 p. 242.

22. Even more, Fred and Hazel L. White's 1976 tax assessment—after White-McMillan Deed—states "1/2 INT 82 A BOWMAN O&G ROY" and not 83 acres. Appx. Vol. 3 p. 243.

23. Unlike Consolidation Coal Company's tax assessment that explicitly states "SURFACE," the McMillans 1976 tax assessment for the Property states "81 A BOWMAN." Appx. Vol. 3 p. 245.

ii. Double Tax Assessments of the Minerals

24. From 1974 to 1984, the tax assessments for the Property were unclear as to whether the Minerals were being taxed. The tax assessments for those years only contained columns for "land" and "buildings" and did not contain a separate column for minerals. Appx. Vol. 3 p. 247-260.

25. The McMillans conveyed all right, title, and interest in the Property in 1982. Appx. Vol. 3 p. 219-221.

26. 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.

27. However, from 1994 to 2010, the Property's tax assessment included a tax on the Minerals. Appx. Vol. 3 p. 262-279.

28. Thus, from at least 1994 to 2010, the then-current owner or owners of the Property paid taxes on the Minerals. *Id.*

29. Then, from 2012 onwards, the Minerals have been taxed in the name of the Tolands as "INT IN 83.3 A O&G LEASED." Appx. Vol. 3 p. 280-287.

30. Upon delivery of the White-McMillan Deed, the Minerals have been taxed in the name of the Whites. Appx. Vol. 3 p. 288.

C. The Whites Execute Oil and Gas Leases for the Minerals

31. Fred White and Hazel L. White executed an Oil and Gas Lease, dated January 20, 1973, in regard to the Minerals. Appx. Vol. 3 p. 331-333.

32. Hazel L. White executed an Oil and Gas Lease, dated August 30, 1982, in regard to the Minerals. Appx. Vol. 3 p. 334-335.

33. Hazel L. White executed an Oil and Gas Lease, dated January 3, 1986, in regard to the Minerals. Appx. Vol. 3 p. 336-337.

D. The Whites Execute Oil and Gas Leases for Unowned Minerals and Use Carryover Oil and Gas Reservation Language in Other Deeds

i. 30.61-Acre Parcel

34. By Deed, dated July 23, 1968, A.D. Welling and Hester V. Welling conveyed an approximately 30.61-acre parcel of real property to Fred White and Hazel L. White (the "Welling-White Deed"). Appx. Vol. 3 p. 338-341.

35. The 30.61-acre parcel is identified as the "SECOND" parcel in the Welling-White Deed. *Id.*

36. Taxes were assessed on the 30.61-acre parcel in the name of Fred & Hazel L. White as "30.61 BOWMAN." Appx. Vol. 3 p. 342-343.

37. By the following language, the Wellings excepted and reserved certain coal, oil and gas underlying the 30.61-acre parcel:

> There is, however, excepted from the operation of this deed all the coal of the Pittsburgh or River Vein together with such rights and privileges as conveyed by S.R. Hanen and Elizabeth Hanen, his wife, by deed dated September 23, 1903, and recorded in the office of the Clerk of the County Court of Marshall County, West Virginia in Deed Book 97, at page 386.
>
> There is excepted and reserved from this conveyance all the oil and gas within and underlying said land together with the right to drill and operate for the same, the said rights having been heretofore reserved.

Appx. Vol. 3 p. 338-341.

38. Thus, Fred and Hazel L. White did not acquire the oil and gas underlying that 30.61-acre parcel. *Id.*

39. Notwithstanding the foregoing, Fred White and Hazel L. White executed an Oil and Gas Lease, dated January 20, 1973, in regard to the 30.61-acre parcel. Appx. Vol. 3 p. 344-346.

40. Additionally, Hazel L. White executed a subsequent Oil and Gas Lease, dated August 30, 1982, in regard to the 30.61-acre parcel. Appx. Vol. 4 p. 347-348.

41. By Deed, dated May 14, 1984, Hazel L. White conveyed the 30.61-acre parcel to Harold A. White and Charlotte White (the "30.61 White-White Deed"). Appx. Vol. 4 p. 349-353

42. The 30.61-acre parcel is identified as the "SECOND" parcel in the 30.61 White-White Deed. *Id.*

43. The 30.61 White-White Deed contains the **exact same** exception and reservation language as was used in the Welling-White Deed—despite the fact that the Whites never owned those coal, oil, or gas interests. *Compare* Appx. Vol. 4 p. 340 and Appx. Vol. 4 p. 351.

44. Notwithstanding the fact that she did not own the oil and gas underlying the 30.61-acre parcel, Hazel L. White executed a third Oil and Gas Lease, dated January 3, 1986, in regard to the 30.61-acre parcel. Appx. Vol. 4 p. 354-355.

ii. 137.55-Acre Parcel

45. By Deed, dated May 6, 1946, Harry E. Carmichael, *et al.* conveyed a 137.55-acre parcel of property to Fred White and Hazel L. White (the "Carmichael-White Deed"). Appx. Vol. 4 p. 356-358

46. Two separate tax assessments were made on the 137.55-acre parcel in the name of Fred & Hazel L. White as "69 BOWMAN" and "66.6 BOWMAN."[6] Appx. Vol. 4 p. 359-361.

47. By the following language, Harry E. Carmichael, *et al.* reserved the coal underlying the 137.55-acre parcel:

> There is excepted and reserved, however, from this grant all the Pittsburgh vein or coal and all the veins of coal underlying the same within and underlying said tract land together with the appurtenant mining rights and privileges appurtenant thereto as set forth in deed recorded in Deed Book 232, at page 235.

Appx. Vol. 4 p. 357.

48. For the purposes of this appeal, it is assumed that the Whites owned the oil and gas underlying the 137.55-acre parcel after the Carmichael-White Deed.

49. By Oil and Gas Lease, dated January 20, 1973, Fred White and Hazel L. White leased the oil and gas underlying the 137.55-acre parcel. Appx. Vol. 4 p. 362-364.

[6] There is a discrepancy between the acreage reported in the deed and the tax assessments. However, both refer to the same property. The Whites conveyed the 137.55-acre parcel to Freddie C. White and Violet C. White by deed in 1977. The Whites' names on the 1977 tax assessments for "66.6 BOWMAN" and "69 BOWMAN" are crossed out and "Freddie C & Violet" are handwritten in their place.

50. By Deed, dated August 16, 1977, Hazel L. White conveyed the 137.55-acre parcel to Freddie C. White and Violet L. White (the "137.55 White-White Deed"). Appx. Vol. 4 p. 365-367.

51. The 137.55 White-White Deed contains the **exact same** exception and reservation language as was used in the Carmichael-White Deed—despite the fact that the Whites never owned the coal. *Compare* Appx. Vol. 4 p. 357 and Appx. Vol. 4 p. 366.

52. Moreover, assuming that the Whites owned the oil and gas underlying the 137.55-acre parcel as a result of the Carmichael-White Deed, they conveyed that interest to Freddie C. White and Violet L. White by the 137.55 White-White Deed.[7] Appx. Vol. 4 p. 365-367.

53. Notwithstanding the foregoing, Hazel L. White executed an Oil and Gas Lease, dated August 30, 1982, in regard to the 137.55-acre parcel. Appx. Vol. 4 p. 368-369.

54. Additionally, Hazel L. White executed a subsequent Oil and Gas Lease, dated January 3, 1986, in regard to the 137.55-acre parcel. Appx. Vol. 4 p. 370-371.

E. The Tolands, Petitioners, and Others Execute Oil and Gas Leases for the Minerals

55. The Tolands executed an Oil and Gas Lease, dated May 5, 2010, in regard to the Minerals. Appx. Vol. 4 p. 372-375.

56. The Tolands were paid $500.00 per acre for executing said Oil and Gas Lease. *Id.*

57. The then-current lessee under the Tolands' lease, Chevron U.S.A., Inc., and/or its related or affiliated companies, extended the Tolands' lease by tendering a check in the amount of $49,995.00. Appx. Vol. 4 p. 376-377.

58. Petitioners and other defendants-below executed Oil and Gas Leases in or around fall 2014 in regard to the Minerals. Appx. Vol. 4 p. 378-426.

[7] There was no oil and gas reservation in the 137.55 White-White Deed.

II. SUMMARY OF ARGUMENT

The White-McMillan Deed is ambiguous. The White-McMillan Deed contains various, inartfully drafted paragraphs that would lead reasonable minds to disagree as to whether the parties intended for Hazel L. White to reserve the one-half of the oil and gas she owned at that time. As more fully detailed below, the facts and circumstances present in the White-McMillan Deed are extremely similar to the facts and circumstances present in *Gastar Exploration, Inc. v. Rine*, 239 W. Va. 792, 806 S.E.2d 448 (2017). In *Gastar*, the Court stated that:

> [W]e find that the 1977 deed is ambiguous. The deed was poorly drafted, the language of the document is uncertain, and reasonable minds may disagree as to just what was conveyed. The deed does not express the precise intentions of the [grantors] regarding the one-half interest in the oil and gas underlying the tract.

"[W]hen a deed is inconsistent, confusing, or ambiguous on its face, a court must look to extrinsic evidence of the parties' intent to construe the deed.... A trial court may look to a variety of evidence, including the parties' conduct before and after delivery of the deed, to discern the parties' intent[.]" *Gastar*, 239 W. Va. at 799, 806 S.E.2d at 455.

Upon review of all extrinsic evidence contained in the record, it is clear that the only logical and consistent construction of the White-McMillan Deed is that the parties thereto did not intend for Hazel L. White to reserve the Minerals. Most importantly, it is undisputed that Hazel L. White never owned the coal underlying the Property. If Hazel L. White could not have intended to have "excepted and reserved" the coal, how could she have intended to have "excepted and reserved" the Minerals? She logically could not have, and the Deed Language is revealed to be "carryover" language from the Resseger-White Deed.

While some of the remaining extrinsic evidence undoubtedly favors Petitioners, the great weight supports the Tolands. In sum, this remaining extrinsic evidence reveals that: (a) there were

various inconsistent, contradictory, and/or duplicative tax assessments in regard to the Minerals and the out-conveyance made by Fred White and Hazel L. White to Consolidation Coal Company; (b) Fred White and Hazel L. White executed oil and gas leases for the Minerals and other minerals they indisputably did not own; (c) Fred White and Hazel L. White used "carryover" coal, oil, and gas "excepted and reserved" language in other deeds that indisputably could not have force or effect; and (d) each and every deed in the chain of title subsequent to the White-McMillan Deed contains the Deed Language.

Decades-old West Virginia law instructs that "[w]here there is ambiguity in a deed, or where it admits of two constructions, that one ***will be adopted*** which is most favorable to the grantee." Syl. Pt. 6, *Paxton, supra.* (emphasis supplied); Syl. Pt. 3, *Hall v. Hartley*, 146 W.Va. 328, 119 S.E.2d 759 (1961); Syl. Pt. 5, *Cottrill v. Ranson*, 200 W.Va. 691, 490 S.E.2d 778 (1997); Syl. Pt. 8, *Zimmerer v. Romano*, 223 W.Va. 769, 679 S.E.2d 601 (2009). "Where an ambiguity exists in a deed, the language of such deed will be construed most strongly against the grantor." Syl. Pt. 3, *West Virginia Dep't of Highways v. Farmer*, 159 W.Va. 823, 226 S.E.2d 717 (1976).

III. STATEMENT REGARDING ORAL ARGUMENT

The Tolands assert that oral argument is unnecessary pursuant to Rule 18(a)(4), because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

IV. ARGUMENT

A. STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). "Summary judgment is appropriate where the

record taken as a whole could not lead a rational trier of fact to find for the nonmoving party[.]" Syl. Pt. 4, *Painter*, *supra*.

B. THE CIRCUIT COURT DID NOT ERR BY GRANTING THE TOLANDS' MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONERS' MOTIONS FOR SUMMARY JUDGMENT[8]

The Tolands assert that the White-McMillan Deed is ambiguous as to whether the parties intended for Hazel L. White to except and reserve the Minerals. Accordingly, extrinsic evidence is admissible to construe the White-McMillan Deed, and "where it admits of two constructions, that one will be adopted which is most favorable to the grantee." Syl. Pt. 6, *Paxton v. Benedum-Trees Oil Co.*, 80 W. Va. 187, 94 S.E. 472 (1917).

The construction most favorable to the Tolands, successors-in-interest the grantees of the White-McMillan Deed, is that the Deed Language was simply "carryover" language from a prior deed without intent. The result is that the Tolands are now the owners of the Minerals, and this Court should affirm the circuit court's order.

i. Because the White-McMillan Deed repeatedly states "excepted and reserved" in a confusing and uncertain manner, it is ambiguous

"Deeds are subject to the principles of interpretation and construction that govern contracts generally." Syl. Pt. 2, *Faith United Methodist Church and Cemetery of Terra Alta v. Morgan*, 231 W. Va. 423, 745 S.E.2d 461 (2013). "In construing a deed…it is the duty of the court to construe its as a whole, taking and considering all parts together, and giving affect to the intention of the parties wherever that is reasonably clear and free from doubt[.]" *Gastar*, 239 W. Va. at 799, 806 S.E.2d 455 (*quoting* Syl. Pt. 1, *Maddy v. Maddy*, 87 W. Va. 581, 105 S.E. 803 (1921)). "The term 'ambiguity' is defined as language reasonably susceptible to two different meanings or language

[8] Because Petitioners assert similar arguments in their sole assignments of error, the Tolands respond to both, collectively, in this subsection.

of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." Syl. Pt. 5, *Gastar, supra.* (*quoting* Syl. Pt. 4, *Estate of Tawney v. Columbia Nat. Res., L.L.C.*, 219 W. Va. 266, 633 S.E.2d 22 (2006)).

In the White-McMillan Deed, the words "excepted and reserved" are used in a confusing manner. First, the White-McMillan Deed states that Hazel L. White conveyed "the same property" that she and her husband, Fred White, obtained by the Resseger-White Deed. Appx. Vol. 3 p. 215-216. It is undisputed that the "property" that Hazel L. White obtained as a result of the Resseger-White Deed was the surface of the Property and one-half of the oil and gas minerals. However, the White-McMillan Deed then states that "[t]here is further excepted and reserved from the conveyance all the coal" and that "[t]here is also excepted and reserved the one-half (1/2) of the oil and gas" underlying the Property. Appx. Vol. 3 p. 217. Did Hazel L. White intend to convey the "same property" or something less?

Additionally, the White-McMillan Deed states that "[t]here is excepted and reserved" a parcel of real property that the Whites previously conveyed to a third party—*i.e.* an out-conveyance. Appx. Vol. 3 p. 216. How could Hazel L. White except and reserve something she did not own? If Hazel L. White used "excepted and reserved" in this context, does "excepted and reserved" have any meaning in regard to the purported coal, oil, and gas portion of the White-McMillan Deed?

Upon a review of only the four corners of the White-McMillan Deed, it is simply impossible to know for sure. Reasonable minds can reasonably disagree, and thus the White-McMillan Deed is ambiguous as a matter of law. Indeed, this Court has previously ruled that a deed containing very similar language is ambiguous.

In *Gastar*, the successors-in-interest to the grantor and grantee of a 1977 deed disputed ownership of an undivided one-half interest in the oil and gas minerals underlying the property. The 1977 deed—like the White-McMillan Deed—purported to convey "the same property" that was acquired by the previous deed but also purported to "except and reserve" of one-half of the oil and gas. The 1977 deed—again, like the White-McMillan Deed—also purported to have "excepted and reserved" an out-conveyance that was not owned by the grantors. Under these facts, the *Gastar* Court stated that:

> [W]e find that the 1977 deed is ambiguous. The deed was poorly drafted, the language of the document is uncertain, and reasonable minds may disagree as to just what was conveyed. The deed does not express the precise intentions of the [grantors] regarding the one-half interest in the oil and gas underlying the tract.

Gastar, 239 W. Va. at 801, 806 S.E.2d at 456.

If the 1977 deed in *Gastar* is ambiguous, so too must the White-McMillan Deed.

a. The "subject to the exceptions, reservations...granted by or acquired from the party of the first part and her predecessors in title" language contained in the White-McMillan Deed does not evince a clear and unambiguous intent to reserve the Minerals

In support of her argument that the White-McMillan Deed is clear and unambiguous, petitioner White repeatedly refers to the following language contained in it: "This conveyance, is, however, subject to the exceptions, reservations, conditions, restrictions, and easements, if any, granted by or acquired from the party of the first part and her predecessors in title of said land." Appx. Vol. 3 p. 217-218. According to petitioner White, this language evinces a "clear intent...to except the remaining one-half (1/2) of the oil and gas [*i.e.* the Minerals] from the conveyance." Petitioner White's Brief at p. 10.

However, petitioner White fails to further explain how general, "subject to" language commonly found in deeds somehow evinces such a clear intent. There is no specific reference to

the one-half oil and gas reservation contained in the Resseger-White Deed. Moreover, the "subject to" language does not even explicitly state that there are exceptions or reservations in the chain of title by use of the words "if any." It cannot be seriously argued that such generic "subject to" language can seriously evince a clear and unambiguous intent.

That is especially true when "[t]he principal function of a 'subject to' clause is to protect a grantor against a breach of warranty claim." *Texas Independent Exploration, Ltd. v. Peoples Energy Production-Texas L.P.*, 2009 WL 2767037 (Tex. App. Aug. 31, 2009); *Rubel v. Johnson*, 2017-Ohio-9221, 101 N.E.3d 1092, ¶ 26 (Ohio Ct. App., 7th Dist. 2017) ("A 'subject to' clause can be used as a precaution to limit a grantor's liability under the deed's warranty in order to avoid a future breach of warranty claim.").

Additionally, if Hazel L. White wished to clearly and unambiguously reserve the Minerals, she could have and should have employed language to that effect instead of using almost word-for-word the same Deed Language used in the Resseger-White Deed. By extension, her failure to employ such differentiating language is evidence that she did not intend to reserve the Minerals.

ii. Because the extrinsic evidence reveals that (a) the Deed Language also appears almost word-for-word in the Resseger-White Deed; and (b) Hazel L. White never owned any interest in the coal underlying the Property, the only rational construction of the White-McMillan Deed is that there was no intention to reserve the Minerals

"To divine the intent of the parties to an ambiguous deed, and to give the deed a practical construction, a court may consider the circumstances surrounding the parties when the deed was negotiated and delivered, and may consider their subsequent conduct." *Gastar*, 239 W. Va. at 801, 806 S.E.2d at 457.

Upon examination of the Property's chain of title prior to the White-McMillan Deed, there is only one "practical construction" of it—that there was no intent for Hazel L. White to reserve

the Minerals. First, the Deed Language which purported to have "excepted and reserved" all the coal and one-half of the oil and gas is almost word-for-word the same language which appeared in the immediately-preceding deed in the Property's chain of title, the Resseger-White Deed. *Compare* Appx. Vol. 3 p. 212-214 and Appx. Vol. 3 p. 215-218. The differences that exist between the language contained in the Resseger-White Deed and the White-McMillan Deed are patently non-substantive. For example, the White-McMillan Deed states "(1/2)" after "one-half" whereas the Resseger-White Deed does not. *Id.* In effect, the Deed Language is "carryover" language from the Resseger-White Deed.

Perhaps more importantly, neither Fred White nor Hazel L. White ever owned any interest in the coal underlying the Property. Appx. Vol. 3 p. 208-211. This fact is "conceded" by Petitioners. Petitioner Polly Faye Griffin's Brief at p. 2; Petitioner Charlotte White's Brief at p. 2. Because the Whites never owned the coal underlying the Property, the coal portion of the White-McMillan Deed Language is of no force and effect and is a nullity. This is an indisputable fact. It follows that if the coal portion of the Deed Language is a nullity, so too must the oil and gas portion of the Deed Language be a nullity. To put it another way, how can one portion of the "carryover" Deed Language have no meaning (the coal portion) and another portion have meaning (the oil and gas portion)? The answer is that it simply cannot, and Petitioners' arguments to the contrary must fail.

The Deed Language must be read in harmony. Either it is all intended to be a present reservation—of both the coal and the oil and gas—or neither is meant as a present reservation. As the coal portion of the Deed Language is unquestionably a nullity, so too must the oil and gas portion. Thus, the Tolands respectfully submit that the ***only*** way to read the Deed Language in

harmony is that it is all carryover language without intent. To construe the White-McMillan Deed in any other manner defies logic.

iii. The great weight of the remaining extrinsic evidence supports the Tolands' construction of the White-McMillan Deed

Notwithstanding the fact that the Tolands' construction is the only rational construction of the White-McMillan Deed, other extrinsic evidence may be examined to shed light on the intent of the parties. However, upon examination of all, other relevant extrinsic evidence contained in the record, said extrinsic evidence is not definitive and clearly not enough to overcome the clear mandates of *Paxton* ("[W]here, it admits of two constructions, that one will be adopted which is most favorable to the grantee.") and *Farmer* ("[T]he language of such deed will be construed most strongly against the grantor.").

While Petitioners claim that the payment of taxes establishes that Hazel L. White intended to reserve the Minerals, the evidence shows inconsistent and duplicative tax assessments. Moreover, while Petitioners also claim that inclusion of the Minerals in Hazel L. White's appraisement of estate is further evidence of this intent, what a stranger to the White-McMillan Deed—Ruth Ann Mileto—decided to include in the appraisement is irrelevant.

When all relevant extrinsic evidence is examined, the result remains the same—the White-McMillan Deed Language is clearly "carryover" language from the previous deed, the Resseger-White Deed, and no intent was meant by it.

a. Inconsistent, contradictory, and double Marshall County tax assessments

Until the sale of the Property to the McMillans, the Whites were assessed taxes on the Property as "82 BOWMAN & 1/2 INT O&G ROY." Appx. Vol. 3 p. 236. After the White-McMillan Deed, the Whites were assessed on "1/2 INT 82 A BOWMAN O&G ROY." Appx.

Vol. 3 p. 288. While this tends to cut against the Tolands' arguments, the most logical understanding is that the assessor viewed the previous tax assessment as having a half oil and gas interest, saw the seemingly obvious oil and gas reservation in the White-McMillan Deed, and believed that Hazel L. White had reserved the Minerals. Of course, the assessor's office is not responsible for reviewing title and makes determinations based on cursory readings of the current transaction.

Perhaps most importantly, once the McMillans acquired the Property from Hazel L. White, their tax assessment did not indicate that they did not acquire the Minerals. Appx. Vol. 3 p. 247-260. The McMillans' tax assessment simply reads "81 A BOWMAN." *Id.* It does not state "LESS O&G" or "SURFACE." *Compare* Appx. Vol. 3 p. 240-241 and Appx. Vol. 3 p. 242. Thus, the McMillans could have reasonably believed that they acquired the Minerals from Hazel L. White. Indeed, they could have actually been paying taxes on the Minerals. Their tax assessment would not have indicated otherwise. Even more, the McMillans would have no reason to review whether Hazel L. White was receiving a tax assessment for the Minerals. Most importantly, there is no evidence that they knew that Hazel L. White received a tax assessment for the Minerals.

What is more, the Marshall County tax records reveal that various successors-in-interest to the McMillans have been assessed taxes on the Minerals. Indeed, beginning in 1994 until 2010, the then-owners of the Property were assessed and paid taxes for the Minerals. Appx. Vol. 3 p. 262-279. From 2012 until present the Tolands have been assessed taxes on the Minerals. Appx. Vol. 3 p. 280-287. Thus, it is indisputable that the Minerals have been subject duplicate tax assessments issued by the Marshall County Assessor.

The Whites also conveyed a 1-acre parcel of the original 83-acre Property to Consolidation Coal Company in 1975. Appx. Vol. 3 p. 237-239. The deed from the Whites to Consolidation

Coal Company contained the exact same Deed Language present in the White-McMillan Deed. *Compare* Appx. Vol. 3 p. 217 and Appx. Vol. 3 p. 237-238. However, the resulting tax assessments for this 1-acre parcel conveyed conflict. The Whites new tax assessment for the Property read "82 BOWMAN & ½ INT O&G ROY" instead of "83 BOWMAN & ½ INT O&G ROY." *Compare* Appx. Vol. 3 p. 236 and Appx. Vol. 3 p. 242. Thus, it would appear that 1 acre of the Minerals were conveyed to Consolidation Coal Company. However, Consolidation Coal Company's newly-created tax assessment for the 1-acre parcel read "1.00 A BOWMAN FRED WHITE SURFACE." Appx. Vol. 3 p. 240-241. By use of the word "SURFACE," Consolidation Coal Company's tax assessment clearly indicates that it did not include any mineral assessment. Again, it's important to note that the same exact Deed Language (both coal and oil and gas language) is used in the White-Consolidation Deed as in the White-McMillan Deed. *Compare* Appx. Vol. 3 p. 217 and Appx. Vol. 3 p. 237-238.

The successors of both parties to the White-McMillan Deed have been taxed on the Minerals at various times. As a result, the relevant tax records shed very little light on the intent of the parties to the White-McMillan Deed and instead show inconsistent practices of the Marshall County Assessor's office.

b. The Whites' history of executing oil and gas leases for unowned coal, oil, and gas minerals

It is undisputed that Hazel L. White executed three, separate oil and gas leases in regard to the Minerals in 1973, 1982, and 1986. Appx. Vol. 3 p. 331-337. While that may appear to be strong extrinsic evidence in favor of Petitioner, it also cannot be disputed that Hazel L. White had a documented and indisputable history and practice of executing oil and gas leases for minerals she did not own.

To wit, in 1968, the Whites acquired by deed a 30.61-acre parcel. Appx. Vol. 3 p. 338-341. The deed contained a coal, oil, and gas reservation. *Id.* Because of that reservation, it cannot be seriously disputed that the Whites never owned the oil and gas underlying the 30.61-acre parcel. *Id.* Notwithstanding that indisputable fact, the Whites executed an oil and gas lease in regard to the 30.61-acre parcel in 1973. Appx. Vol. 3 p. 344-346. Hazel L. White executed another oil and gas lease in regard to the 30.61-acre parcel in 1982. Appx. Vol. 4 p. 347-348. In 1984, Hazel L. White conveyed the 30.61-acre parcel to Harold A. White and Charlotte White by deed. Appx. Vol. 4 p. 349-353. At that time, she did not own ***any*** interest in the 30.61-acre parcel. *Id.* Nevertheless, she executed a subsequent oil and gas lease for the 30.61-acre parcel in 1986. Appx. Vol. 4 p. 354-355.

Similarly, in 1946, the Whites acquired by deed a 137.55-acre parcel. Appx. Vol. 4 p. 356-358. For the purposes of this appeal, it is assumed that the Whites did acquire the oil and gas minerals by that conveyance and executed an oil and gas lease in regard to the 137.55-acre parcel in 1973. Appx. Vol. 4 p. 362-364. However, by deed in 1977, Hazel L. White conveyed the 137.55-acre parcel to Freddie C. White and Violet L. White. Appx. Vol. 4 p. 365-367. Importantly, that conveyance did not include any reservation of the oil and gas minerals. *Id.* Notwithstanding the indisputable fact that Hazel L. White deeded all of her interest of any kind in the 137.55-acre parcel—including the oil and gas minerals—in 1977, she executed two, separate oil and gas leases for the 137.55-acre parcel in 1982 and 1986. Appx. Vol. 4 p. 368-371.

As a result, the fact that Hazel L. White executed oil and gas lease for the Minerals at issue is underwhelming. The Whites, and especially Hazel L. White, have a documented and undisputable history of executing oil and gas leases for minerals that they did not own. In some

cases, Hazel L. White executed oil and gas leases in regard to property that she had no interest in of any kind and had recently deeded away.

While Petitioners claim that this extrinsic evidence is irrelevant, "a court may consider the circumstances surrounding the parties when the deed was negotiated and delivered, and may consider their ***subsequent conduct***." *Gastar*, 239 W. Va. at 801, 806 S.E.2d at 457 (emphasis supplied). Here, the subsequent conduct of Fred White and Hazel L. White detailed above is clearly probative as to whether Hazel L. White intended to reserve the Minerals by the White-McMillan Deed. If the Whites had an indisputable and documented history of executing oil and gas leases for minerals they did not own, their execution of oil and gas lease for the Minerals has little, if any, weight on the issues at hand.

c. The Whites' use of carryover mineral reservation language in other deeds supports the Tolands' construction of the White-McMillan Deed

The argument that Hazel L. White intended to reserve the Minerals by use of the carryover Deed Language in the White-McMillan Deed is further refuted by her practice of using carryover language in other property transactions.

As detailed above, in 1968, the Whites acquired by deed a 30.61-acre parcel. Appx. Vol. 3 p. 338-341. Because that deed contained a reservation of the coal, oil, and gas, the Whites were never owners of those mineral interests underlying the 30.61-acre parcel. *Id.* When Hazel L. White conveyed the 30.61-acre parcel to Harold A. White and Charlotte White in 1984, the deed of conveyance contained the ***exact same*** coal, oil, and gas reservation language as the 1968 deed did. *Compare* Appx. Vol. 3 p. 340 and Appx. Vol. 4 p. 351. Because she never owned the coal, oil, and gas underlying the 30.61-acre parcel, it is undisputable that the carryover reservation language of the 1984 deed was a nullity without an intention to reserve any mineral interest. *Id.* Hazel L. White simply did not own any minerals to reserve. Appx. Vol. 3 p. 338-341.

As also detailed above, in 1946 the Whites acquired by deed a 137.55-acre parcel. Appx. Vol. 4 p. 356-358. Because the deed contained a coal reservation, the Whites were never owners of the coal underlying the 137.55-acre parcel. Appx. Vol. 4 p. 357. When Hazel L. White conveyed the 137.55-acre parcel to Freddie C. White and Violet L. White in 1977, the deed contained the exact same coal reservation language as the 1946 deed did. *Compare* Appx. Vol. 4 p. 357 and Appx. Vol. 4 p. 366. Because she never owned the coal, it is undisputable that the carryover coal reservation language of the 1977 deed was a nullity without an intention to reserve any mineral interest. *Id.* Hazel L. White simply did not own any coal to reserve. Appx. Vol. 4 p. 356-358.

Petitioners also claim that this extrinsic evidence is irrelevant. However, and again, "a court may consider the circumstances surrounding the parties when the deed was negotiated and delivered, and may consider their ***subsequent conduct***." *Gastar*, 239 W. Va. at 801, 806 S.E.2d at 457 (emphasis supplied). Here, the subsequent conduct of Fred White and Hazel L. White detailed above is clearly probative as to whether Hazel L. White intended to reserve the Minerals by the White-McMillan Deed. If the Whites had an indisputable and documented history of using carryover coal, oil, and gas reservation language in other deeds for minerals which they indisputably did not own, it clearly indicates that Hazel L. White did not intend to reserve the Minerals by the White-McMillan Deed.

d. Successors-in-interest to the McMillans used the carryover Deed Language without intention, and the Tolands execute an oil and gas lease

Petitioner and respondents cannot dispute that, essentially, the Deed Language has been used in each deed in the Property's chain of title subsequent to the White-McMillan Deed. Appx. Vol. 3 p. 219-235. The most logical conclusion that can be drawn from this fact is that subsequent

owners of the party have all treated the Deed Language as carryover, property-description language without any intent to reserve. Out of all of the owners of the Property from the Whites to the present day owners, the Tolands, it is only the Whites' heirs that claim the Deed Language was intended to reserve the Minerals. All other parties clearly believed the opposite, and their deeds reflect that.

Based upon the foregoing, the Tolands rightfully believed they obtained the Minerals since they purchased the Property in 2010. TriEnergy Holdings, L.L.C., an oil and gas production company, believed the same as well and entered into an oil and gas lease with the Tolands in 2010. Appx. Vol. 4 p. 372-375. The Tolands were paid $500.00 per acre for executing the oil and gas lease. *Id.* Even more, Chevron U.S.A., Inc. extended the oil and gas lease in 2015 and paid the Tolands $49,995.00 to do so. Appx. Vol. 4 p. 376-377. It was not until the Fall of 2014 that Petitioners and other below-respondents executed oil and gas leases, presumably as a precautionary measure by Chevron U.S.A., Inc. Appx. Vol. 4 p. 378-426.

Thus, when all extrinsic evidence is examined, the great weight supports the Tolands' construction of the White-McMillan Deed. Most importantly, to the extent that some extrinsic evidence may tend to support a different construction, that extrinsic evidence is insufficient to overcome the mandate that "[w]here there is ambiguity in a deed, or where it admits of two constructions, that one ***will be adopted*** which is most favorable to the grantee." Syl. Pt. 6, *Paxton*, *supra.*

V. CONCLUSION

The White-McMillan Deed is ambiguous, because the language "excepted and reserved" is continually used in a confusing and irreconcilable manner. The facts and circumstances relevant to the White-McMillan Deed are remarkably similar to those relevant to the 1977 deed in *Gastar*.

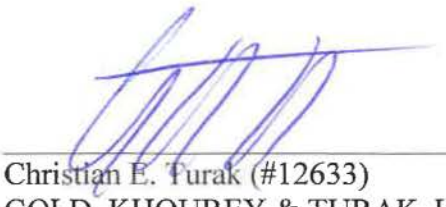
Just as this Court ruled the 1977 deed in *Gastar* to be ambiguous, so too should the White-McMillan Deed be ruled ambiguous.

Upon review of the Property's prior deed in the chain-of-title—the Resseger-White Deed—and the knowledge that the Whites never owned the coal underlying the Property, it becomes clear that the parties could not have intended for Hazel L. White to reserve the Minerals. That is because the Deed Language purports to have "excepted and reserved" the coal when it is undisputed that Hazel L. White never owned the coal. If it is now known that the coal portion of the Deed Language could not have any intent behind it, how can the oil and gas portion of the Deed Language have any intent? Hence, the only rational construction of the White-McMillan Deed is that the parties did not intend for Hazel L. White to reserve the Minerals. Petitioners offer no other rational construction of the White-McMillan Deed, because there simply is not one.

The other extrinsic evidence favors both Petitioners and the Tolands. However, what extrinsic evidence that tends to support Petitioners cannot be enough to insufficient to overcome *Paxton's* mandate that "[w]here there is ambiguity in a deed, or where it admits of two constructions, that one ***will be adopted*** which is most favorable to the grantee." Syl. Pt. 6, *Paxton*, *supra*.

For these reasons, the Tolands respectfully request that this Court affirm the circuit court's Order Denying Motions for Summary Judgment of Petitioner Polly Faye Griffin and Respondent Charlotte White and Granting Motion for Summary Judgment of Respondents William E. Toland and Amanda N. White-Toland.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0459 and 22-0470

POLLY FAYE GRIFFIN,

Petitioner,

v.

WILLIAM E. TOLAND and
AMANDA N. WHITE-TOLAND,

Respondents.

&

CHARLOTTE WHITE,

Petitioner,

v.

WILLIAM E. TOLAND and
AMANDA N. WHITE TOLAND,

Respondents.

CIVIL ACTION NO. 18-C-138
On Appeal from a final order of the
Circuit Court of Marshall County
Hon. David W. Hummel, Jr.

CERTIFICATE OF SERVICE

Service of the foregoing ***Respondents' Brief*** was made upon the following petitioners as indicated below by mailing a true and correct copy thereof by US Mail postage prepaid this 3rd day of November, 2022, to:

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