No. 23-ICA-154
(Consolidated with No. 23-ICA-155)
IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NORTHEAST NATURAL ENERGY LLC;
NNE PROPERTIES LLC; PACHIRA ENERGY, LLC;
AND PACHIRA ENERGY HOLDINGS, LLC

Defendants Below, Petitioners,

v.

LT REALTY UNLIMITED, LLC,

Plaintiff Below, Respondent.

REPLY BRIEF OF PETITIONERS NORTHEAST NATURAL ENERGY, LLC; NNE PROPERTIES LLC; PACHIRA ENERGY, LLC; AND PACHIRA ENERGY HOLDINGS, LLC

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I. ARGUMENT

A. Binding Case Law Ignored by Respondent Clearly Establishes that the Subject Oil and Gas Continued to be Assessed with the Surface Following Severance.

As explained in detail in Petitioners' original brief addressing Assignment of Error 1, the Supreme Court of Appeals of West Virginia held in Syllabus Point 2 of *United Fuel Gas Co. v. Hays Oil & Gas Co.*, 111 W. Va. 596, 163 S.E. 443 (1932) that "[w]here a grantor conveys the minerals in a tract of land, and the assessor fails to charge the interest so conveyed on the land book in the name of the grantee, for taxation, and the land remains charged in fee to the grantor at the full valuation, and he keeps the taxes paid thereon, there can be no forfeiture of the minerals for nonentry for five years in the name of the grantee." Thus, if the record in this case establishes that the assessed value of the Subject Oil and Gas and the overlying surface is the same before and after severance, the Subject Oil and Gas is considered to continue to be assessed with the surface and cannot be forfeited for non-entry per Syllabus Point 2 of *United Fuel*. Indeed, that is exactly what happened in this case, as is clear from the record.

As detailed in Petitioners' brief, the assessed value of the Subject Oil and Gas and the overlying surface estate in 1940, which is prior to severance, was $1,300.00 (J.A. 000939-000954; J.A. 001158); *see* Pet. Br. at 5-6. The assessed value of property in 1941, which is after the Subject Oil and Gas and the surface were severed, still equaled $1,300.00. (J.A. 000934; 001158-001159). Thus, under Syllabus Point 2 of *United Fuel*, the Subject Oil and Gas cannot be considered non-entered after its severance from the overlying surface because the assessed value of the land remained the same. Therefore, the Subject Oil and Gas could not have vested in the state for non-entry and been subsequently conveyed in the tax deeds at issue in this case, as Respondent contends.

Despite the critical, binding, and dispositive[1] nature of Syllabus 2 of *United Fuel* to this case - and Petitioners' great reliance on that case - it is not even mentioned or cited once in Respondent's brief. *See* Resp. Br. at Table of Authorities. It is ignored altogether. Rather than address *United Fuel*, Respondent tries to muddy the waters by identifying a litany of "inconsistencies" in the Land Books, the class type of the properties, and the columns in which the values of the assessment are placed - with the concluding statement that "[t]aken together, these inconsistencies call into question whether and to what extent the property described in the 1941 Land Book as '118 SUR O. G. Days Run' assessed in the names of George Tennant and the other co-owners included a value attributed to the oil and gas in that parcel." Resp. Br. at 17-18. In other words, to avoid the consequence of *United Fuel*, Respondent is trying to argue the Subject Oil and Gas was never assessed with the surface.

There are several critical points to note about this argument. First, Respondent acknowledges that the assessed value of the land in question prior to severance and after severance remained the same – Respondent maintains there is just a question as to whether the assessor ever assessed the Subject Oil and Gas with the overlying surface. This argument leads to the second critical point – throughout this litigation it has been undisputed that Subject Oil and Gas and the overlying surface were both being assessed together up to and including 1940. This fact is acknowledged throughout the record, foremost of which is the Circuit Court's Order. In its Findings of Fact, the Circuit Court states that "[t]he 1939 and 1940 Clay District Land Books continued to assess George Tennant as owning '3/8 118 acres SUR O &7 G DAYS RUN' and '3/8 136.192 acres SEW. C. DAYS RUN.' George's 2/8 interest in the oil and gas of the 119 acre tract

[1] It is critical to note this point of law in *United Fuel* is contained in a signed opinion and set forth in syllabus point, as "[s]igned opinions containing original syllabus points have the highest precedential value because the Court uses original syllabus points to announce new points of law or to change established patterns of practice by the Court." *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303, 306 (2014).

was assessed together with his 3/8 interest in the surface of the 119 acre tract. George's fractional interest in the coal of the 136 acres was assessed apart and separate." (J.A. 00008). The Circuit Court further found in the Conclusion of Law that "[t]he record before the Court establishes that the 2/8 undivided interest in 119 acres oil and gas was last assessed for property taxes in the name of George D. Tennant in the 1940 Clay District Land Book." (J.A. 000017).

The Circuit Court had a basis to make these particular findings, as the parties agreed throughout the litigation that the Subject Oil and Gas and the overlying surface were assessed together up to and including 1940. For example, Respondent in its own Response to Tennant Defendant's Motion for Summary Judgment, states: "the 1941[2] Clay District Land Book ***unambiquously*** assessed George D. Tennant and the other Tennant heirs as owning the surface of and oil and gas within the 118 acre Tennant farm." (J. A. 001218). Also, Respondent in its Motion for Partial Summary Judgment states that "***[t]he parties agree*** that the 1940 Clay District Land Book correctly assessed George D. Tennant as owning '2/8 118 SUR O&G Days Run,' that is, a 2/8 undivided interest in the surface of and oil and gas with the 118 acre home farm." (J.A. 000432). Indeed, during the hearing held before the Circuit Court on January 30, 2020, Respondent's counsel represented to the Circuit Court that "[w]e also know that in 1941/1942[3] George Tennant was correctly assessed by our assessor as owning that 2/8th interest in the oil and gas." (J.A. 000763).[4]

[2] Respondent incorrectly identifies 1941 rather than 1940 as being the last year George Tennant was assessed with the Subject Oil and Gas and the overlying surface.

[3] Again, Respondent's Counsel mistakenly referred to 1941 rather than 1940 as the last year George Tennant was assessed for the Subject Oil and Gas.

[4] Respondent's counsel also made other similar statements in other hearings before the Circuit Court, such as stating during the August 19, 2019, hearing that "I don't think that's in dispute. [George Tennant] was properly assessed. I believe the last year was either 1940 or 1941 as owning the surface and oil and gas in this 118 acres. It falls off the tax rolls." (J.A. 000306).

As the record clearly reflects, Respondent's statement that the Land Books containing "inconsistences [that] call into question whether and to what extent the property described in the 1941 Land Book as '118 SUR O. G. Days Run'. . .included a value attributable to the oil and gas in that parcel" is nothing more than a self-serving statement contradicted by the record and Respondent's own position throughout this litigation. It is also counter to law as a "tax on an undivided property includes 'all of its constituent parts.'" *Collingwood Appalachian Mins. III, LLC v. Erlewine*, 248 W. Va. 615, 889 S.E.2d 697, 703 (2023). Therefore, clearly an assessment of "118 SUR O.G. Days Run" would also include the referenced oil and gas in the value of the assessment.

Ultimately, Respondent's unsupported, self-serving statement is simply an attempt to avoid the consequences of Syllabus Point 2 of *United Fuel*, as Respondent cannot dispute that the amount of the assessment in question did not change after the Subject Oil and Gas was severed from the surface. Also, Respondent's reversal on this issue is not permissible on appeal. If Respondent maintains the Subject Oil and Gas and overlying surface were never assessed together, it should have raised that issue below. Not only did it not do so, but it is now taking the exact opposite position it took throughout this litigation, which is not permissible. *See Barney v. Auvil*, 195 W. Va. 733, 741, 466 S.E.2d 801, 809 (1995) ("Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered."); *W. Virginia Div. of Highways v. Powell*, 243 W. Va. 143, 842 S.E.2d 696, 699 n.5 (2020) (respondent could not argue for the first time on appeal that statutory continuing practice exception also applied to render his grievance timely).

Respondent's statement that there are so many inconsistencies in the Land Book it is uncertain as to what was covered by the assessment raises another critical issue. Namely,

Respondent has the burden of proof to establish the Subject Oil and Gas went non-entered and vested in the state. It is "conclusively presumed, in absence of anything to the contrary, that the minerals are still charged with the surface." *United Fuel*, 163 S.E. at 445 (1932). Thus, even if Respondent's statement that it cannot be determined whether the Subject Oil and Gas was assessed along with the surface is taken at face value, this cuts against Respondent, as it cannot satisfy its burden to overcome the presumption that the Subject Oil and Gas continued to be assessed with the surface. *Pearson v. Dodd*, 159 W. Va. 254, 261, 221 S.E.2d 171, 176 (1975) *overturned on other grounds, Lilly v. Duke*, 180 W. Va. 228, 376 S.E.2d 122 (1988) ("there exists a presumption against a forfeiture of title for non-entry. . .").

Finally, Respondent claims that "it strains credulity to believe that the assessor, despite explicitly assessing Chisler as owning only the surface, intended [sic] include in Chisler's assessment the value of the oil and gas in the subjacent 118 acres owned by George Tennant and the other Tennant heirs." Resp. Br. at 19. First, this is mere speculation on the part of Respondent, and he offers no support whatsoever for this statement. Regardless, this is the same scenario addressed by Syllabus Point 2 of *United Fuel*, as that holding applies to situations where "***the assessor fails to***" create separate assessments for a severed mineral and the overlying surface. *See* 163 S.E. at Syl. Pt. 2. This is not an uncommon occurrence, as demonstrated by numerous cases.[5]

[5] *See e.g.*, *Sult v. A. Hochstetter Oil Co.*, 63 W. Va. 317, 61 S.E. 307, 311 (1908) ("Forfeiture of the title to minerals in a tract of land for nonentry on the land books cannot be predicated on mere severance in title of the minerals from the surface and lapse of time, since presumptively the land was taxed as a whole when the severance occurred, and has since been carried on the land books in the same manner and the taxes paid"); *Kiser v. McLean*, 67 W. Va. 294, 67 S.E. 725, 725 (1910) ("On a claim of forfeiture for nonentry of oil and gas which have been severed in title from that of the land under which they lie, it will be presumed that the land was assessed and taxed as a whole at the time of the severance, that it has since been carried on the land books in the same manner, and that the taxes have been paid on the land as a whole, when the contrary does not appear"); Robert Tucker Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia*, 16 (1951) ("[W]here a grantor conveys the minerals in a tract of land and the assessor fails to charge it for taxation on the land books in the name of the grantee, and the land remains charged in fee to the grantor at the full valuation and keeps the taxes paid thereon, there can be no forfeiture for non-entry in the name of the grantee.")

For this reason, the Supreme Court of Appeals of West Virginia in *United Fuel* has held how this issue should be handled when it occurs – treat the severed minerals as continuing to be assessed with the surface when the assessed value does not change. The purpose of this holding is to prevent forfeiture for non-entry. This position is in keeping with the Supreme Court of Appeals of West Virginia's long held abhorrence of forfeiture and its attendant position that there is presumption against forfeiture except where "the law clearly warrants," which is not the case here. *See e.g.*, *Pearson*, 221 S.E.2d at 176 ("Forfeiture has been described as a harsh, even dreadful, remedy; courts generally disfavor it and never apply it except where the law clearly warrants. In fact, there exists a presumption against a forfeiture of title for non-entry until overthrown by the State.") (internal quotes and citations omitted).

Accordingly, notwithstanding the arguments raised in Respondent's Response brief, the Circuit Court's Order should be reversed with instructions to enter partial summary judgment in favor of Petitioners.

B. A Tax Deed Only Conveys the Specific or Exact Interest Proceeded Against, and If Respondent's Argument Were Accepted, It Would Create Absurd Results that Undermine the Supreme Court of Appeals of West Virginia's Most Recent Case on Tax Deeds.

1. Petitioners' Interpretation of West Virginia Code § 11-4-9 and § 11A-4-33 is Correct Because its Interpretation Reconciles the Two While Respondent's Cannot

West Virginia Code § 11-4-9, which provides in pertinent part that:

> In any tax sale by a sheriff, school commissioner or commissioner of forfeited lands, **only the tract, lot, estate, interest or undivided interest proceeded against in that particular instance shall pass to the purchaser**, so far as the State is concerned, so that any other estate, interest or undivided interest in the same tract not embraced in such sale shall not be affected by such sale, nor shall the title, or rights of the owners or claimants of such other estate, interest, or undivided interest in land be affected thereby.

W. Va. Code § 11-4-9 (emphasis added). The express language is clear – only the estate proceeded against can be encompassed by a subsequent tax deed. In this case, the estate proceeded against for delinquency was Sewickley coal. The tax deed from that proceeding only identifies Sewickley coal as being conveyed; therefore, the Subject Oil and Gas, to the extent it is assumed to have been non-entered, cannot also be conveyed in that Sewickley coal tax deed.

Respondent in its response brief never directly addresses this specific language of West Virginia Code § 11-4-9, other than in generalities that often misstate what the actual language actually states. *See e.g.*, Resp. Br. at 25. Instead, Respondent reiterates the code section upon which it relies, and then claims that Petitioners are not giving effect to this section and that the two sections cannot be reconciled if Petitioners' interpretation is adopted. This is untrue.

The following will clearly demonstrate how both can be reconciled under Petitioners' interpretation of West Virginia Code § 11-4-9. First, the "2/8 136.192 Sew C. Days Run" went delinquent for non-payment of taxes. The Sewickley coal is the specific and exact estate proceeded against for delinquency. Therefore, other different estates – like the Subject Oil and Gas – are not also conveyed in the tax deed issued for the delinquent Sewickley coal per § 11-4-9. Now, the amount of the interest identified as being delinquent and subsequently forfeited to the state is 2/8. However, Karl Tennant, in whose name this Sewickley coal interest went delinquent and subsequently vested in the state, actually possessed 3/8 interest in the Sewickley coal, not just 2/8. Now, under operation of West Virginia Code § 11A-4-33, which vests the tax deed purchaser with "all such right, title, and interest in and to the real estate as was, at the time of the execution and delivery of the deed, vested in or held by the state. . .," the tax deed purchaser acquired the *entire* 3/8 interest, not just the 2/8. And to further illustrate, if for example, Karl Tennant had also purchased the other 5/8 of the Sewickley coal at some other point in time, and it went non-entered,

that interest would also be conveyed if not separately assessed. This is how both statutes work in harmony.

Respondent, however, can provide no such example. Seemingly recognizing this fact, Respondent suggests that these two code provisions are just possibly contradictory, in which case the specific code section, which it claims is the code section upon which it relies, trumps the general code section, which is how it characterizes the section upon which Petitioners rely. In other words, Respondent argues West Virginia Code § 11A-4-33 implicitly repealed West Virginia Code § 11-4-9. *See* Resp. Br. at 24-25; *see Zigmond v. Civ. Serv. Comm'n*, 155 W. Va. 641, 641, 186 S.E.2d 696, 697 (1972) ("two statutes will operate together unless the conflict between them is so real and irreconcilable as to indicate a clear legislative purpose to repeal the former statute.").

This argument, however, cannot be accepted for at least two reasons. First, these two sections can be reconciled, as noted above, and the Supreme Court of Appeals of West Virginia abhors repeal by implication and will not accept this argument "unless the repugnancy between the new provisions and a former statute be plain and unavoidable." *Brown v. Civ. Serv. Comm'n*, 155 W. Va. 657, 660, 186 S.E.2d 840, 843 (1972). Second, Respondent's premise for this argument is wrong. Respondent argues West Virginia Code § 11A-4-33 is specific because it is in the Chapter of the code that authorizes the sale of interest in realty for forfeiture, while West Virginia Code § 11-4-9 is in the chapter of the code pertaining to assessments. However, the two chapters in which these two sections are located are intertwined and cannot be divorced – hence Chapter 11 and Chapter 11A. *What* is assessed and *how* it is assessed dictates *what interest* can be sold by any one particular tax deed. Moreover, Respondent's premise that West Virginia West Virginia Code § 11-4-9 is general as to tax sales is patently contradicted by the plain language of that section: "**In any tax sale** . . . only the tract, lot, estate, interest or undivided interest proceeded against in that

particular instance shall pass to the purchaser. . .” W. Va. Code 11-4-9. Therefore, it must be given force and effect. *See* W. Va. Code § 2-2-10(b)(12) (“Statutes are to be read as a whole, in context, and, if possible, the court is to give effect to every word of the statute.”).

Accordingly, this Court should accept Petitioners’ interpretation of West Virginia Code § 11-4-9 and how it harmonizes with West Virginia Code § 11A-4-33 and reject Respondent’s interpretation that focuses solely on West Virginia Code § 11A-4-33, without any consideration as to how it is to work in harmony with West Virginia § 11-4-9.

2. Black Band Supports Petitioners’ Interpretation of West Virginia Code § 11-4-9.

Petitioners’ initial brief relied on the Supreme Court of Appeals of West Virginia case *State v. Black Band Consol. Coal Co.*, 113 W. Va. 872, 169 S.E. 614, 615 (1933) for the proposition that under West Virginia’s tax deed statutory scheme, “the estate acquired by the state and sold by it” is limited “to the exact estate against which the taxes were assessed.” *State v. Black Band Consol. Coal Co.*, 113 W. Va. 872, 169 S.E. 614, 615 (1933) (emphasis added).

The discussion provided in *Black Band* supports the statutory analysis of West Virginia Code § 11-4-9 offered by Petitioners, which further demonstrates that Petitioners’ interpretation is correct. Respondent claims that Petitioners did not give *Black Band* a fair reading. Petitioners have quoted *Black Band* for the proposition that the Supreme Court of Appeals of West Virginia has stated that “title of that which comes from the state under a sale based on forfeiture must be considered in the light of the above statutory provisions which limit such title to that against which the assessment was made and the taxes laid,” and that “title which a purchaser acquires from the state under a forfeiture sale is not an unqualified fee simple carrying everything from the surface to the center of the earth, it is merely a new title for the estate which was vested in the former owner for whose tax delinquency the property was proceeded against by the state.” *Id.* at 616.

Respondent argues Petitioners omitted the qualifying sentence that follows, namely: "[t]hese postulates are, of course, based on the assumption that the State had no other title than that which it acquired under the forfeiture. All the State's title, whatever it may be, passed to its grantee." Resp. Br. at 28 (quoting *Black Band*, 169 S.E. at 616). This statement does not mean that a tax deed for one specific estate proceeded against for delinquency, like Sewickley coal, will also convey a separate estate, like oil and gas. Instead, this statement is referring back to the one exception noted earlier in the case that the general rule that a tax deed only conveys the estate proceeded against that is discussed early in the case – and that is when the estate proceeded against is the surface and the underlying minerals are not assessed apart from the surface.[6] Specifically, the *Black Band* Court notes in the section preceding the quote identified by Respondent that "[o]f course, even though there has been a severance of the mineral or timber from the surface, if it affirmatively appears that such mineral or timber, separately owned, has not been separately assessed, but that the entire estate has been assessed to the surface owner, delinquency and forfeiture of the estate charged to the surface owner carries with it the mineral and timber." *Id*. at 615.[7]

This is the "assumption" being referenced in the quote pointed to in Respondent's brief – not that there are other separate mineral estates forfeited to the state that will be conveyed in a tax deed for a wholly separate mineral estate. Therefore, Petitioners did in fact give *Black Band* a fair reading and it supports Petitioners' interpretation of West Virginia Code § 11-4-9, namely a tax deed for Sewickley coal does not also pass title to a wholly separate oil and gas estate.

[6] This exception is discussed in Petitioners' brief. Pet. Br. at 22, n. 15.

[7] Indeed, it is worth noting that this situation that supports the basis of Petitioners' argument in conjunction with Assignment of Error 1.

3. Respondent's Interpretation of West Virginia Code § 11A-4-33 is Contradicted by the Results of a Recent Supreme Court of Appeals of West Virginia's Tax Deed Case.

The sole basis for Respondent's argument that the tax deeds at issue conveyed the Subject Oil and Gas is by operation of law; namely, through West Virginia Code § 11A-4-33, not what the assessor or state actually intended to convey in a tax deed. Therefore, it is important that this Court consider the implications of the parties' respective positions on the interpretation of West Virginia Code § 11-4-9 and West Virginia Code § 11A-4-33 in light of the Supreme Court of Appeals of West Virginia's most recent decision on tax deeds, *Collingwood Appalachian Mins. III, LLC v. Erlewine*, 248 W. Va. 615, 889 S.E.2d 697 (2023). As *Erlewine* was not issued until June 2023, the Circuit Court did not have the benefit of reviewing the decision for guidance in issuing its Order.

Specifically, in *Erlewine*, the same person owned both a 136 acre surface tract and the underlying oil and gas under the same acreage. These two separate and distinct estates were both placed on the land books. *Id.* at 701. In 1991, both went delinquent for non-payment of taxes. *Id.* There was a tax deed issued to the plaintiff in *Erlewine* for the 136 acre surface tract, then there was a separate tax deed issued to a separate buyer for the underlying oil and gas estate. *Id.* Both claimed an interest to the oil and gas underlying the 136 acre surface tract. The purchaser of the 136 acre surface estate argued the first tax deed conveyed everything, whereas the purchaser of the oil and gas tax deed argued that both tax deeds were operative and that the first tax deed only conveyed the surface estate. *Id.* at 702. The Supreme Court of Appeals of West Virginia held that both taxes deeds were valid, even though both interests sold in those tax deeds were located within the same 136 acre tract and owned by the same person who held the right to redeem, and despite the fact that those interests had never been severed.

Respondent argues that when any type of estate (be it surface, coal, oil and gas, or limestone) is forfeited to the state for non-entry, a tax deed for one estate will also carry any other estate vested in the state that happens to also be within the same acreage. *See* Resp. Br. at 19-23. Respondent's basis for this argument is West Virginia Code § 11A-4-33, which provides in pertinent part that a tax deed purchaser obtains "all such right, title, and interest in and to the real estate as was, at the time of the execution and delivery of the deed, vested in or held by the state ***or*** by any person who was entitled to redeem. . ." Importantly, the state and the person entitled to the right to redeem are the legal equivalent under West Virginia § 11A-4-33. In *Erlewine*, the person with the right to redeem the 136 acre surface and the underlying oil and gas was the same person and both separate, distinct estates were delinquent. Thus, if Respondent's argument were accepted, the first tax deed purchaser would have acquired ***all*** estates within the 136 acres as it would have acquired all of the interests of the person with the right to redeem in any estate within the 136 acres – being both the surface and the oil and gas. No effect could have been given to the second tax deed as there would have been nothing left to convey after the first tax deed was issued.

However, that is not the result the Supreme Court of Appeals of West Virginia reached in in *Erlewine*. Rather, the *Erlewine* Court gave effect to both tax deeds. The *Erlewine* Court reached this result without discussing West Virginia Code § 11-4-9. Nevertheless, under Petitioners' interpretation of West Virginia Code § 11-4-9, both deeds would have been operative, which is consistent with *Erlewine's* holding. There were two separate, distinct estates, and each were "proceeded against" separately. The same is not true if Respondent's argument is accepted, as only the first tax deed could be operative since it would have acquired all of the different estates for which the same owner had the right to redeem under that specific 136 acres. Thus, to accept Respondent's argument would undermine the result of *Erlewine*, whereas adoption of Petitioners'

argument would not. Therefore, this Court should reject Respondent's argument and reverse the Circuit Court Order, which did not have the benefit of considering *Erlewine*, prior to its issuance, and remand with instruction to enter judgment in favor of Petitioners with respect to Respondent's declaratory judgment cause of action.

C. Public Policy is An Overriding Concern For Property Law to Which Petitioners' Arguments Conform, and This is Not Necessarily an Isolated Issue as Respondent Contends that Will Decrease Overtime, as Respondent Argues.

Petitioners' public policy arguments are not offered to override express statutory language, as Respondent suggests in its response brief. Resp. Br. at 28-29. Rather, these public policy considerations further support the correctness of Petitioners' tax deed arguments. Specifically, the Supreme Court of Appeals of West Virginia has stated that "confidence in one's title to land is of paramount importance. As we have remarked previously, certainty above else is the preeminent compelling public policy to be served." *Mingo Cnty. Redevelopment Auth. V. Green*, 207 W. Va. 486, 491, 534 S.E.2d 40, 45 (2000). Indeed, Petitioners' position is correct and simultaneously advances this public policy concern because Petitioners' argument is predicated upon a comprehensive consideration of legal authority that speaks to the issues raised in this case. Respondent, on the other hand, advances his legal position by focusing on one, isolated section of the West Virginia Code, and then giving it an unreasonable interpretation.

Respondent's position, if accepted, would undermine the goal of West Virginia property law to "avoid bringing upon the people interminable confusion of land title," and the "endeavor to prevent and eradicate uncertainty of such title." *Faith United Methodist Church & Cemetery of Terra Alta v. Morgan*, 231 W. Va. 423, 745 S.E.2d 461, 469 (2013). Respondent's counsel conceded during a hearing below that applying his interpretation of the West Virginia Code § 11A-4-33, would "require[] some title work to figure out what those folks owned. That's what the statute

requires." (J.A. 000770). However, as the arguments advanced above demonstrate, that is not what is required.

Respondent tries to downplay the consequences of accepting his position. Respondent claims "the universe of situations like the one presented in this case is presumably small and continues to decrease with the passage of time." Resp. Br. at 30. First, Respondent has no basis to argue the universe of these issues are small. As is evident by the cases cited by the parties in this action, there are numerous issues with how assessors were assessing properties throughout West Virginia since its inception. Second, this problem will not decrease over time. Any title in this state where an issue such as this, or similar to this, is present today will remain so in perpetuity. The change in the current statutory scheme does not address issues created under the prior statutory scheme, which is still applicable to all tax deeds issued prior to 1994 amendments. Make no mistake, the issues presented in this case will arise again – indeed, it just did in another variation in *Erlewine*.

Finally, if Respondent's position is accepted, the Supreme Court of Appeals of West Virginia's most recent decision on tax deeds from June 2023 would be undermined and called into question. While the *Erlewine* Court focuses on other portions of the former tax deed statutory scheme, the result would undisputedly be called into question by a subsequent opinion that undermines that case's result. This in turn would create further uncertainty for practitioners as to what case law to follow until this Court inevitably is called upon again to determine how to address the issue. This can be avoided altogether if Petitioners' position is accepted, as there would be certainty and uniformity with *Erlewine*.

D. A Special Warranty Deed Does Not Require Exception and Reservation When The Type of Estate Being Conveyed is Expressly Stated.

Before addressing the merits of Petitioners' argument in support of its Assignment of Error 4, two misstatements of the record contained in Respondent's response brief must first be addressed. First, in Respondent's response brief, it claims that Petitioners do not dispute the Circuit Court's finding that the Subject Oil and Gas was conveyed in the second tax deed to Elemental Resources. Resp. Br. at 30. This is false. Petitioners' argument that the Subject Oil and Gas was never non-entered and thus never subject to sale for non-entry, as well as its argument that a tax deed can only convey the exact estate proceeded against per West Virginia 11-4-9, were argued in its initial brief. *See* Pet. Br. at 22 ("The 1992 and 2010 tax deed both make clear that the estate proceeded against in those tax sales was only the estate described as '2/8 136.192 SEW.C. DAYS Run'"); Pet. Br. at 25 ("When these statutes are read in harmony and applied to the facts of this case, the 1992 and 2010 tax deeds conveyed the Subject Sewickley Coal, as that was the only estate against which taxes were assessed and which were proceeded against"); Pet. Br. at 19 (". . . because the assessment value did not change following severance, which, under West Virginia case law, cannot result in forfeiture. Therefore, the Subject Oil and Gas ***could not be subject to any sale for non-entry***'') (emphasis added).

Regarding the second misstatement, Respondent claims that Petitioners are raising the standing argument for the first time on appeal. Resp. Br. at 30. It should be self-evident that this statement is false given that Respondent then goes on to discuss how the Circuit Court addressed Petitioners' standing argument below. Nevertheless, Petitioners raised the standing argument in support of their motions for summary judgment, as is clear from the record. (J.A. 000885-000891). Indeed, it is the first argument of that motion and is under heading "A," which states "Plaintiff Must First Establish Standing to Raise Legal Issue Contained in its Declaratory Judgment Action Concerning Effect of the Disputed Tax Deeds." (J.A. 000885). Even so, standing is a jurisdictional

issue and "cases have made clear that jurisdictional matters may be raised for the first time on appeal." *Hoover v. W. Virginia Bd. of Med.*, 216 W. Va. 23, 27, 602 S.E.2d 466, 470 (2004) (internal quotes and emphasis omitted); *W. Virginia Reg'l Jail & Corr. Facility Auth. v. Est. of Grove*, 244 W. Va. 273, 277, 852 S.E.2d 773, 777 (2020) (noting "standing are jurisdictional issues").

Now, with respect to the merits of the standing argument, Respondent claims that it is circular logic for Petitioners to argue that Respondent cannot raise issues about whether the tax deeds in this case conveyed the Subject Oil and Gas if Respondent was only conveyed Sewickley Coal in the special warranty deed. This statement makes no sense because if the deed from which Respondent claims it obtained the Subject Oil and Gas in fact only conveyed Sewickley coal, it would have no claim of ownership to the Subject Oil and Gas regardless of how the issues pertaining to the tax deed are decided. Therefore, Respondent would not have standing to maintain this suit and seek an adjudication on the legal issues raised concerning the Subject Oil and Gas in those tax deeds. Otherwise, an adjudication of the issue of whether the Subject Oil and Gas was conveyed in tax deed would be an academic exercise, which is not permissible.[8] *See Kanawha Cty. Pub. Library Bd. V. Bd. Of Educ. Of Cty. Of Kanawha*, 213 W. Va. 386, 403, 745 S.E.2d 424, 441 n. 2 (2013) ("[c]ourts are not constituted for the purpose of making advisory decrees or resolving academic disputes").

Tellingly, Respondent simply ignores the case law Petitioners rely upon to establish that Respondent lacks standing. Instead of addressing Petitioners' arguments, Respondent merely block quotes the Circuit Court's Order on this issue and argues that the "unambiguous language"

[8] Just for the sake of clarity, it should be noted that neither Petitioners nor the Tennant Petitioners, from the other consolidated appeal, asserted counterclaims for declaratory judgment. Thus, if Respondent cannot maintain his declaratory judgment claim for lack of standing there is no other declaratory judgment action to adjudicate.

of the special warranty deed is "to convey all its interests in the realty Elemental acquired via the [tax deed to Elemental Resources]." Resp. Br. at 32. That is not true. The actual language used in the special warranty deed is that Elemental conveyed Respondent "all of the right, title, and interest. . .in and to that certain parcel of land located in Monongalia County, West Virginia, **more particularly described as follows**;" (J.A. 001013-001014) (emphasis added). The property that is more particularly described is "2/8 136.192 Sew C Days Run, and being parcel 0400-0731-000 as shown on tax map 9999." *Id.*

As detailed in Petitioners' brief, the Supreme Court of Appeals of West Virginia has held that "a grant or reservation of ***specifically named*** minerals conveys and reserves rights ***only in*** those minerals." *W. Virginia Dep't Highways v. Farmer*, 159 W. Va. 823, 826, 226 S.E.2d 717, 720 (1976). Here, the special warranty deed to Respondent identifies a specifically named mineral – Sewickley coal. Therefore, only that specifically named mineral was conveyed in Respondent's special warranty deed – nothing else. Despite the obvious application and dispositive nature of this case to the facts raised in this matter, Respondent completely ignores it.

Moreover, in *Faith United Methodist Church & Cemetery of Terra Alta v. Morgan*, 231 W. Va. 423, 745 S.E.2d 461 (2013), the Supreme Court of Appeals of West Virginia held a deed that specified a surface estate as being conveyed **did not** also convey oil and gas regardless of the fact that there was no exception and reservation of the same, explaining "[w]ithout a construction in this manner, the insertion of the word surface becomes meaningless and only the reservation is of any import. When a grantor conveys the surface, he means just that – a conveyance of the surface, and to hold otherwise controverts the clear intention of the parties." *Id*. at 482. Here, Sewickley coal is the specific estate identified as being conveyed in the special warranty deed to Respondent, nothing else. To argue this special warranty deed conveyed other unnamed minerals

would render the use of the term Sewickley coal and its tax map and parcel number meaningless. Again, despite the obvious application of this case to the matter at hand, and its dispositive effect – it too is simply ignored by Respondent.

Another critical fact is that the description of the land being conveyed in the special warranty deed is also identified by the tax map and parcel number assigned to it for tax purposes. The tax ticket for that assessment only identifies Sewickley coal. (J.A. 001016). It is important to keep in mind that, under Respondent's own theory, at the time it received the special warranty deed referencing this tax map and parcel number, the Subject Oil and Gas was not entered for tax purposes. Therefore, the Subject Oil and Gas could not have been encompassed by this tax map and parcel number used to describe the property conveyed in the special warranty deed. Again, Respondent simply ignores this inconvenient fact.

Put simply, what specific property interest is described in the special warranty deed is the only interest conveyed. This is a fundamental, basic principles of property law. For example, if the specialty warranty deed at issue had described only a general location of 136.192 acres without any reference to a specific type of estate, and the grantor had not made any exceptions or reservations from that conveyance, then Respondent's argument that Elemental Resources had conveyed to it everything it owned within that generally described acreage would be more compelling. But that is not what happened here. The grantor specifically described a specific mineral estate as being conveyed within the stated acreage - Sewickley coal - and it further defined the specific mineral estate by a tax map and parcel number referencing only Sewickley coal. Therefore, Sewickley coal can be the only property interest conveyed in the special warranty deed to Respondent, regardless of the fact that there was no exception and reservation.

Accordingly, since the deed from which Respondent claims it acquired the Subject Oil and Gas in fact only conveyed Sewickley coal, it has no standing to raise the legal issues concerning whether the tax deeds conveyed the Subject Oil and Gas, as it still would not own the Subject Oil and Gas regardless of how those issue were decided. Thus, the Court should reverse the Circuit Court's Order and remand with direction to grant Petitioners' partial motions for summary judgment and dismiss Respondent's declaratory judgment action.

II. CONCLUSION

Based on the forgoing, this Court should reverse the Circuit Court's Order granting partial summary judgment in favor of Respondent and finding it the owner of the Subject Oil and Gas and its denial of Petitioners' motions for partial summary judgment which sought the dismissal of Respondent's declaratory judgment action. The case should be remanded to the Circuit Court with the instruction to enter judgment in favor of Petitioners' motions for partial summary judgment and deny Respondent's motion for partial summary judgment with respect to its declaratory judgment action.

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No. 23-ICA-154
(Consolidated with No. 23-ICA-155)
IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NORTHEAST NATURAL ENERGY LLC;
NNE PROPERTIES LLC; PACHIRA ENERGY, LLC;
AND PACHIRA ENERGY HOLDINGS, LLC

Defendants Below, Petitioners,

v.

LT REALTY UNLIMITED, LLC,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, Seth P. Hayes, do certify that on this 20th day of September 2023, I served the foregoing **REPLY BRIEF OF PETITIONERS NORTHEAST NATURAL ENERGY, LLC; NNE PROPERTIES LLC; PACHIRA ENERGY, LLC; AND PACHIRA ENERGY HOLDINGS, LLC** via File & Serve on the following:

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