No. 23-ICA-155
(Consolidated with No. 23-ICA-154)

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DAVID TENNANT, by and through
DEBORAH TENNANT, his guardian and conservator,
and YURI DMITRI POPOV,

Defendants Below, Petitioners,

v.

LT REALTY UNLIMITED, LLC,

Plaintiff Below, Respondent.

BRIEF OF PETITIONERS DAVID TENNANT, BY AND THROUGH DEBORAH TENNANT, HIS GUARDIAN AND CONSERVATOR, AND YURI DMITRI POPOV

James A. Walls (WVSB#5175)
Matthew P. Heiskell (WVSB#10389)
Spilman Thomas & Battle, PLLC
48 Donley Street, Suite 800
Morgantown, WV 26501
304.291.7920
jwalls@spilmanlaw.com
mheiskell@spilmanlaw.com

Counsel for Petitioners David Tennant, by and through
Deborah Tennant, his guardian and conservator, and Yuri Dmitri Popov

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred when it failed to find that the disputed oil and gas was and has been presumptively assessed along with the surface estate. Because the disputed oil and gas was presumptively assessed with the surface estate, the oil and gas never went non-entered and thus was never forfeited to the State for non-entry. Accordingly, the disputed oil and gas was never subject to a tax sale and was not subsequently conveyed in a tax deed.

2. The Circuit Court erred when it found that the subject oil and gas was conveyed in a tax deed when the only specific estate proceeded against for delinquency and identified in the tax deed was Sewickley Coal; the Circuit Court's ruling contravenes West Virginia Code section 11-4-9 and West Virginia case law addressing the same.

3. The Circuit Court's ruling ignores long established West Virginia property law precedent, violating critical public policy considerations of certainty in land titles.

II. STATEMENT OF CASE

This suit[1] concerns the ownership of an undivided 2/8th (or 1/4th) interest in an oil and gas estate underlying a 119-acre tract[2] of land located in Clay District, Monongalia County, West Virginia, and described in a deed dated May 18, 1940 ("Subject Oil and Gas"). (J.A. 000366-000370). The three assignments of error arise from how the Subject Oil and Gas and its 119-acre surface estate were assessed in relation to a 136-acre Sewickley coal estate, which underlies the 119-acre surface estate and an adjacent 17-acre tract, and a subsequent tax deed conveying the 136-acre Sewickley coal estate.

A. Acquisition of Subject Oil and Gas by Tennant Petitioner's Grandfather, George Tennant.

[1] Petitioners' arguments, and brief, are substantially similar to Northeast and Pachira's in the consolidated case, No. 23-ICA-154.

[2] The tract of land overlying the Subject Oil and Gas is sometimes referenced in the documents of record as containing 118 acres. Consequently, the Subject Oil and Gas in dispute is sometimes referred to as containing 118 acres.

In 1871, the Subject Oil and Gas was acquired by Marion Tennant, who was the great-grandfather of Petitioners David Tennant and Yuri Popov[3] ("Tennant Petitioners"). (J.A. 000912-000913). Marion Tennant died on May 7, 1912, and in his will, he devised all his property, including the Subject Oil and Gas, to Martha Tennant, his wife and the great-grandmother of Tennant Petitioners (J.A. 000915-000916). Martha Tennant died intestate on December 22, 1925, survived by her and Marion Tenants' eight (8) children: George D. Tennant – which is the Tennant Petitioners' grandfather; Annie J. Tennant Pyles; Sarah M. Tennant Haight; Emrod P. Tennant; Emma R. Tennant Hunnell; Lourvernia B. Tennant Shanes; Lillie Tennant Sine; and John Julius Tennant. (J.A. 000918-000921).

Consequently, each of Marion and Martha Tennant's eight children inherited a 1/8th interest in the 119-acre surface estate overlying the Subject Oil and Gas, as well as a 1/8 interest in the underlying oil and gas estate, of which the Subject Oil and Gas is a part. In addition, each child of Marion and Martha Tennant inherited a 1/8th interest in a 136-acre Sewickley coal estate – 119 acres of which underlies the same 119-acre surface estate as the Subject Oil and Gas, with the remaining portion of the Sewickley coal underlying an adjoining 17-acre tract.

In 1925, following the death of Martha Tennant, Emrod Tennant conveyed George Tennant – the Tennant Petitioners' grandfather - several interests, including 1/8th of the surface overlying the Subject Oil and Gas, as well as his 1/8th interest in the 136-acre Sewickley coal estate. (J.A. 000923-000924). Following this conveyance, George Tennant possessed 2/8th in the overlying surface estate, 2/8th of the Sewickley coal estate, and the 1/8th interest in the Subject Oil and Gas which he had inherited from his mother.

[3] Yuri Popov was previously named Doug Tennant.

In 1928, John Tennant conveyed to George Tennant several interests, including his 1/8th interest in the Subject Oil and Gas, his 1/8th interest in the overlying 119-acre surface estate, and his 1/8th interest in the 136-acre Sewickley coal estate. (J.A. 000926-000928). Following this conveyance, George Tennant possessed a 2/8th interest in the oil and gas underlying the 119-acre surface tract – being the entire interest comprising the Subject Oil and Gas, 2/8th interest in the overlying 119-acre surface estate, and a 3/8th interest in the 136-acre Sewickley coal estate ("Subject Sewickley Coal").

In 1938, George Tennant died. (J.A. 000744). From 1938 until 1941, the Subject Oil and Gas and the overlying 119-acre surface tract were assessed in George Tennant's name as a single assessment, described as follows: "3/8 118 Sur. O&G Days Run."[4] (J.A. 000930-000932). Importantly, the Circuit Court found that at no time prior to 1940 was the Subject Oil and Gas and the overlying surface tract ever separately assessed. *See* (J.A. 000004-000007). Also, from 1938 through 1940, there was a separate assessment in the name of George Tennant for the Subject Sewickley Coal, described as follows: "3/8 136.192 Sew. C." (J.A. 000930-000932).

B. Partition of 119-acre Surface Tract Following Death of George Tennant and Subsequent Assessment.

In 1940, as part of a partition action among various owners of the Subject Oil and Gas's 119-acre surface estate, the entire interest in the 119-acre surface estate was conveyed to Velma Jewel Chisler, with the Subject Oil and Gas and the Subject Sewickley Coal being excepted and reserved. (J.A. 000906-000910). Subsequently, in 1941 there was one assessment in the name of Velma Jewel Chisler for "119.171 SUR DAYS RUN," and another assessment in the name of

[4] The Subject Oil and Gas and overlying 119-acre (a/k/a 118-acre) surface estate assessment from the 1938 land book is the first assessment listed on the first page of the referenced document. The page has been torn and the entry is difficult to read, but when compared to the subsequent 1939 and 1940 assessment it can be discerned that the entry reads "2/8 118 Sur O&G Days Run." (J.A. 000930).

George Tennant for "3/8 136.192 Sew. C." (J.A. 000934; 000936). There is no separate assessment for the Subject Oil and Gas placed on the land books in 1941 or any subsequent tax year up to and including 2015.

Even though the Subject Oil and Gas was not placed as its own, separate assessment in the land books, the evidence establishes that it continued to be assessed with the surface after severance in title. Specifically, the 1941 Land Book entry for "119.171 SUR DAYS RUN" in the name of Velma Jewel Chisler states that the assessed "Land Value" was $1,300, and the assessed "Building Value" was $500, for a "Total Assessed Value" of $1,800. (J.A. 000934). There is a handwritten note that accompanies this land book entry, which states that this assessed value is based on the total comprised value of the following individuals' assessments from 1940: George D. Tennant; Cora O. Berry; Zola Greyson; Emma R. Hunnell; Anna J. Pyles; Louvernia B. Shanes; Lillie C. Sine; and David A Tennant. (J.A. 000934).

There is also a notation in the 1941 land book denoting which assessments of the prior owners were transferred to Velma Jewel Chisler and which account for the assessed "Land Value" of the property described in 1941 as "119.171 SUR DAYS RUN." Each of these handwritten notations state: "To Velma Jewel Chisler."[5] (J.A. 000939-000954). The following is a table of the 1940 assessments which were notated in the 1941 Land Book as being transferred to Velma Jewel Chisler in 1941:

Name	**Description**	**Land Value**	**Building Value**	**Total Assessed Value**
George Tennant	3/8 118 SUR O & G DAYS RUN	$525	$225	$750
David Tennant	1/32 118 SUR O&G DAYS RUN	$25	$0	$25

[5] Given the writing is in pencil, and given the lapse of time, some of the handwritten entries are difficult to read on photocopies of these land book entries. Nevertheless, Tennant Petitioners' expert, Robert Shuman, who examined the title records in this case, attests to the statements contained in these entries. (J.A. 001158).

Cora Berry	1/32 118 SUR DAYS RUN	$25	$25	$50
Zola Greynolds	1/32 118 SUR DAYS RUN	$25	$0	$25
Emma R. Hunnell	1/8 118 SUR O&G DAYS RUN	$175	$75	$250
Anna J. Pyles	1/8 118 SUR DAYS RUN	$175	$75	$250
Lourvernia B. Shanes	1/8 118 SUR O & G DAYS RUN	$175	$75	$250
Lillie Sine	1/8 SUR O & G DAYS RUN	$175	$75	$250
TOTAL:		**$1,300**	$550	$1,850

(J.A. 000939-000954; J.A. 001158).

As this table demonstrates, the total "Land Value" of the 1940 assessments that were transferred to Velma Jewell Chisler in 1941 equaled $1,300. Critically, the "Land Value" of the 1941 assessment for "119.171 SUR DAYS RUN" in the name of Velma Jewel Chisler also equaled $1,300. (J.A. 0000934; 001158-001159). Therefore, all real property interests encompassed in the individual assessments from 1940, which included the Subject Oil and Gas previously assessed in the name of George Tennant, were transferred to Velma Jewel Chisler in 1941 in an assessment described as "119.171 SUR DAYS RUN." The fact that the value of those real property interests did not change between 1940 and 1941 establishes that the Subject Oil and Gas continued to be assessed in the "119.171 SUR DAYS RUN" assessment in 1941.

C. Petitioners' Acquisition of the Subject Oil and Gas Estate

In 1942, as part of the administration of George Tennant's estate, the Subject Oil and Gas and the Subject Sewickley Coal, formerly possessed by George Tennant, were conveyed to Hazel Tennant - George Tennant's widow and the Tennant Defendants' grandmother. (J.A. 000956-000967). In 1943, the Subject Sewickley Coal assessment was transferred from the name of

George Tennant to Hazel Tennant and is described as being "2/8 136.192 SEW. C. DAYS RUN."[6] (J.A. 000969). The parties do not dispute that there is no separate assessment of the Subject Oil and Gas in 1943 or any subsequent year up to and including 2015. Petitioners maintain, however, that the Subject Oil and Gas throughout this time was encompassed in the assessment in the name of Velma Jewel Chisler, described as "119.171 SUR DAYS RUN."

In 1974, Hazel Tennant conveyed the Subject Oil and Gas to Karl Tennant and Carolyn Tennant, the father and mother of the Tennant Petitioners. (J.A. 000971-000980). In 1987, Karl and Carol Tennant divorced, and Karl Tennant was awarded all realty he and Carolyn Tennant owned in Clay District, Monongalia County, West Virginia, which included the Subject Oil and Gas and the Subject Sewickley Coal. (J.A. 000745). In 2005, Karl Tennant died intestate. He was survived by his second wife, Wilma J. Tennant, and his three surviving children, Trey Brock Allan Tennant and the Tennant Petitioners. (J.A. 000982-000983).

In 2013, the Tennant Petitioners leased the interest in the Subject Oil and Gas they inherited from their father, Karl Tennant, to Petitioners Northeast Natural Energy and Pachira Energy[7]. (J.A. 000985-000987). In May 2015, Wilma J. Tennant conveyed the interest in the Subject Oil and Gas she inherited from Karl Tennant to Petitioners Northeast Natural Energy and Pachira Energy. (J.A. 000989-000992). Also, in May 2015, Trey Brock Allan Tennant conveyed the interest in the Subject Oil and Gas he inherited from his father, Karl Tennant, to Petitioners Northeast Natural Energy and Pachira Energy. (J.A. 000994-000997). Subsequently, in June 2015, Petitioners Northeast Energy and Pachira Energy conveyed a royalty interest in certain oil and gas formations,

[6] The assessment incorrectly refers to the fractional interest of the Subject Sewickley Coal as being "2/8" rather than 3/8 interest, which was the actual fractional interest conveyed to Hazel Tennant as part of the administration of George Tennant's estate. The assessment is carried forward with this incorrect fractional interest up to and including the 2015 tax year.

[7] Petitioners in the consolidated action, No. 23-ICA-154.

including the Subject Oil and Gas, to Petitioners NNE Properties and Pachira Energy Holdings. (J.A. 000999-001002).

D. Sewickley Coal Tax Deeds and Respondent's Special Warranty Deed for Sewickley Coal.

In 1992, a tax deed for the interest in realty identified as "2/8 136.192 Sew C. Days Run," assessed in the name of Karl or Carolyn Tennant—successors in interest to the Subject Sewickley Coal—was issued to Shuman, Inc. for non-payment of taxes. (J.A. 001004). In its Order, the Circuit Court found the Subject Oil and Gas was also conveyed to Shuman, Inc. in this tax deed because the Subject Oil and Gas was never separately assessed following its severance from the surface. The Circuit Court did not address the fact that the Land Value assessments for the surface estate remained constant following the severance of the Subject Oil and Gas. (J.A. 000020-000023).

In 2010, another tax deed for the realty identified as "2/8 136.192 Sew C Days Run, Clay District" assessed in the name of Shuman, Inc., was issued to Elemental Resources LLC ("Elemental Resources") for delinquent taxes. (J.A. 001006-001007). The Circuit Court concluded the Subject Oil and Gas was also conveyed in this Sewickley coal tax deed because Shuman, Inc. never had the Subject Oil and Gas separately assessed apart from the surface estate following the acquisition of the 1992 Sewickley coal tax deed. (J.A. 000023-000024). Following Elemental Resources' acquisition of the 2010 Sewickley coal tax deed, it too never had the Subject Oil and Gas separately assessed. (J.A. 001022).

In April 2015, Respondent reached out to Elemental Resources to purchase certain Sewickley coal interests. On April 27, 2015, a representative of Elemental Resources emailed the sole member of Respondent, in which she stated:

> **It was a pleasure speaking with you today about our <u>coal parcels</u> in Monongalia county**. Attached is a list of coal properties we have for sale in Monongalia County. Our asking price is $20 per net acre. If you are interested in taking everything on the list we would let it go for $15 per net acre. **The one you called about is highlighted in red**. If you have any questions let me know.

(J.A. 001009) (emphasis added). There is an accompanying spreadsheet attached to this email with various Sewickley coal interests identified. The "one" referenced in the email is highlighted in red and reads: "2/8 136.192 Sew C Days Run." (J.A. 001011). The "one coal parcel" Respondent contacted Elemental Resources about is the Subject Sewickley Coal interest granted to Elemental Resources in the 2015 tax deed. There is no reference or mention of an oil and gas interest in any correspondence between Respondent and Elemental Resources.

Three days following the above email exchange, Elemental Resources issued Respondent a special warranty deed for an interest described as follows:

> All that certain parcel of land, situate in the **Clay District**, of **Monongalia** County, State of West Virginia described as follows: **<u>2/8 136.192 Sew C Days Run</u>**, and being parcel **<u>0400-0731-0000</u>** as shown on tax map **<u>9999</u>**, which said map is filed in the office of the Clerk of the County Commission of **Monongalia** County, West Virginia.
>
> Being the same property conveyed to **Elemental Resources LLC** from **G. Russell Rollyson Jr., Deputy Commissioner of Delinquent and Nonentered Lands of Monongalia County, West Virginia**, bearing the date of November 4, 2010 and of record in the Office of the Clerk of the County Commission of **Monongalia** County, West Virginia in **Deed Book 1423 at page 854**.

(J.A. 001013-001014) (bold in original, underline added).[8] This is the conveyance by which Respondent claims he acquired the Subject Oil and Gas.

[8] It should be noted that in February 2020, Elemental Resources conveyed to Petitioner Northeast Natural Energy LLC by quitclaim deed all right, title, and interest to any oil and gas Elemental Resources acquired in the second tax deed at issue in this case. (J.A. 001028).

E. Pertinent Procedural History

Respondent filed its original complaint on December 28, 2018.[9] (J.A. 000029-000049). Respondent subsequently amended its complaint again on March 19, 2019.[10] (J.A. 000129-000153). On January 23, 2020, Respondent sought leave to amend again to add two indispensable parties, the Tennant Petitioners, which was granted. (J.A. 000705-000759). A few days later, on January 30, 2020, and prior to the Tennant Petitioners being served with and having an opportunity to respond to the Second Amended Complaint, the Court proceeded with a hearing on Respondent and Petitioners Northeast Natural Energy LLC, NNE Properties LLC, Pachira Energy, LLC, and Pachira Energy Holdings, LLC's respective motions for partial summary judgment. (J.A. 000760-000798). At the conclusion of the hearing, and without stating her reasoning, the then sitting judge, Judge Scudiere, orally stated she was going to grant Respondent's motion. (J.A. 000795-000797). However, Judge Scudiere's oral ruling would have adversely affected the Tennant Petitioners in the Subject Oil and Gas, and therefore, any order entered in their absence would have been null and void, which was brought to her attention during this hearing after she announced how she intended to rule. Consequently, the Court thereafter held a status conference on March 10, 2020, with counsel for Tennant Petitioners present. (J.A. 000865-000866).

Following that status conference, the Court entered an order holding its ruling on the summary judgment motions in abeyance and entered an Amended Scheduling Order, which established a new summary judgment motion deadline. (J.A. 000865-000868). The parties subsequently filed their respective motions for summary judgment. The Circuit Court, then

[9] In its original complaint respondent asserted a cause of action for declaratory judgment in which it sought a declaration that it was the owner of the Subject Oil and Gas – it is the Circuit Court's ruling on this cause of action that is the subject of this appeal. It should be noted Respondent also asserted causes of action for trespass and slander of title – neither of these two causes of action are the subject of this appeal. (J.A. 000029-000049).

[10] The Respondent asserted the same causes of action in its amended complaint as it did in its original complaint – it just asserted additional averments omitted from its original complaint. (J.A. 000129-000153).

presided over by Judge Scott, held a hearing on the parties' respective motions for summary judgment on September 28, 2020 (J.A. 001229-001273). The Circuit Court subsequently granted Respondent's motion for partial summary judgment and denied the Petitioners' respective motions for partial summary judgment, by order entered March 17, 2023, which was certified as a Rule 54(b) final order. (J.A. 000001-000028). This instant appeal followed.

III. SUMMARY OF ARGUMENT

This case turns on three distinct issues. If this Court sides with Petitioners on any one of these three issues, then not only must it reverse the Circuit Court's ruling granting Respondent's motion for partial summary judgment, but it must also instruct the Circuit Court to grant Petitioners' motions for partial summary judgment. These three issues are addressed in turn.

The first issue concerns the presumption that a mineral estate continues to be assessed with an overlying surface estate after the two estates are severed. Here, the Subject Oil and Gas had always been assessed together with the overlying surface estate. After the two estates were severed, there was not a separate individual assessment placed on the land books for the Subject Oil and Gas. However, the assessed value of the surface estate remained the same as when it was assessed together with the Subject Oil and Gas.

West Virginia law is clear on this issue - it is improper to equate severance of title with severance of assessment. Well settled case law makes clear that when an oil and gas and surface estate have been assessed together, the fact that the oil and gas estate is not separately assessed after severance does not automatically mean it is non-entered for purposes of forfeiture. In fact, the oil and gas cannot be considered non-entered if the assessed value of the surface stays the same after the severance.

Despite this well settled law, the Circuit Court concluded that the Subject Oil and Gas was non-entered following its severance from the overlying surface estate simply because there was a

severance in title. Consequently, the Circuit Court found that the Subject Oil and Gas vested in the State five years after it was severed from the surface and then subsequently conveyed by two tax deeds for delinquent Sewickley coal interests. The Circuit Court never discussed the legal presumption that the oil and gas estate continued to be assessed with the surface, and in fact, the lower court completely ignored the evidence establishing that was actually what occurred here.

Given the Circuit Court clearly erred in concluding that the Subject Oil and Gas went non-entered immediately after it was severed from the overlying surface estate, this Court should reverse the Circuit Court's ruling granting partial summary judgment in favor of Respondent. Indeed, since Respondent's only claim to the Subject Oil and Gas is by virtue of his purported predecessors in interests' acquisition of the Subject Oil and Gas in these tax deeds, the Circuit Court should be instructed to enter partial summary judgment in favor of Petitioners.

The second issue before this Court is whether the Subject Oil and Gas could have been conveyed in tax deeds that were issued solely for a delinquent Sewickley coal estate. West Virginia statutory and case law provides that when there is a tax deed for a specific type of interest, the tax deed conveys only that specific interest against which the taxes were levied and proceeded against for delinquent taxes. Here, the two tax deeds at issue were solely for delinquent taxes pertaining to a Sewickley coal estate. It is undisputed that the Subject Oil and Gas was never assessed with the Sewickley coal, and the Subject Oil and Gas is not separately identified on either of the tax deeds at issue. Thus, under West Virginia law, the Sewickley coal tax deeds could not have conveyed the Subject Oil and Gas.

Third, the Circuit Court ignored West Virginia statutory law and case law when it concluded that a tax deed which proceeded against only a specific Sewickley coal estate also conveyed a separate and unreferenced oil and gas estate merely because there were overlapping

acreages between the two estates. Not only was the Circuit Court's ruling in error, but it also violates important public policy considerations regarding the certainty of land titles. And like with issue one above, since Respondent's claim to the Subject Oil and Gas is dependent upon the Subject Oil and Gas being conveyed in the two tax deeds at issue, the Circuit Court's granting of Respondent's motion for partial summary judgment should be reversed with instructions to grant partial summary judgment in favor of Petitioners.

IV. STATEMENT REGARDING ORAL ARGUMENT

While this appeal pertains to assignments of error in the application of settled law, counsel for Petitioners believe that this case also concerns certain legal issues of important public policy – namely, the certainty of land titles. Therefore, Petitioners request that oral argument be granted by this Court in accordance with Rule 20 of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

A. Standard of Review

The Circuit Court granted Respondent's motion for partial summary judgment, as to Respondent's declaratory judgment cause of action, and denied the Petitioners' respective motions for partial summary judgment as to Respondent's declaratory judgment cause of action. Therefore, this Court's review of the Circuit Court's decision is *de novo*. *See Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 89, 576 S.E.2d 807, 816 (2002). Further, though interlocutory in nature, the Circuit Court's Order is subject to immediate appeal because the Circuit Court entered the Order as a Rule 54(b) final order. "Under Rule 54(b), a circuit court enjoys the authority to direct entry of a final order as to less than all claims in a multi-claim case upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 549, 584 S.E.2d 176, 183 (2003) (internal quotes omitted). Also, "[i]n an order dismissing fewer than all of the parties or fewer than all the

claims in a civil action, the inclusion of the language required by Rule 54(b) of the West Virginia Rules of Civil Procedure makes that order appealable immediately. . .” *Riffe v. Armstrong,* 197 W. Va. 626, 638, 477 S.E.2d 535, 547 (1996).

Here, the current Order being appealed qualifies as proper Rule 54(b) final, appealable order. It fully adjudicates one cause of action with respect to all Petitioners, namely the declaratory judgment action asserted by Respondent, leaving nothing left to do with the declaratory judgment action but to enter and enforce what has been ordered. Also, since the declaratory judgment cause of action was the only cause of action asserted against the Tennant Petitioners, the Order being appealed represents a full and final order with respect to all claims asserted against them.

B. Assignment of Error 1 – The Circuit Court Erred When It Failed to Find the Subject Oil and Gas was Presumed to be Assessed Along With the Surface and Thus Never Forfeited to the State for Non-Entry.

The lynchpin of the Circuit Court’s Order is that the Subject Oil and Gas went non-entered five (5) years following its severance from the surface in 1940 and was automatically forfeited to the state by operation of law. (J.A. 000009; 000011). This is incorrect. First, the Circuit Court failed to give deference to West Virginia case law that abhors forfeiture, and which places the burden of proof on the one claiming a forfeiture occurred. Second, the Circuit Court erred in finding the Subject Oil and Gas non-entered merely because the Subject Oil and Gas was severed from the overlying surface, even though it is undisputed that the Subject Oil and Gas was never separately assessed apart from the surface prior to severance. Third, the record establishes that the Subject Oil and Gas was carried forward and assessed along with the overlying surface estate following severance 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.

a. Abhorrence of Forfeiture and Presumption Against Forfeiture for Non-Entry.

Prior to 1994, under West Virginia's tax sale statute, all property interests not entered for tax assessment purposes for five (5) years were automatically forfeited to the state for non-entry. *See* W. Va. Code § 11A-4-2 (repealed 1994) ("Land which for any five successive years shall not have been so entered and charged, shall by operation of law, without any proceedings thereof, be forfeited to the state. . ."). This statute was abrogated in 1994, because the automatic forfeiture of property without due process was deemed unconstitutional. *See* Shuman, Robert Louis, et al. *The Amended and Reenacted Delinquent and Nonentered Land Statutes – The Title Examination Ramifications*, 98 W. Va. L. Rev 537, 546 (1998).

Nevertheless, until 1994, West Virginia's statutory scheme governing issuance of tax deeds was a forfeiture statute. "Forfeiture has been described as a harsh, even dreadful, remedy; courts generally disfavor it 'and never apply it except where the law clearly warrants.'" *Pearson v. Dodd*, 159 W. Va. 254, 261, 221 S.E.2d 171, 176 (1975) (internal quotes omitted) *overturned on other grounds, Lilly v. Duke*, 180 W. Va. 228, 376 S.E.2d 122 (1988). Because forfeiture of property interests under West Virginia's prior tax deed scheme was abhorred by the courts, the Supreme Court of Appeals of West Virginia repeatedly held over the years that "[t]here is a presumption of entry of lands for taxation and payment of the taxes thereon, in favor of the owner and persons claiming under him, which stands until overthrown by proof to the contrary." Syl. Pt. 7, *White Flame Coal Co. v. Burgess*, 86 W. Va. 16, 102 S.E. 690, 691 (1920).

A by-product of the presumption against forfeiture is that separate mineral estates that have never been separately assessed apart from the surface are presumed to be assessed with the surface. This is true even when title to the mineral estate is severed from the surface estate. In other words,

severance of title is different than severance of assessment for tax purposes. *Sult v. A. Hochstetter Oil Co.*, 63 W. Va. 317, 61 S.E. 307, 311 (1908) ("We are asked to presume severance for taxation because there has been a severance in title. In so doing counsel ask us to relieve their client, in violation of the general rule of law, from the burden of proving an affirmative issue, its claim of title by forfeiture and transfer.") As explained by the Supreme Court of Appeals of West Virginia:

> Forfeiture of the title to minerals in a tract of land for nonentry on the land ***books <u>cannot</u> be predicted 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.

Syl. Pt. 5, *Sult*, 61 S.E. 307 (emphasis added). Indeed, the Supreme Court of Appeals of West Virginia has even gone so far to say that even when there is a severance of title between a surface and mineral estate, it is "conclusively presumed, in absence of anything to the contrary, that the minerals are still charged with the surface." *United Fuel Gas Co. v. Hays Oil & Gas Co.*, 111 W. Va. 596, 163 S.E. 443, 445 (1932).

Consequently, the burden of proof to establish nonentry and a subsequent forfeiture is placed upon the party claiming forfeiture – which cannot be overcome by the mere fact that there was a severance in title without a subsequent severance of assessments of the surface and the mineral estate in question. Despite numerous cases stating that one cannot assume there was a severance of assessment merely because there was a severance in title, this was the basis of the Circuit Court's finding that the Subject Oil and Gas went non-entered. (J.A. 000009-000010). It was in error for the Circuit Court to equate severance of title with severance of an assessment.

b. The Record Establishes the Value of the Assessment Before and After Severance was the Same and Therefore Cannot be Considered Forfeited.

While it is troubling that the Circuit Court found that the Subject Oil and Gas went non-entered merely because there was severance of title, despite clear West Virginia case law that dictates such a finding could not be based on this fact alone, what is even more critical and dispositive is the fact that the record clearly establishes that the assessed value of the surface and oil and gas before the severance remained the same following the severance. However, the Circuit Court just ignored this fact, when binding case law dictates the Circuit Court should have found the Subject Oil and Gas was carried forward with the assessment of the surface.[11]

In *United Fuel Gas Co. v. Hays Oil & Gas Co.*, the Supreme Court of Appeals of West Virginia expressly held that: "Where 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." Syl. Pt. 2, 163 S.E. 443[12]; *see also* 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."); *See* Syl. Pt. 5, *Sult*, 61 S.E. 307.

Here, it is undisputed that the Subject Oil and Gas was severed from the 119-acre surface estate in 1940 when the surface estate was conveyed to Velma Jewel Chisler. (J.A. 000906-

[11] The Circuit Court's analysis of this issue inexplicably begins and ends with the following sentence: "Defendants contend that beginning in 1941, the assessment in the name of Velma Chisler included both the surface and subjacent oil and gas in the 119-acre tract." (J.A. 000025).

[12] In this case, the inverse occurred – the grantee received the surface, and the grantor retained the minerals, but the value of taxation for the land was nevertheless charged at full value after severance in the name of the grantee, but this distinction is immaterial.

000910). It is also undisputed that the Subject Oil and Gas was never separately assessed before the 1940 severance or after the 1940 severance, up to and including 2015.[13] (J.A. 000004-000010; 000017-000018). Importantly, however, the assessments following the 1940 severance demonstrate that all interests in the oil and gas underlying the 119-acre surface estate, including the Subject Oil and Gas, were transferred to the name of Velma Jewel Chisler. As explained above, in 1941, following Velma Jewel Chisler's purchase of the 119-acre surface estate, she was assessed with an interest described as "119.171 SUR DAYS RUN," which had an assessed "Land Value" of **$1,300**. (J.A. 0000934). The notation accompanying this assessment indicated that the assessments of eight individuals from the prior year were aggregated to comprise the assessed "Land Value" for the interests described in 1941 land book as "119.171 SUR DAYS RUN." *Id*.

As the table set forth above in Section II demonstrates, the aggregate amount of "Land Value" of these individuals' assessments from the previous year that were transferred to Velma Jewel Chisler, including the assessment for the Subject Oil and Gas, also total **$1,300.00**. (000939-000954). In other words, the Land Value of the 1940 assessments, which included the Subject Oil and Gas, was $1,300 – the exact same amount as the Land Value of the 1941 surface assessment in Velma Chisler's name following severance of title of the surface and oil and gas estates.

Put simply, the total amount assessed for "Land Value" after severance of title was the same as before the severance of title. Thus, as dictated by Syllabus Point 2 of *United Fuel*, the assessment for the Subject Oil and Gas, as well as several other interests in oil and gas underlying the 119-acre surface tract, were carried forward with the surface assessment placed in the name of Velma Jewel Chisler. *See* Syl. Pt. 2, *United Fuel*, 163 S.E. 443. By well-established case law, the

[13] While the Petitioners disagree with the Circuit Court's finding that the Subject Oil and Gas was non-entered following the 1940 severance, as they contend it was still assessed with the surface after 1940, Petitioners and the Circuit Court are nevertheless in agreement there is no separate entry for the Subject Oil and Gas on the land books after 1940.

Subject Oil and Gas cannot be considered non-entered and subsequently forfeited following its severance from the surface. The Circuit Court's finding on this issue is in direct contravention of *United Fuel* and other binding authority from West Virginia that holds when minerals and surface are severed, and the assessment of the land value is the same before and after the severance, there can be no forfeiture for non-entry.[14]

Ultimately, the Court never addressed – or even acknowledged – the fact that the "Land Value" assessment was the same before and after severance of the Subject Oil and Gas from the overlying surface – which under West Virginia required it to find the Subject Oil and Gas was not non-entered. Instead, the Circuit Court's Order simply - and incorrectly - predicates forfeiture of the Subject Oil and Gas on the mere severance of title. It makes no difference that the owner of the surface is no longer the owner of the severed minerals. So long as the tax assessment is paid, there can be no forfeiture, because "[o]ne payment of taxes is all the state is entitled to receive." *State v. Hines-Bailey Corp*., 103 W. Va. 180, 136 S.E. 780, 782 (1927). Accordingly, the Circuit Court's decision to declaring Respondent the owner of the Subject Oil and Gas should be reversed, with instructions to grant Petitioners' motions for partial summary judgment on Respondent's declaratory judgment cause of action.

C. Assignment of Error 2 – The Circuit Court Erred When It Found that the Subject Oil and Gas was Conveyed in a Tax Deed for Delinquent Sewickley Coal.

Even assuming *arguendo* that the Subject Oil and Gas was non-entered, the Circuit Court still erred in granting Respondent's motion for partial summary judgment and denying Petitioners' respective motion for partial summary judgment. The Circuit Court held below that a tax deed

[14] Indeed, Respondent's counsel conceded he loses this case if the Subject Oil and Gas continued to be assessed with the surface: "if you conclude that Velma Chisler's assessment included the oil and gas, then its game over for me." (J.A. 001258).

describing only one coal seam - not even "all coal" - also conveyed an unreferenced oil and gas estate under dissimilar acreage because the oil and gas estate had been non-entered for five years or more when the tax deed was issued. (J.A. 000021-000022). The Circuit Court erred in reaching this conclusion because, in so doing, it ignored West Virginia statutory law and case law that establishes, in a tax sale, only the specific estate against which the taxes were assessed can be conveyed by the State in that tax deed. The only estate against which taxes were assessed in this case was the Sewickley coal estate, and under the law that is the only estate which could have ever been conveyed by tax deed. The Circuit Court's decision is clearly wrong on this fundamental issue and should be reversed.

The statute that controls the disposition of this legal issue is West Virginie Code § 11-4-9, which provides in pertinent part:

> 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 Ann. § 11-4-9 (West). West Virginia Code § 11-4-9 also provides that "[e]ach such undivided interest so separately assessed shall be considered as if such undivided interest were a separate tract." *Id*.

The Supreme Court of Appeals of West Virginia has also stated 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). The *Black Band* Court further observed 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**." *Id*. at 616 (emphasis added).[15]

Here, the only delinquent estate taxed against was the Subject Sewickley Coal. (J.A. 001004). The 1992 and 2010 tax deeds 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." Under West Virginia Code § 11-4-9 and *Black Band*, only the estate against which taxes were assessed as part of the assessment identified as 2/8 136.192 SEW. C. DAYS RUN could have been conveyed in those tax sales. As the Subject Oil and Gas was never assessed under the property description 2/8 136.192 SEW. C. DAYS RUN, the Subject Oil and Gas could never be sold in a tax sale for the delinquent Sewickley coal interest – only the estate encompassed in this assessment could be conveyed in the tax deed. *See* W. Va. Code § 11-4-9; *Black Band*, 169 S.E. at 615.

No other separate estate – be it the Subject Oil and Gas or countless other estates like limestone, timber, or ore - could have been conveyed in these two tax deeds along with the Subject Sewickley Coal because those estates were never assessed and taxed along with the estate described as 2/8 136.192 SEW. C. DAYS RUN. The Subject Sewickley Coal was the only estate against which taxes were assessed and the only estate that could have been conveyed in the two tax deeds at issue.

While the Circuit Court notes Petitioners' arguments, it never clearly explains why West Virginia Code § 11-4-9 does not apply and ignores *Black Band* altogether. *See* (J.A. 000001-

[15] The only exception to this statutory rule that a tax sale only conveys the exact estate proceeded against is where there is a tax sale of the surface estate, and the other underlying estates are not separately assessed. The reason being that those other underlying mineral estates are presumed to be assessed with the surface and are therefore carried with it in a tax sale if not separately assessed. As explained by the *Black Band* Court: "Of 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. The fact that minerals are presumed to be assessed with the surface if not previously assessed separately is in fact the basis for Petitioners' Assignment of Error No. 2.

000028). The Circuit Court makes only the following statement in rejecting the applicability of West Virginia Code § 11-4-9:

> West Virginia Code § 11-4-1, et seq. governs the assessment of real property for the purposes of *ad valorum* taxation. West Virginia Code § 11-4-9 specifically provides for the assessment of different estates or undivided interests in the same tract of realty. The Court concludes that given its location within the section of the Code governing the assessment of different estates or undivided interests in the same tract of realty, the portion of §11-4-9 relied on by Defendants make clear that a tax deed issued pursuant to a tax sale of a delinquent or forfeited undivided intertest conveys only undivided interest of the owner of the delinquent and forfeited undivided interest and not the undivided interest in that realty owned by others.

(J.A. 000025-000026).

While the Circuit Court's analysis is admittedly difficult to understand, the lower court seems to suggest that because § 11-4-9 is located within the section of Code establishing that undivided interests in the same realty may be separately assessed, this particular section limits the interests conveyed in a tax deed to that of the *owner* of any undivided interest of delinquent and forfeited lands. But the Circuit Court is reading words out of what is a clear limitation; namely, that the property conveyed in a tax sale is limited only to that of the *owner* of undivided interests of delinquent and forfeited lands. (J.A. 00025-26). The scope of the conveyance in § 11-4-9 is not limited to that of the *owner* of the delinquent undivided interest; rather, the scope of conveyance is limited to "the tract, lot, estate, interest or undivided interest **proceeded against."** W. Va. Code § 11-4-9 (emphasis added). By omitting words and limitations in an otherwise unambiguous statute, the Circuit Court violates the maxim that when interpreting statutes, courts should "consider the precise words employed in the enactment. Where such language is plain, [courts should] apply the subject statutory language as written without any further interpretation." *State ex rel. Frazier v. Thompson*, 243 W. Va. 46, 52, 842 S.E.2d 250, 256 (2020).

The Circuit Court concludes that West Virginia Code § 11A-4-33[16], a curative statute enacted to cure non-jurisdictional defects in a tax sale proceeding, is the statutory provision providing that an unreferenced wholly separate estate can be carried in a tax deed, provided the unreferenced estate was forfeited to the state at the time of sale.[17] Section 11A-4-33 provides that a tax deed purchaser "shall thereby acquire 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 . . ." W. Va. Code § 11A-4-33. Relying on this language alone, the Circuit Court concludes that the tax deeds for the Subject Sewickley Coal also conveyed the Subject Oil and Gas. (J.A. 000020-000021).

The Circuit Court erred by failing to read § 11-4-9 in *pari materi* with § 11A-4-33, rendering § 11-4-9 superfluous. *Young v. State*, 241 W. Va. 489, 491–92, 826 S.E.2d 346, 348–49 (2019) ("when two statutes relate to the same general subject, and the two statutes are not in conflict, they are to be read *In pari materia*.") (internal quotes omitted). Section 11-4-9, as well as its interpreting case law, clearly limits the interests conveyed in a tax deed to only the estate **proceeded against**, a limitation which the Circuit Court reads out of the statute altogether. *State ex rel. Smith v. W. Virginia Crime Victims Comp. Fund*, 232 W. Va. 728, 733–34, 753 S.E.2d 886, 891–92 (2013) (it is axiomatic that "[a] statute is enacted as a whole with a general purpose and

[16] West Virginia Code § 11A-4-33 was amended in 1994 and is now codified in West Virginia §11A-3-62 following the 1994 amendment to the tax deed statutory scheme, which repealed the automatic forfeiture of title to the State for non-entry that was considered violative of due process. Now under the current scheme, non-entered land is considered within the authority and control of the state auditor and is subject to redemption and reentry on the land books by one entitled to redeem. *See* Shuman, Robert Louis, et al., *The Amended and Reenacted Delinquent and Nonentered Land Statutes – The Title Examination Ramifications*, 98 W. Va. L. Rev 537, 545-548 (1998).

[17] *See Pearson v. Dodd*, 159 W. Va. 254, 264, 221 S.E.2d 171, 178 (1975), *overruled by Lilly v. Duke*, 180 W. Va. 228, 376 S.E.2d 122 (1988) (noting the purpose of West Virginia Code 11A-4-33 is intended to fix irregularities and cure mistakes in the tax sale process).

intent, and each part should be considered in connection with every other part to produce a harmonious whole.").

Furthermore, by reading West Virginia Code § 11A-4-33 in isolation, detached from West Virginia § 11-4-9, the Circuit Court has given West Virginia Code § 11A-4-33 an overly expansive interpretation. West Virginia Code § 11A-4-33, and its subsequent amendment, ensures that the entire interest in the "real estate" intended to be encompassed by the assessment is transferred by the tax deed. This rectifies issues where the interest may be improperly described, such as the case here. The tax deeds at issue here identify the realty being conveyed as "2/8" interest in the Subject Sewickley Coal, when the interest covered by the assessment was actually a 3/8th interest in the Subject Sewickley Coal. By operation of West Virginia Code § 11A-4-33, the tax deed purchaser acquired all 3/8th interest in the Sewickley coal estate despite the faulty description of the fractional interest in the Sewickley coal tax deed.

Ultimately, neither West Virginia Code § 11A-4-33 nor its subsequent amendment eviscerate the limitations placed on the *estate* conveyed in a tax deed as set forth in West Virginia § 11-4-9 and *Black Band*. 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 was proceeded against. *See* W. Va. Code § 11-4-9; *Black Band*, 169 S.E. at 615. And despite the fact that the tax deed erroneously described a 2/8 interest in the Sewickley coal estate as being conveyed, § 11A-4-33 makes clear the tax deed conveyed a 3/8 interest in Sewickley coal as that was the entirety of the "real estate" proceeded against for non-payment of taxes.

As a final note on this issue, West Virginia's tax deed statute "has undergone significant change in the last several years, with each change increasing the protections afforded the

delinquent land owner." *Mingo Cty. Redevelopment Auth. v. Green*, 207 W. Va. 486, 491, 534 S.E.2d 40, 45 (2000). The reasoning is because "[f]orfeitures are not favored"; therefore, statutes that operate in a manner to cause forfeiture "should be enforced only when within both letter and spirit of the law." *United States v. One 1936 Model Ford V-8 De Luxe Coach Motor*, 307 U.S. 219, 226 (1939). Thus, to the extent there were competing interpretations of the West Virginia tax deed statute that the Circuit Court could have considered plausible, it should have adopted the one that is more protective of the landowner. In this case, that would be the interpretation that limits the estate conveyed in the two tax deeds at issue to the estate actually proceeded against for delinquency, which was the Subject Sewickley Coal.

D. Assignment of Error 3 – The Circuit Court's Ruling Violates Critical Public Policy Concerns Regarding Certainty and Predictability of Land Titles.

The Circuit Court's Order, if upheld, will create considerable uncertainty around land titles. Indeed, it will do so on two fronts. First, it would upend the predictability and certainty created by *United Fuel* and *Sult*, which dictates that when there is a severance of surface and minerals estates that had been jointly assessed and there is no separate assessment for the mineral estate following severance, but the assessed value of the surface remains unchanged, the severed mineral estate is considered to be carried forward with the assessment of the surface. The Circuit Court refused to follow *United Fuel* and *Sult*. The consequence of this is that there would be confusion and uncertainty for title examiners as they could no longer rely on the clear dictates of *United Fuel* and *Sult* and thus be left to guess as to whether any number of different minerals estates were non-entered following their severance.

Second, the Circuit Court's ruling that a tax deed for a very specific estate can also convey separate estates that were never proceeded against for nonpayment of taxes if those estates have overlapping acreages would create a lack of certainty of title with respect to what estates are

actually being conveyed in any one tax deed - which is counter to West Virginia Code § 11-4-9 and *Black Band*. Using this suit as an example, the practical effect of the Circuit Court's ruling here is that the tax deed for a fractional interest of one specific coal seam, the Sewickley seam, also conveyed any number of other estates (oil and gas, limestone, ore, timber, any other valuable minerals, etc.) not separately assessed that were underlying or overlapping the same acreage of the Sewickley coal. While the Respondent only focuses on the Subject Oil and Gas in this suit, the application of Circuit Court's ruling would nevertheless also apply to any number of estates not separately assessed that overlap in whole or in part the acreage of the Subject Sewickley Coal.

The Supreme Court of Appeals of West Virginia has explained that its "goal in the area of land ownership is to avoid bringing upon the people interminable confusion of land titles; instead, we must endeavor to prevent and eradicate uncertainty of such titles." *Faith United Methodist Church & Cemetery of Terra Alta v. Morgan*, 231 W. Va. 423, 431, 745 S.E.2d 461, 469 (2013) (internal citations omitted). "[C]onfidence in one's title to land is of paramount importance. As we have remarked previously, certainty above all 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, "[t]he quest for uniformity and certainty is a major concern for the practitioner." *Id*. at 474. The Supreme Court of Appeals of West Virginia has further observed that "[p]redictability is at the heart of the doctrine of Stare decisis, and regardless of what we think of the merits of this case, we must be true to a reasonable interpretation of ***prior law in the area of property where certainty above all else is the preeminent compelling public policy to be served."*** *Hock v. City of Morgantown*, 162 W. Va. 853, 856, 253 S.E.2d 386, 388 (1979) (emphasis added). The Circuit Court violated this critical public policy of certainty in the area of property two separate times.

First, as noted above, *United Fuel* and *Sult* are clear that if there is severance of a mineral estate and a surface estate and there is no sperate assessment placed on the land books for the severed mineral estate, but the assessed value of the surface remains unchanged after severance, then the severed minerals are considered to be carried forward with the surface for assessment purposes – even though there may have been a severance in title. This is a clear point of law that has been relied upon by title attorneys for decades, yet the Circuit Court outright ignored this established case law.

Second, as noted above, under West Virginia Code § 11-4-9 and *Black Band*, the estate conveyed in a tax deed for delinquent taxes is limited to the exact estate proceeded against for the delinquent taxes. *See* W. Va. Code § 11-4-9; *Black Band* 169 S.E. at 615, 616 (emphasis added). Not only did the Circuit Court rule in direct contravention of West Virginia Code § 11-4-9, but it also failed to provide any true reasoning as to why West Virginia Code § 11-4-9 does not apply. It also failed to even mention *Black Band*, despite the compelling interest in stare decisis in the area of property law. Furthermore, the Circuit Court completely ignored *Black Band*, which discusses the very situation raised in this case.

Ultimately, if the Circuit Court's ruling in its Order is accepted, all goals regarding predictability and certainty of title and adherence to stare decisis – not to mention abhorrence of forfeiture – would be undermined, for it would render what estates are and are not conveyed in a tax deed ambiguous. "Ambiguity in real estate law leads to blind groping by the courts, promotes instability of titles and encourages litigation." *W. Virginia Dep't of Transportation v. Veach*, 239 W. Va. 1, 17, 799 S.E.2d 78, 94 (2017). Importantly, this ambiguity would not only be an issue moving forward, but it would create ambiguity in past title opinions as well given the Circuit Court concluded that the forfeiture in this case occurred in the 1940's.

The adverse, practical effect of such a ruling is evidenced by the report of the Tennant Petitioners' expert, Robert Shuman. In addition to having performed and overseen the performance of thousands of title examinations in West Virginia, Mr. Shuman has both taught property law at the West Virginia University College of Law and been published extensively on matters of land title examinations in West Virginia. (J.A. 001163-64).[18] Mr. Shuman, in his affidavit, makes two important attestations based upon his considerable experience and knowledge in the area of real title property examination in West Virginia. First, he attests that in this case, the Subject Oil and Gas continued to be assessed with the overlying surface following the 1940 severance because the "Land Value" assessed for tax purposes after severance was the same as the "Land Value" assessed for tax purposes before there was severance - in other words, the amount being assessed for taxes remained unchanged after the Subject Oil and Gas was severed from the surface and therefore continued to be carried forward for tax assessment purposes with the surface. (J.A. 001159). This is in accord with the dictates of *United Fuel* and *Sult*. Second, Mr. Shuman attests a tax deed for Sewickley coal cannot convey with it other estates not proceeded against, like oil and gas, as the Circuit Court ruled. (J.A. 001160). This is in accord with the dictates of West Virginia Code § 11-4-9 and *Black Band*.

To accept the Circuit Court's ruling would not only create uncertainty in land titles moving forward, but it will also create uncertainty with respect to title examinations that have already occurred given the Circuit Court's decision upset long established West Virginia statutory law and case law, upon which any number of business transaction have relied over those years.

[18] Indeed, Mr. Shuman has published two law review articles in the West Virginia Law Review that focuses solely on issues concerning delinquent and non-entered lands and tax deeds: Robert Louis Shuman, *Update: The Amended and Reenacted Delinquent and Nonentered Land Statutes - the Title Examination Ramifications*, 111 W. Va. L. Rev. 707 (2009) and Robert Louis Shuman, et al., *The Amended and Reenacted Delinquent and Nonentered Land Statutes - the Title Examination Ramifications*, 98 W. Va. L. Rev. 537, 538 (1996)

Accordingly, the Circuit Court's Order creates both past and future uncertainty in land titles, which is counter to the compelling public interest and therefore should be reversed.

VI. 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.

Respectfully submitted,

DAVID TENNANT and
YURI DMITRI POPOV

By: Spilman Thomas & Battle, PLLC

/s/ Matthew P. Heiskell
Matthew P. Heiskell (WVSB#10389)
James A. Walls (WVSB#5175)
48 Donley Street, Suite 800
Morgantown, WV 26501
304.291.7920
mheiskell@spilmanlaw.com
jwalls@spilmanlaw.com

No. 23-ICA-155
(Consolidated with No. 23-ICA-154)

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DAVID TENNANT, by and through
DEBORAH TENNANT, his guardian and conservator,
and YURI DMITRI POPOV,

Defendants Below, Petitioners

v.

LT REALTY UNLIMITED, LLC,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, Matthew P. Heiskell, do hereby certify that on this 17th day of July, 2023, I served the foregoing **BRIEF OF PETITIONERS DAVID TENNANT, BY AND THROUGH DEBORAH TENNANT, HIS GUARDIAN AND CONSERVATOR, AND YURI DMITRI POPOV**, via U.S. Mail, postage pre-paid, on the following:

William J. Leon
William J. Leon, LC
315 High Street
Morgantown, WV 26505
Counsel for Respondent

Seth P. Hayes
Dale H. Harrison
Jackson Kelly PLLC
150 Clay St., Suite 500
Morgantown, WV 26501
Counsel for Northeast Natural Energy LLC and NNE Properties LLC

Roger L. Cutright
Cutright Law, PLLC
455 Suncrest Towne Center, Suite 201
Morgantown, WV 26505
Counsel for Pachira Energy, LLC and Pachira Energy Holdings, LLC

/s/ Matthew P. Heiskell
Matthew P. Heiskell (WVSB#10389)

16084276