NO. 24-ICA-34

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ESTATE OF JAMES L. SINE,

Plaintiff Below/Petitioner,

v.

Richard L. Armstrong,

Defendant Below/Respondent.

On Appeal from the Circuit Court of Tyler County, West Virginia
Civil Action No. 20-C-44

PETITIONER'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

The Circuit Court erred in granting the Respondent's motion for summary judgment on the Petitioner's counterclaim and in denying the Petitioner's motion for summary judgment on the same claim. Both rulings stem from the Circuit Court's erroneous interpretation of a 1905 Deed.

STATEMENT OF THE CASE

At issue in this case and the case below is the oil and gas underlying a tract of 32.395 acres in Mead District, Tyler County, West Virginia (the "Subject Lands"). PA 008.[1] As set forth in the Court's Order below, the Parties have agreed as to the operative chain of title. PA 162. Robert K. Eberhart acquired 100% of the surface and oil and gas underlying the Subject Lands, and other lands, by deed dated December 12, 1876, and recorded in Deed Book 5 at Page 564. *Id.* On April 27, 1895, Robert K. Eberhart leased the oil and gas underlying the Subject Lands, and other lands, to The Fisher Oil Company, for three years "and as much longer as oil or gas is found in paying quantities thereon not exceeding in the whole [illegible] term of twenty-five years from the date hereof" by lease recorded in Deed Book 25 at Page 316. *Id.*

On April 1, 1905, Robert K. Eberhart conveyed an interest in the Subject Lands to Hugh B. Kane, E. L. Carson, and Frank Wester, by deed recorded in Deed Book 90 at Page 560 ("The 1905 Deed"). PA 163. The decision below and the outcome of this appeal rest entirely upon the interpretation of the 1905 Deed. PA 166.

The 1905 Deed consists of four substantive paragraphs. The first paragraph simply recites that this is an "Agreement" between R. K. Eberhart and his wife and the aforementioned grantees, Kane, Carson, and Wester. PA 078. In the second, Eberhart purports to convey "one-

[1] References to PA are to the Petitioner's Appendix, which has been paginated at the lower right with PA 001, etc.

half of the oil and gas in and under" the lands described, being the Subject Lands. *Id.* The third paragraph states that the Agreement is as follows: "Subject Only to any valid existing lease for oil and gas purposes" and "hereby granting to the grantees the one-half (1/2) part of the royalty and rents reserved under such lease while the same remains in force." PA 079.

The fourth paragraph of the 1905 Deed is the one squarely before this Court. The first sentence of that paragraph reads, "If the first well drilled on said premises produces ____ barrels per day, for thirty consecutive days after its completion, grantee agrees to pay grantor the sum of _____ Dollars additional for this grant and conveyance. PA 079. There is no habendum clause in the 1905 Deed, and the final sentence of the final and fourth paragraph is the closest approximation. That sentence reads, "For the term of 25 years from the date hereof or so long thereafter as oil or gas may be produced in paying quantities." *Id.*

The 1905 Deed therefore created two separate mineral interests underlying the Subject Lands: (1) the interest retained by Robert K. Eberhart, along with the surface (the "Surface Interest"); and (2) the interest conveyed by Eberhart to Kane *et al*. (the "Severed Interest"). The surface and the Surface Interest were devised, descended and conveyed by various conveyances to James L. Sine. PA 163-164. James L. Sine died, testate, on January 12, 2023, during the pendency of this action. The Petitioner, the Estate of James L. Sine by his Executor and Mr. Sine's nephew, Michael West, was substituted in his place. PA 044. There were no additional mineral reservations in the chain of title to the Petitioner; thus, the Petitioner owns any interest not conveyed in the 1905 Deed.

The Severed Interest was entered separately for taxation in 1923. PA 011. In 2007, the tax assessment on the Severed Interest went delinquent and the Respondent's predecessor in title, Peggy A. Armstrong, purchased it at a tax sale as evidenced by Deed Book 373, Page 194. PA 164. Peggy A. Armstrong is the mother of the Respondent. *Id.* She died on June 20, 2011,

and by her will left her interest in the Subject Lands to her husband, Eugene Armstrong, who in turn left the interest by his will to the Respondent. PA 015.

The Petitioner's predecessors, James and Kathy Sine, signed an oil and gas lease with Antero Resources Corporation ("Antero") on April 11, 2012, covering their interests in the Subject Lands (Deed Book 400, Page 422). PA 015. The Respondent's predecessor, Eugene H. Armstrong, signed an oil and gas lease with JB Exploration I, LLC ("JB") on August 11, 2014, covering his interest, if any, in the Subject Lands (Deed Book 454, Page 564). PA 033-041. Antero later acquired an interest in this lease from JB. PA 016. Antero has drilled several wells under the Subject Lands or lands pooled or unitized therewith. *Id*.

The Respondent initially filed his Complaint on December 10, 2020, contending that his mother had acquired 100% of the oil and gas underlying the Subject Lands by virtue of her tax deed. He sought a declaration of the same, as well as damages from Antero and JB for their failure to pay him on the basis of 100% ownership. PA 022. On October 13, 2023, Antero and JB were dismissed by stipulation of the Parties when they agreed to suspend any royalties pending resolution of this matter. PA 006, 165.

The Petitioner filed a counterclaim on October 13, 2023, alleging that he owned 100% of the oil and gas underlying the Subject Lands. PA 042-050. In the counterclaim, the Petitioner contends that the penultimate sentence in the 1905 Deed, reading "For the term of 25 years from the date hereof or so long thereafter as oil or gas may be produced in paying quantities[,]" means exactly what it says. PA 047. Therefore, the grant of "one-half of the oil and gas" and "the one-half (1/2) part of the royalty" was to expire upon the later of the cessation of production under or 25 years. *Id.* Because it was undisputed that the "25 years" period expired in 1930 *and* that no production was taking place at the time Antero and JB took their leases, the grant in the 1905 Deed had reverted to the surface. PA 048.

The Petitioner filed a motion to dismiss the Plaintiff's claims, contending that the taxes for the surface had always been paid and therefore the surface owner could not have lost any oil and gas interest at a tax sale pursuant to *L & D Invs., Inc. v. Mike Ross, Inc.*, 241 W. Va. 46, 818 S.E.2d 872 (2018). PA 005. The parties also filed cross-motions for summary judgment on the Petitioner's claim to 100% ownership. PA 165. All of these motions were brought on for hearing on December 19, 2023. At that hearing, the Respondent abandoned his initial claim to more than 50% of the oil and gas underlying the Subject Lands, conceding that the *L & D* case dictated the result. PA 166. Thus, the sole issue decided by the Court below and subject to this appeal was the interpretation of the 1905 Deed.

In their written briefs and at the hearing, both parties argued that the language of the 1905 Deed mandated a decision in their favor. The Petitioner contended that the term was a clear limitation on the grant in the 1905 Deed. PA 100. The Respondent contended that "a plain reading of the fifth paragraph reveals that its operation would have been to pay the grantors a sum of *additional* consideration if the first well drilled on the property produced a certain number of barrels per day, and the second sentence provides the time frame for the additional consideration to be paid." PA 111. The Respondent further alleged that the subsequent taxation of the Severed Interest, beyond 25 years, along with the prior lease and an option agreement recorded contemporaneously with the 1905 Deed provided extrinsic support for its argument as to the parties' intent. PA 114.

As the Respondent conceded the Petitioner's title to the Surface Interest, the Circuit Court denied Petitioner's Motion to Dismiss as moot. With respect to the Motions for Summary Judgment, as the Severed Interest the Circuit Court agreed with the Respondent that the time limit only applied to the additional consideration. According to the Circuit Court's statement at the hearing, it was "'We're going to pay you more, but we ain't going to pay you forever.'" And so

they crafted some kind of term that they're going to pay additional monies." PA 136. In other words, according to the Circuit Court, "it was intended as – as a conveyance with additional consideration in the event that this thing really was a gusher. . . ." PA 140.

The Circuit Court's ruling was based largely on its interpretation of the "plain language" of the instrument. That said, the Circuit Court also referenced "the parties conduct before and after delivery of the deed" in its Order. PA 168. The Petitioner filed a written objection to the Order prior to entry, specifically objecting to any resort to evidence outside the four corners of the document. PA 157-159.

SUMMARY OF ARGUMENT

In interpreting contracts, deeds, and other written instruments, the Court's task is not to divine what the Court believes the parties to that instrument meant but rather to give effect to the language the parties themselves chose. The Court must give effect to all of the language used and may not disregard any provision of the instrument, as long as all of those provisions can be given meaning. The Circuit Court erred in failing to give effect to the time limitation used in the 1905 Deed. Once that language is given effect, the only possible coherent construction of the 1905 Deed, in its entirety, is that advocated by the Petitioner, that the time limit in the final sentence of the deed applies to the entire deed. Accordingly, this Court must reverse the lower Court and direct the entry of summary judgment in favor of the Petitioner.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case should be set for a Rule 19 oral argument, because the Circuit Court erred in its application of settled law, engaged in an unsustainable exercise of discretion where the law governing that discretion is settled, and reached an outcome unsupported by the record. The Petitioner respectfully submits that a published opinion be issued, fully reversing the Circuit Court and directing that summary judgment be entered in favor of the Petitioner.

STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *State Farm Fire & Cas. Co. v. Nathaniel Realty*, 246 W. Va. 676, 874 S.E.2d 788 (2022) (citations omitted). The denial of a summary judgment motion is reviewed under the same *de novo* standard. Syl. pt. 1, *Smith v. Chestnut Ridge Storage, LLC*, 244 W. Va. 541, 855 S.E.2d 332 (2021) (citations omitted).

ARGUMENT

The 1905 Deed's terms are clear. The mineral interest conveyance is limited to "the term of 25 years from the date hereof and so long as oil or gas may be produced in paying quantities." There is no ambiguity in this instrument. The contrary position adopted by the Respondent and the Court below is internally inconsistent and requires the Court to read out portions of the deed. This flies in the face of longstanding principles of contract interpretation and risks creating a dangerous precedent across a variety of contract-related matters.

The reviewing court's task in interpreting a written instrument is not to divine what that court thinks the parties *meant to* say but rather to give effect to what the parties *did* say. Accordingly, the Circuit Court erred. Respectfully, this Court must reverse the decision granting summary judgment in favor of the Respondent and direct judgment in favor of the Petitioner.

Courts interpret deeds as a question of law. *Faith United Methodist Church & Cemetery of Terra Alta v. Morgan*, 231 W. Va. 423, 428, 745 S.E.2d 461, 466 (2013) (footnote omitted). "In construing a deed, will, or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever it is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith." Syl. pt. 1, *Maddy v. Maddy*, 87 W. Va. 581, 105 S.E. 803 (1921). "Each word in a contract is presumed to have a unique meaning and, thus,

no word or clause is to be treated as a redundancy, if any meaning reasonable and consistent with other parts can be given it." Syl. pt. 6, *Columbia Gas Transmission Corp. v. E.I. DuPont de Nemours & Co.*, 159 W. Va. 1, 217 S.E.2d 919 (1975).

In the recent *Severin* case, this Court affirmed these principles of deed interpretation, stating "that 'it is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.'" *Nicholson v. Severin POA Grp., LLC*, 895 S.E.2d 927, 292 (W. Va. App. 2023) (quoting *Faith United*, 231 W. Va. 423, 745 S.E.2d 461 at syl. pt. 7). The *Severin* case dealt with whether a reservation of "one-sixteenth of the oil and gas" meant one-half or whether it meant one-sixteenth, as the deed expressly stated. As this Court is aware, one-sixteenth is one-half of the customary one-eighth owner royalty and therefore, in some situations "'one-sixteenth' was often used synonymously with and was equal to 'one-half.'" *Id.* at 930. Despite the alleged shorthand meaning of one-sixteenth, this Court drew a clear distinction between cases where other language in the deed, or existing leases, revealed an intent for one-sixteenth to mean one-half, and the case before it where one-sixteenth was the only language utilized by the parties to specify quantity. *Id.* at 930-931. This Court therefore affirmed the longstanding and well-reasoned law that, "'where a writing is free from ambiguity, it must speak for itself[,]'" and accordingly the phrase "one-sixteenth" meant the fraction one-sixteenth. *Id.* at 929 (quoting *McCoy v. Ash*, 64 W. Va. 655, 657, 63 S.E. 361, 362 (1908)).

The unambiguous limitation in the 1905 Deed is not unusual in mineral deeds, particularly when an identified lease is present and when the parties wish to share in the profits from the shortly anticipated production. The Supreme Court of Appeals has applied similar language according to its bare terms. In *Cofield v. Antero Res. Corp.*, 2022 W. Va. LEXIS 442 (2022), a 1915 deed contained a reservation of the oil and gas "west of County road, and One half

. . . East of county road, for a period of twenty years. . . ." *Id.* at *2. Despite the fact that the twenty-year limitation expired in 1935, taxes on a portion of the reserved minerals "west of county road" were paid through 1992. The Petitioners in *Cofield* were the tax sale successors to this interest and argued that the twenty-year limitation applied only to the "east of county road" property. *Id.* at *2-4. The Supreme Court of Appeals, applying the same principles guiding this Court in *Severin*, affirmed the lower court's decision that the language was "plain and unambiguous" and that the limitation applied to both tracts. The Supreme Court of Appeals affirmed the dismissal of the petitioner's claim to title, as the twenty years had expired. *Id.* at * 4.

In the case before this Court, the language is remarkably simple. At issue are essentially two sentences. The Court can only give effect to both sentences if it rejects the lower court's interpretation. There is the additional consideration term: "If the first well drilled on said premises produces ____ barrels per day, for thirty consecutive days after its completion, grantee agrees to pay grantor the sum of _____ Dollars additional for this grant and conveyance." By its clear and unambiguous terms, the additional consideration is triggered if, and only if, the first well to be drilled on the property produces a certain quantum of oil after its completion. The next and imperative sentence reads, "For the term of 25 years from the date hereof or so long thereafter as oil or gas may be produced in paying quantities." If this sentence is read as limiting the conveyance in its entirety – according to its clear terms and as Petitioner requests – no revisions, excisions, substitutions, or edits are necessary to give effect to the entirety of the deed. If, however, this sentence is read as the Respondent requests, the Court cannot give effect to the preceding additional consideration term without performing surgery on the instrument to essentially read out "first well" or "paying quantities." That is, because we know the first well could only produce sufficient oil to trigger the additional payment provision if it also commences production in paying

quantities, the drilling of that *first* well could not take place at some remote time when production is maintained by production paying quantities.

As the 1905 Deed is *unambiguous*, no extrinsic evidence may be considered to alter its terms. And according to its clear terms, the interest conveyed expired and reverted the Petitioner's predecessors. To the extent that the Court below chose to look outside the four corners of the document and gleaned additional evidence, from the alleged prior option agreement or the subsequent tax history, these things do not dictate a different outcome. The option is irrelevant, as a contract of sale is merged into the deed and, in the event of a conflict between the two, the deed controls. *Harman v. Dry Fork Colliery Co.*, 80 W. Va. 780, 94 S.E. 355 (1917). The parties were free to change the terms of the deal, which they undoubtedly did – conveying "oil and gas" and not merely "royalty," adding an additional consideration provision based on production from the first well, *and* limiting the grant to 25 years or the cessation of profitable production.

The subsequent taxation of the Severed Interest beyond 1930 is no more persuasive. According to Respondent's Complaint, and it is not disputed, the Severed Interest first went delinquent for 1927. PA 012. That ticket was in the name of four individuals, all of whom were presumably provided notice and none of whom redeemed it, resulting in its sale in 1932, two years after the earlier potential expiration date in the 1905 Deed. *Id.* Was this because the interest no longer had value to the owners? We do not know. We also do not know precisely when, between 1905 and the present leases, production ceased "in paying quantities." We do know that: (1) the grantors in the 1905 Deed (owners of the surface and Surface Interest) sold their interest in the Subject Lands in 1922; (2) the grantees (owners of the Severed Interest) took no action with respect to the Severed Interest after the payment of the 1926 taxes; and (3) as of 1932, none of the original parties to the 1905 Deed retained an interest in the Subject Lands. The actions of their successors cannot be said to meaningfully inform the intent of the parties to that instrument in any way.

Further, this Court is undoubtedly aware, and the *L & D* and *Cofield* cases illustrate, it is not uncommon for erroneous or expired interests to remain on the books and paid for years or decades.

CONCLUSION

In conclusion, the 1905 Deed by its clear terms contains a time limitation for a period of 25 years or the cessation of profitable production, whichever occurs last. Because the Petitioner's proffered interpretation is the only one that allows the Court to give effect to the instrument in its entirety, this Court must reverse the Circuit Court and direct the entry of summary judgment in favor of the Petitioner.

Dated this 20th day of May, 2024.

/s/ Edmund L. Wagoner

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May, 2024, I filed a true and exact copy of the foregoing "Petitioner's Opening Brief" with the Intermediate Court of Appeals of West Virginia using the electronic filing system, which will send notification of such filing to counsel of record as follows:

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