IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Case No. 24-ICA-34

ESTATE OF JAMES L. SINE,

Petitioner, Counterclaim Plaintiff Below

v.

RICHARD L. ARMSTRONG

Respondent, Counterclaim Defendant Below

RESPONDENT'S BRIEF

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

Brian R. Swiger (WVSB #5872)
Jonathan R. Marshall (WVSB #10580)
John A. Budig (WVSB #13594)
Denali S. Hedrick (WVSB #14066)
Bailey & Glasser, LLP
209 Capitol Street
Charleston, West Virginia 25301
Telephone: (304) 345-6555
Fax: (304) 342-1110
bswiger@baileyglasser.com
jmarshall@baileyglasser.com
jbudig@baileyglasser.com
dhedrick@baileyglasser.com

William E. Ford III (WVSB #1246)
Ford Law Office
P.O. Box 231
Hobe Sound, Florida 33455

Counsel for Respondent, Counterclaim Defendant Below, Richard L. Armstrong

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

II. SUMMARY OF ARGUMENT 4

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 5

IV. ARGUMENT 5

A. The Trial Court Correctly Ruled that the Unambiguous Language in the 1905 Deed Conveyed the One-Half Oil and Gas Interest with No Temporal Limitation and that Any Reversionary Clause Modified Only an Ineffective Clause for Additional Compensation. 5

B. The Trial Court Properly Granted Mr. Armstrong's Motion for Summary Judgment Because Even If the 1905 Deed Language is Ambiguous, Extrinsic Evidence Shows that the Interest Conveyed Was Not Subject to Any Temporal Limitation or Reversionary Clause 11

V. CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Cofield v. Antero Res. Corp.,
No. 21-0164, 2022 WL 1715170 (W. Va. May 27, 2022).....10

Collingwood Appalachian Mins. III, LLC v. Erlewine,
248 W. Va. 615, 889 S.E.2d 697 (2023).....8, 9

Gastar Expl. Inc. v. Rine,
239 W. Va. 792, 806 S.E.2d 448 (2017).....5, 6, 12, 14

Goodwin v. Wright,
163 W. Va. 264, 255 S.E.2d 924 (1979).....11

Hall v. Hartley,
146 W. Va. 328, 119 S.E.2d 759 (1961).....6

McCullough Oil, Inc. v. Rezek,
176 W. Va. 638, 346 S.E.2d 788 (1986).....8

Nicholson v. Severin POA Group., LLC,
249 W. Va. 458, 895 S.E.2d 927 (W. Va. Ct. App. 2023).....10

Realty Sec. & Disc. Co. v. Nat'l Rubber & Leather Co.,
122 W. Va. 21, 7 S.E.2d 49 (1940).....7

Rules

W. Va. R. App. P. 18 5

W. Va. R. App. P. 20(a).....5

W. Va. R. App. P. 22 5

I. STATEMENT OF THE CASE

This case involves a dispute between Respondent and Counterclaim Defendant below, Richard Armstrong, ("Mr. Armstrong") and Petitioner and Counterclaim Plaintiff below, the Estate of James L. Sine ("the Estate"), as to the ownership of an undivided one-half interest in the oil and gas in and under a tract of land in Tyler County, West Virginia. The pertinent chain of title and the material facts of the case are not in dispute. Mr. Armstrong draws the Court's attention to only the facts and chain of title pertinent to his rebuttal of the assignments of error the Estate raised in its Brief.

On April 27, 1895, R.K. Eberhart and his wife, Elizabeth Eberhart, leased to the Fisher Oil Company their interest in "all the oil and gas" under 83 acres of property, which included the one-half interest at issue. PA 074–76 (the "Fisher Oil Lease"). The Fisher Oil Lease was "for the purpose of operating thereon for said oil and gas," PA 074, "for the term of three years from the date hereof and as much longer as oil or gas is found in paying quantities thereon not exceeding in the whole the term of twenty-five years. . . ." PA 075.

On March 18, 1905, Hugh B. Kane paid $500 to grantors R.K. and Elizabeth Eberhart, for grantors to "convey unto Hugh B. Kane for the period of fifteen days" the option "to hold . . . one half of said Royalty *in perpetuity* the one half part of his royalty of all the oil and gas in and under" a thirty-acre tract of property (the "Option Contract"). PA 078. This 30-acre tract was part of the 83 acres the Eberharts leased to the Fisher Oil Company. *Id.*

On April 1, 1905, fewer than fifteen days after the execution of the Option Contract, the Eberharts as grantors conveyed to grantees Hugh B. Kane, E.L. Carson, and Frank Webster "the undivided one-half of the oil and gas in and under" the same 30-acre tract of the property described in the Option Contract, in consideration of $1,000. PA 078. This deed (the "1905 Deed") created

the severed one-half oil and gas interest at issue. The body of the 1905 Deed is reproduced in its entirety below:

THIS AGREEMENT, Made this First day April, 1905, between R. K. Eberhart and Elizabeth Eberhart his wife of the first part, hereinafter called grantors and Hugh B. Kane and E. L. Carson & Frank Wester of the second part, hereinafter called grantees

WITNESSETH: That grantors in consideration of One Thousand Dollars, the receipt whereof is hereby acknowledged, hereby grants and conveys, with covenants of general warranty unto grantees, their heirs, personal representatives and assigns, the undivided one-half of the oil and gas in and under the following tract of land in Meade District, Tyler County, W. Va., containing Thirty acres, more or less and bounded as follows:

On the North by lands of Public Road
On the East by lands of E. B. Long
On the South by lands of Snodgrass Brothers
On the West by lands of S. E. Eberhart

SUBJECT Only to any valid existing lease for oil and gas purposes, hereby granting to grantees the one-half (½) part of the royalty and rents reserved under such lease while the same remains in force.

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. For the term of 25 years from the date hereof or so long thereafter as oil or gas may be produced in paying quantities.

PA 078–79.

The severed one-half interest in the oil and gas the 1905 Deed created has since been the subject of two tax sales in Tyler County, West Virginia.

First, on October 15, 1932, Kahle Long bought the severed one-half interest in the royalties in oil and gas at a tax sale by the Commissioner of School Lands for Tyler County, West Virginia. PA 083. Taxes were assessed on this tract in Kahle Long's name from 1932 until 1974, and on June 26, 1974, Kahle died and left his remaining property interests to his wife, Eleanor Long. PA 087. Taxes were assessed on the mineral interest in Eleanor Long's name from 1975 until 2006, when Eleanor Long died, leaving no heirs. PA 147.

Second, on November 12, 2008, as recorded by deed on April 1, 2010, the Clerk of the County Commission of Tyler County sold the severed one-half interest in the oil and gas for nonpayment of 2007 taxes to Mr. Armstrong's mother, Peggy Armstrong. PA 089–91. Mr. Armstrong inherited the interest thereafter through his parents' wills. PA 093–94.

Mr. Armstrong brought this declaratory judgment action on December 10, 2020, when former Defendants, JB Exploration I, LLC ("JB"), and Antero Resources Corporation ("Antero") began paying to James L. Sine oil and gas royalties pursuant to certain mineral interests, which Mr. Armstrong believed were rightfully due to him. PA 001. Almost three years later, the Estate filed a motion for leave to file a declaratory judgment counterclaim and cross-claim, pursuant to the same argument it makes in the instant appeal: that based on the last sentence in the fifth paragraph of the 1905 Deed, it owns the one-half oil and gas interest at issue. PA 005. After voluntary dismissal of JB, Antero, and Mr. Armstrong's initial claims, the Estate's counterclaim was the only issue left to resolve.

The parties filed cross motions for summary judgment on the Estate's counterclaim, and the trial court held a hearing on the motions. PA 118–41. At the hearing, the trial court agreed with Mr. Armstrong's position that the final sentence in the 1905 Deed modified only the sentence immediately before it in the same paragraph. The trial court observed that this paragraph operates within the Deed as "a clause that says, 'In the event that this [well] really takes off, [grantees] want to give [grantors] more money,'" and "'Your additional compensation, grantor, is that we're willing to pay more monies *in this amount of time* [] in the event this thing was a real great producer.'" PA 134:9–22; PA 135:12–18 (emphasis supplied); PA 136:1.

The trial court found for Mr. Armstrong at the hearing based on the unambiguous language of the 1905 Deed, and by written order granted Mr. Armstrong's motion for summary judgment

on the Estate's counterclaim and denied the Estate's motion. *See* PA 139:19–24; PA 161–73. The Estate's appeal followed.

II. SUMMARY OF ARGUMENT

The trial court below correctly ruled that based on the overall construction and unambiguous language of the 1905 Deed, the two-sentence fifth paragraph—which provides for additional consideration to the grantor in the event that a certain amount of oil and gas is produced from the first well on the property—is self-containing, in that the second sentence reversionary clause modifies only the first sentence in the same paragraph, not the 1905 Deed as a whole. The first sentence of the fifth paragraph is an ineffective clause providing for an unknown sum of additional consideration to the grantor in the event that an unknown amount of oil and gas was produced from the first well on the property. The parties' unexpressed intent in the fifth paragraph of the otherwise unambiguous 1905 Deed renders the reversionary clause in the same paragraph similarly ineffective. Because the Estate's argument ignores both the plain and unambiguous language in the granting clause of the Deed and the construction of the deed as a whole, this Court should affirm the ruling of the trial court.

In the alternative, if this Court finds that the Deed language is ambiguous or susceptible to more than one reasonable interpretation, the Court must consider extrinsic evidence in the light most favorable to the grantees—Mr. Armstrong's predecessors in interest—to ascertain the parties' intent. Here, evidence of the 1895 Fisher Oil Lease, the prior Option Contract to buy the interest at issue, and the conduct of the parties and their successors in interest in the 119 years after delivery of the 1905 Deed makes clear that any alleged reversionary clause in the Deed should not be read to limit the conveyance in the second paragraph, as the Estate argues. In the century since the conveyance, the parties to the 1905 Deed, their successors in interest, and the State of West Virginia have all treated the instrument as having no possibility of reversion, which culminates in

Mr. Armstrong's ownership of the one-half undivided interest in the oil and gas interest at issue. Because there are no questions of material fact extant, this Court may consider the evidence in the record and should deny the Estate's argument for its ownership of the oil and gas interest at issue based on the same.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court should hear oral argument under West Virginia Rules of Appellate Procedure 18 and 20(a) because oral argument will aid the decisional process. Moreover, this appeal involves issues of fundamental public importance regarding the ownership of real property in the State of West Virginia. The Court should issue a published opinion. W. Va. R. App. P. 22.

IV. ARGUMENT

A. The Trial Court Correctly Ruled that the Unambiguous Language in the 1905 Deed Conveyed the One-Half Oil and Gas Interest with No Temporal Limitation and that Any Reversionary Clause Modified Only an Ineffective Clause for Additional Compensation.

This Court reviews "a circuit court's summary judgment order *de novo*." *Gastar Expl. Inc. v. Rine*, 239 W. Va. 792, 798, 806 S.E.2d 448, 454 (2017) (citing Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)). "In construing a deed . . . 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 that is reasonably clear and free from doubt. . . ." *Gastar*, 239 W. Va. at 799, 806 S.E.2d at 455 (quoting Syl. Pt. 1, *Maddy v. Maddy,* 87 W.Va. 581, 105 S.E. 803 (1921)). The polar star that should guide the Court in construing the deed is the discernible intention of the parties making the instrument. *Gastar*, 239 W. Va. at 798, 806 S.E.2d at 454. "When a deed expresses the intent of the parties in clear and unambiguous language, a court will apply that language without resort to rules of interpretation or extrinsic evidence." *Id.* at 798–99, 806 S.E.2d at 454–55. "The

mere fact that parties do not agree to the construction of a deed does not alone render it ambiguous." *Id.* at 799, 806 S.E.2d at 455.

"Whether a deed is ambiguous is a question of law to be determined by the court." *Id.* "The term 'ambiguity' is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." *Id.* at Syl. Pt. 5, 806 S.E.2d 448 (quoting Syl. Pt. 4, *Estate of Tawney v. Columbia Nat. Res., L.L.C.*, 219 W. Va. 266, 633 S.E.2d 22 (2006)).

In ruling on the cross motions for summary judgment of the parties, the trial court found that the 1905 Deed was unambiguous. PA 171 at ¶ 66. While the Estate argues that the trial court failed to give any effect to the time limitation in the Deed, it is more accurate to say that the trial court did not give that clause the effect the Estate requested. Rather, based on the overall construction and language of the 1905 Deed, the trial court found that the temporal limitation or reversionary clause in the final sentence of the 1905 Deed modified only the sentence it immediately follows, thus providing a time limit for the grantees to pay the grantors additional money if the first well drilled on the property produced a certain number of barrels per day. *Id.* The trial court's construction of the Deed considers and gives meaning to each portion of the Deed and does not constitute error. *See Hall v. Hartley*, 146 W. Va. 328, 332, 119 S.E.2d 759, 762 (1961) ("[T]he very purpose of a proceeding under the Declaratory Judgment Act, such as is involved in the case at bar, is to have a court construe an instrument, such as the instrument involved in this case, and enter judgment upon the construction thereof, which is the law of the case.").

Based on the unambiguous language of the 1905 Deed and its construction as a whole, this Court should find the same. To aid this Court's *de novo* review of the meaning and effect of the

1905 Deed, Mr. Armstrong analyzes each section in turn below. Including the description of the property conveyed, the 1905 Deed contains five separate paragraphs.

The first paragraph explains that the grantors are R.K. and Elizabeth Eberhart and that the grantees are Hugh B. Kane, E.L. Carson, and Frank Webster. PA 078. These are the same grantors and grantees as listed in the Option Contract, and the grantees are the same individuals whose property interest was the subject of the 1932 tax sale.

The second paragraph, the granting clause, states that the "grantors in consideration of One Thousand Dollars… hereby grants and conveys, with covenants of general warranty unto grantees, their heirs, personal representatives, and assigns, *the undivided one-half of the oil and gas* in and under the following tract of land in Meade District, Tyler County, W. Va., containing Thirty acres, more or less. . . ." *Id.* (emphasis supplied). The third paragraph of the 1905 Deed describes the bounds of the property conveyed. PA 079. The 1905 Deed's language and effect in these paragraphs is clear: the grantors, in exchange for $1,000, intended to convey one-half of the oil and gas under the described tract to the grantees.

Although the Estate takes issue with the fact that the 1905 Deed apparently lacks a habendum clause, longstanding precedent in West Virginia is clear that "where the estate is clearly defined in the granting clause, the use of the habendum is not necessary." *Realty Sec. & Disc. Co. v. Nat'l Rubber & Leather Co.*, 122 W. Va. 21, 7 S.E.2d 49, 50 (1940). Given the specific language in the second paragraph granting clause, there is no ambiguity in the clearly defined estate that is the subject of the conveyance. The plain language of the deed operates as a severance of one-half of the interest in the oil and gas from the surface interest and remaining mineral interest, and there is no limitation in the conveyance of "the undivided one-half of the oil and gas." The expressed intent of the parties to the 1905 Deed reflects that the predecessors in interest to the Estate

conveyed one-half of their undivided oil and gas interest to grantees Hugh B. Kane, E.L. Carson, and Frank Wester, without a reversionary limitation. The Estate's reading and insistence that the final sentence in the Deed acts as a habendum clause essentially transform the 1905 Deed into a lease. *See McCullough Oil, Inc. v. Rezek*, 176 W. Va. 638, 644, 346 S.E.2d 788, 794 (1986).

The fourth paragraph of the 1905 Deed provides that the grantees are entitled to one-half of any royalties owed pursuant to any existing lease on the property, stating that the conveyance is "SUBJECT ***Only*** to any valid existing lease for oil and gas purposes, hereby granting to grantees the one-half (1/2) part of the royalty and rents reserved under such lease while the same remains in force." PA 079 (emphasis supplied). The operation of this paragraph is similarly clear: The conveyance in the second paragraph is limited only to the extent the grantors previously encumbered the tract with an oil and gas lease—e.g., the Fisher Oil Lease—and the grantees, as current owners of one-half of the oil and gas by virtue of the conveyance in the second paragraph, are now entitled to one-half of the royalties while said lease is in effect.

Dispositively, the parties to the 1905 Deed did not indicate that the conveyance in the second paragraph is subject to the temporal limitation in the fifth paragraph by including it in this limiting fourth paragraph, which reflects their intent that the fifth paragraph operate as a separate, self-contained provision for additional consideration. *See Collingwood Appalachian Mins. III, LLC v. Erlewine*, 248 W. Va. 615, 623, 889 S.E.2d 697, 705 (2023) (quoting Syl. Pt. 2, *Hall v. Hartley*, 146 W. Va. 328, 119 S.E.2d 759 (1961)) ("In order to create an exception or reservation in a deed which would reduce a grant in a conveyance clause which is clear, correct and conventional, such exception or reservation must be expressed in certain and definite language.").

The fifth and final paragraph of the 1905 Deed, upon which the Estate bases its argument, states:

> 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. 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. As evident on the face of the 1905 Deed, the parties did not fill in the blanks for either the amount of additional consideration the grantors were entitled to if the first well drilled on the premises produced, nor the amount of barrels the first well was required to produce before the grantors would be entitled to the additional consideration. In this way, the parties to the 1905 Deed did not fully express their intent for the operation of the fifth paragraph, rendering it ineffective. In other words, for this Court to give effect to the intention of the parties as is required when construing a deed, it should disregard operation of the incomplete fifth paragraph, in the same manner that the parties to the Deed apparently did in 1905.

While the parties to the 1905 Deed only partially expressed their intent in the fifth paragraph, as evidenced by the blanks in the first sentence, their intent is still discernible from the plain language and overall construction of the 1905 Deed. The first sentence of the fifth paragraph clearly states that if a producing well was drilled, the grantee will pay a certain unknown sum of *additional* consideration to the grantor for the conveyance of the undivided one-half interest in the oil and gas under the tract. The second sentence provides the timeframe for payment of the additional consideration and states that the possibility for additional consideration to be paid existed no longer than (1) twenty-five years after April 1, 1905, or (2) so long as oil and gas was produced in paying quantities from the property. Thus, the only temporal limitation or reversionary clause in the deed does not affect the one-half interest in the oil and gas rights conveyed in the

second paragraph, but rather provides the length of time for which any *additional consideration* would be due from the grantee to the grantor if the first well on the property produced oil and gas in paying quantities.

Contrarily, the Estate argues that the second sentence of the fifth paragraph limits the conveyance of "the undivided one-half of the oil and gas" in the second paragraph to the "term of twenty-five years or so long as oil or gas was produced in paying quantities" language located in the fifth paragraph. The Estate argues that because those terms have passed, the interest conveyed reverted to the grantors. The Estate's argument might hold water if the parties to the Deed had evidenced such an intent by instead placing the limiting language of the second sentence of the fifth paragraph into the second paragraph of the Deed or within the fourth paragraph. *See, e.g.*, *Cofield v. Antero Res. Corp.*, No. 21-0164, 2022 WL 1715170, at *1 (W. Va. May 27, 2022) (twenty-year limitation on conveyance placed in same sentence as granting clause). It would also make more sense to apply the final sentence to the Deed as a whole if the parties to the Deed made the final sentence into a separate paragraph. The parties to the 1905 Deed did neither. Instead, a plain reading of the fifth paragraph shows that the parties to the 1905 Deed intended for it to operate as a self-containing provision, separate from the conveyance made in the second paragraph, rendering any limiting provision inapplicable to the remainder of the Deed. This construction does not ignore or replace the clear language of the Deed, unlike the respondent's reading in *Nicholson v. Severin POA Group., LLC*, nor does it require the Court to excise portions of the Deed for the ruling to construe the entire instrument, as the Estate suggests. 249 W. Va. 458, 895 S.E.2d 927, 931 (W. Va. Ct. App. 2023).

The Estate further argues that the first well could not be drilled "at some remote time" when production was continuing in paying quantities because the first well is the well that

commences production. While the Estate is correct that the first well drilled on a tract of land is the well that *commences* production, merely commencing production does not mean that the well is producing a certain number of barrels per day, or that a property is producing oil or gas "in paying quantities," which signifies that production from an operation is yielding a profit above the costs of production. *See, e.g.*, *Goodwin v. Wright*, 163 W. Va. 264, 266, 255 S.E.2d 924, 926 n.1 (1979); PA 139:9–17. Given the construction of the fifth paragraph, the blank space in "produces __ barrels per day" would likely have expressed the parties' agreement as to what production "in paying quantities" would have meant for the first well drilled. This makes perfect sense: if the first well drilled on the property produced a certain number of barrels per day, for thirty consecutive days, the grantor would receive an additional sum of consideration from the grantee. The length of time provided for the well to produce a certain number of barrels per day, for thirty consecutive days, such that the grantor would be entitled to this additional sum, was either 25 years from the date of the agreement or so long as oil or gas is produced in paying quantities from the property conveyed. Indeed, the language "so long thereafter as oil or gas may be produced in paying quantities," is not clearly limited to production solely from the first well drilled.

Accordingly, the plain language of this clause defeats the Estate's argument: The fifth paragraph of the 1905 Deed operates to give the grantor additional consideration—for a limited period of time—rather than limiting the grant of the one-half interest of the oil and gas in the second paragraph to a specific timeframe.

B. The Trial Court Properly Granted Mr. Armstrong's Motion for Summary Judgment Because Even If the 1905 Deed Language is Ambiguous, Extrinsic Evidence Shows that the Interest Conveyed Was Not Subject to Any Temporal Limitation or Reversionary Clause.

Because the trial court found the Deed language unambiguous, it did not consider extrinsic evidence in its ruling. However, if this Court finds on its *de novo* review of the record that the

1905 Deed is inconsistent, confusing, or ambiguous on its face, this Court should find that extrinsic evidence supports Mr. Armstrong's reading of the 1905 Deed. Here, it is appropriate for this Court to consider extrinsic evidence and determine the effect of an ambiguous deed because no genuine dispute of material fact exists, as the parties agreed before the trial court, and because both parties asked for summary judgment in their favor as a matter of law. *See, e.g.*, *Gastar*, 239 W. Va. at 801, 806 S.E.2d at 457 (trial court found deed unambiguous, appellate court found deed ambiguous but interpreted deed because no issues of fact appeared within record).

When the Court finds that a deed is inconsistent, confusing, or ambiguous on its face, the Court "must look to extrinsic evidence of the parties' intent to construe the deed." *Id.*, 239 W. Va. at 799, 806 S.E.2d at 455. This evidence includes "the parties' conduct *before and after* delivery of the deed." *Id.* (emphasis in original). Critically, where there is ambiguity in a deed, "[a] court must also adopt any reasonable interpretation of the deed most favorable to the grantee." *Id.* at 795, 806 S.E.2d at 451.

The extrinsic evidence in this case—consisting of the Option Contract, the Fisher Oil Lease, the subsequent tax sales, and the decades of taxes paid on the severed mineral interest created by the 1905 Deed—makes clear that the temporal limitation or reversionary clause in the 1905 Deed's fifth paragraph was never intended or understood to apply to the conveyance in the second paragraph. Mr. Armstrong's interpretation of the Deed is reasonable on these facts.

First, the Option Contract entered into by the parties to the 1905 Deed suggests that the 1905 Deed was meant to convey the one-half interest in the oil and gas with no possibility of reverter. On *the same page in the Deed Book* where the 1905 Deed is recorded is an Option Contract between the same grantors and one of the grantees of the 1905 Deed to purchase one-half of the grantors' interest in the royalties of the same oil and gas underlying the same tract of land

as the 1905 Deed. This Option Contract states that the grantee, Hugh B. Kane, paid $500 to the grantors, the Eberharts, for the grantors to hold open for fifteen days the option to buy the one-half oil and gas interest and hold it "*in perpetuity*." PA 078 (emphasis supplied). The Option Contract was entered into on March 18, 1905, and the 1905 Deed was executed less than fifteen days later, on April 1, 1905. While the grantees ultimately purchased an undivided interest in one-half of the oil and gas under the property, rather than a royalty interest, it is unlikely that the parties to the Option Contract and the 1905 Deed intended the length of the grantees' ownership to change so substantially in the thirteen days between the entry of each instrument. This is especially true in consideration of the amount of money that the grantees paid pursuant to the Option Contract and the 1905 Deed: $1,500 in 1905 is the equivalent to over $53,000 in today's dollars. CPI Inflation Calculator, https://www.officialdata.org/us/inflation/1905?amount=1500 (last accessed July 3, 2024). It is again unlikely that the grantees would pay such a sum for an interest subject to reversion.

Second, the Fisher Oil Lease provides context and, likely, an explanation for the partially expressed intent of the grantors in the fifth paragraph of the 1905 Deed, as the Lease contains a habendum clause with almost the exact temporal limitation as the one the parties attempted to incorporate into the Deed. The habendum clause states that the duration of the Fisher Oil Lease was "for the term of three years from the date hereof and as much longer as oil or gas is found in paying quantities thereon not exceeding in the whole the term of twenty-five years from the date hereof." PA 075. Given that the fourth paragraph to the 1905 Deed was likely a direct acknowledgment of the Fisher Oil Lease, it makes sense that the parties might attempt to adopt the same temporal limitation from the oil and gas Lease to determine the temporal limitation for the

prospective additional consideration due to the grantor if the oil and gas Lease wound up producing at a certain rate per day.

Last, the parties' conduct after delivery of the 1905 Deed shows that the one-half oil and gas interest conveyed was not subject to the Estate's argued temporal limitation. Over 25 years after the 1905 Deed was delivered, presumably after the interest should have extinguished under the Estate's reading of the fifth paragraph, the severed one-half mineral interest was sold by the Commissioner of School Lands for Tyler County to Kahle Long at a tax sale in 1932. Kahle Long then paid taxes on the interest until his death in 1974, when the interest went to his wife, and she paid taxes on the interest until her death in 2006. Peggy Armstrong subsequently bought the interest at another tax sale by the Clerk of the Tyler County Commission in 2008, and the Armstrongs have paid taxes on the property since 2010. The Estate's argument would have this Court undo and declare invalid both the 1932 and the 2008 tax sales, and it would wrongfully and inequitably strip property from the lawful, taxpaying owners. *See Gastar*, 239 W. Va. at 801, 806 S.E.2d at 457 (evidence of one party's payment of taxes on property is evidence of that party's ownership of the property). Unlike the Estate's reading, Mr. Armstrong's reading of the fifth paragraph leaves these events in the chain of title rightfully undisturbed.

As the West Virginia Supreme Court of Appeals has unequivocally held, when interpreting ambiguous deeds to determine the intent of the grantor and the grantee, the Court must "adopt any reasonable interpretation of the deed most favorable to the grantee." *Gastar*, 239 W. Va. at 795, 806 S.E.2d at 451. Based on the record in this case, for over a century, every individual to read and interpret the 1905 Deed has given it the same meaning and effect as Mr. Armstrong—except for the Estate. Mr. Armstrong's interpretation of the 1905 Deed is both the interpretation most favorable to the grantee, in that it does not spring from the grantee the interest unequivocally

conveyed in the second paragraph, and a reasonable interpretation, considering the events in the chain of title supporting Mr. Armstrong's position.

Construing the above evidence in the light most favorable to the grantees of the 1905 Deed, who were Mr. Armstrong's predecessors in interest, the Court can reasonably and should find that the Estate's reading of fifth paragraph of the 1905 Deed is incorrect. Both the plain language of the 1905 Deed and the extrinsic evidence surrounding the conveyance and subsequent ownership of the one-half oil and gas interest conveyed provide that the interest was not subject to the reversionary clause as the Estate argues. Rather, that clause affects only the incomplete preceding sentence which provides for a sum of additional consideration to the grantor in the event that a certain amount of oil and gas is produced from the first well on the property and does not limit the conveyance as a whole.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the trial court which granted Mr. Armstrong's motion for summary judgment on the Estate's counterclaim and denied the Estate's cross motion for summary judgment.

Respectfully submitted this 5th day of July 2024.

/s/ Jonathan R. Marshall
Brian R. Swiger (WVSB #5872)
Jonathan R. Marshall (WVSB #10580)
John A. Budig (WVSB #13594)
Denali S. Hedrick (WVSB #14066)
Bailey & Glasser, LLP
209 Capitol Street
Charleston, West Virginia 25301
Telephone: (304) 345-6555
Fax: (304) 342-1110
dhedrick@baileyglasser.com
bswiger@baileyglasser.com
jmarshall@baileyglasser.com
jbudig@baileyglasser.com

William E. Ford III (WVSB #1246)
Ford Law Office
P.O. Box 231
Hobe Sound, Florida 33455

Counsel for Respondent, Counterclaim Defendant Below, Richard L. Armstrong

CERTIFICATE OF SERVICE

I, Jonathan R. Marshall, counsel for the Respondent, hereby certify that on the 5th day of July 2024, I filed the foregoing **Respondent's Brief** via the File and ServeXpress system upon the following counsel of record:

Edmund L. Wagoner (WVSB #10605)
Matthew B. Hansberry (WVSB #10128)
Hansberry & Wagoner, PLLC
265 High Street, 3rd Floor
Morgantown, WV 26505
Tel: (304) 470-2056
Fax: (304) 470-2057
Email: eddie@hanswag.com
Email: matt@hanswag.com
Counsel for Petitioner

/s/ Jonathan R. Marshall
Jonathan R. Marshall (WVSB #10580)