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 REPLY BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

I. BRIEF STATEMENT OF FACTS

This case involves a declaration of the ownership of oil and gas underlying 32.395 acres in Meade District, Tyler County, West Virginia (the "Subject Lands"). PA 144. At issue in the Court below was the effect of a 1905 deed, from R. K. Eberhart to Hugh B. Kane *et al.*, recorded in Deed Book 90 at Page 561 (the "1905 Deed"). PA 146. The 1905 Deed conveyed "one-half of the oil and gas underlying" the Subject Lands and ended with a sentence 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." PA 078-079. The time limit in the 1905 Deed is preceded by an incomplete additional consideration provision reading, "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." *Id.*

The issue on appeal is the effect of the time limitation in the final sentence of the 1905 Deed. The Court below decided the issue on summary judgment under West Virginia Rule of Civil Procedure 56. In their briefs below, both parties agreed the deed was *unambiguous*. PA 100, 109, 115. The Petitioner argued the 1905 Deed was unambiguous and the time limit applied to the conveyance of one-half of the oil and gas. PA 100. The Respondent disagreed, arguing the Petitioner's position is "a contrived reading of a provision in an unambiguous deed" and thus the time limit did not limit the grant. PA 115. The Court below agreed that the 1905 Deed was unambiguous and adopted the Respondent's construction. PA171.

II. ARGUMENT

A. This Deed Can Only Be Read, *in Its Entirety,* in the Manner Advocated by the Petitioner.

It is undisputed that the 1905 Deed grants one-half of the oil and gas and ends with the following sentence: "For the term of 25 years from the date hereof or so long thereafter as oil

or gas may be produced in paying quantities." The Respondent provides a number of rationales as to why this Court can ignore this provision. None are persuasive.

1. The Time Limit in the 1905 Deed Cannot Modify *Only* the Additional Consideration Provision.

The Respondent argues that the 25 year/paying quantities provision modifies only the preceding sentence, which is an incomplete additional consideration provision reading, "If the first well drilled on the 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." This provision contains two key qualifiers – "*first*" and "*after completion*" – both making it clear that the time limit could not apply to the additional consideration provision only.

The only well that could trigger additional compensation was the first well drilled. The only way that the first well could trigger that additional compensation is if it were a "gusher" for thirty consecutive days *after completion*. If the first well drilled produced extraordinary results sufficient to trigger additional compensation, it would necessarily produce in paying quantities. It is therefore an absolute impossibility that the *first* well completed could be a gusher in its first thirty days at some remote time when production, due to other wells somehow predating the *first* well, continued in paying quantities.

The Respondent attempts to get around the obvious by ignoring the "first" and "after completion" language and by arguing that the thirty days of extraordinary production could occur at some remote time. In so doing, the Respondent reads away "first", as discussed above, and interprets "after completion" in a way that completely casts aside the practical realities of oil and gas production. It is so well known that this Court may take judicial notice of the fact that flush production is the best production and that a well's production declines over time with such predictability that it has a name, the decline curve. There is no feasible way that the *first* well

would not hit the specified quantum of production initially but would do so at year 24. Moreover, if the parties intended for the thirty days to be "at any time" prior to the expiration of 25 years or the cessation of production, why include the phrase "after completion"? Completion simply means the well is now producing. The obvious intent was to specify that, if the first well drilled proves to be very profitable initially, additional money is owed. It makes no sense to think that the parties would track down each other, or their successors, heirs, or assigns, 25 – or potentially many more – years later to exchange a few shekels.

The law is clear that "'[n]o word or clause in a contract is to be treated as a redundancy, if any meaning reasonable and consistent with other parts can be given to it.'" *Antero Res. Corp. v. Directional One Servs. Inc. USA,* 246 W. Va. 301, 311, 873 S.E.2d 832, 842 (2022)(quoting *Carnegie Nat. Gas Co. v. South Penn Oil Co.*, 56 W. Va. 402, 49 S.E. 548 (1904)). The time limit contained in the 1905 Deed cannot be given any effect if it is read as the Respondent argues and as the Court below adopted. Reading the provision as such effectively deletes the provision entirely. Accordingly, the time limit must be read as limiting the grant in the 1905 Deed to a period of 25 years or so long as oil or gas are produced in paying quantities.

2. There Is No Valid Reason to Ignore the Time Limit in the 1905 Deed.

The Respondent argues this Court should "disregard operation of the incomplete fifth paragraph, in the same manner that the parties to the Deed apparently did in 1905." (Resp't Br. at p. 9.) The Respondent points to essentially three rationales for doing so: (1) the preceding additional consideration provision is incomplete; (2) the time limit appears at the end of the document and not in a separate paragraph; and (3) reading the deed as the Petitioner contends renders it a lease. All three of the Respondent's rationales are flawed and invalid.

"In construing a contract, 'force and effect must be given to every word, phrase and clause employed, if possible.'" *Columbia Gas Transmission Corp. v. E.I. DuPont de Nemours & Co.*, 159 W. Va. 1, 14, 217 S.E.2d 919, 927 (1975) (quoting *Henderson Dev. Co. v. United Fuel Gas Co.,* 121 W. Va. 284, 3 S.E.2d 217 (1939)). "No word or clause in a contract is to be treated as a redundancy, if any meaning reasonable and consistent with the other parts can be given to it." *Carnegie Natural Gas. Co. v. South Penn Oil Co.*, 56 W. Va. 402, 49 S.E. 548 (1904). We do not know how or why the additional consideration amounts were not completed. That matter is of no consequence. We do know that the parties chose *not* to strike or omit the time limit. This Court must give effect to all of the words used, in all of the sentences that the parties did complete, in the 1905 Deed. This includes the time limit.

The time limit's location, at the end of the document and not in a separate paragraph, is no more persuasive. The law is clear that a later provision in a deed that is not repugnant to the grant can define or limit the estate granted. *See Lott v. Braham*, 92 W. Va. 317, 116 S.E. 513 (1922) (general warranty grant without mention of estate qualified by habendum as life estate). As to the inclusion in a paragraph with the additional consideration clause, there is nothing to be gleaned from this fact. As the Court is aware, in 1905, deeds were recorded by hand into the record books by a deputy clerk. We presume the clerk copied the spacing and punctuation used in the original, but we have no way of knowing. We do know that the parties included the time limit language and that it can only be given effect by reading it as qualifying the grant.

The fact that the 1905 Deed shares similarities with an oil and gas lease likewise does not bolster the Respondent's positions. A lease "with the right to remove all the oil . . . in consideration of [lessee] giving the lessors a certain *per centum* thereof, is in legal effect a sale of a portion of the land. . . ." *Wilson v. Youst*, 43 W. Va. 826, 839, 28 S.E. 781, 787 (1897). Such a

lease is both a "contract" and a "conveyance" of realty. *EQT Prod. Co. v. Antero Res. Corp.,* 244 W. Va. 15, 18, 851 S.E.2d 94, 98 (2020). A "clause in an oil and gas lease (or other mineral lease) providing for a short primary term and a secondary term for 'so long as' production in paying quantities or operations therefor continue . . . conveys a 'determinable' interest. . . ." *McCullough Oil v. Rezek*, 176 W. Va. 638, 644, 346 S.E.2d 788, 794 (1986). Such an interest automatically terminates by its own terms upon the occurrence of the stated event, namely . . . the cessation of production. . . ." *Id.* It is clear that an oil and gas lease *is* a determinable conveyance of the oil and gas. The deed in the present case – a deed which explicitly references such a lease and is obviously intended to share the profits ("the royalty and rents") from that lease – is also a determinable conveyance of the oil and gas. This fact does not abrogate the conclusion that the parties intended "25 years . . . or so long thereafter as oil or gas may be produced in paying quantities" to mean what it says. It rather supports such a conclusion.

B. Extrinsic Evidence Is Unnecessary and Improper to Adjudicate This Case.

In his briefs below, the Respondent agreed that the 1905 Deed was unambiguous and could be construed according to its terms. PA 066, 109, 115. The Respondent did argue alternatively in his brief below that, if the 1905 Deed was determined to be ambiguous, extrinsic evidence bolstered its contention, but that position was abandoned at the hearing and not relevant to the Circuit Court's decision below. PA 142-143. The Respondent has subsequently attempted to direct this Court to extrinsic evidence. Extrinsic evidence is improper here; moreover, the extrinsic evidence proffered by the Respondent is entirely unpersuasive.

"Extrinsic evidence will not be admitted to explain or alter the terms of a written contract which is clear and unambiguous." Syl. pt. 6, *Faith United Methodist Church v. Morgan*, 231 W. Va. 423, 745 S.E.2d 461 (2013). As discussed above, the 1905 Deed is unambiguous and

must be construed as the Petitioner contends. It is therefore improper to consider anything outside of the four corners of the document.

In his summary judgment brief below, the Respondent stated that the deed is "unambiguous in that the grantor intended to convey one half of the oil and gas in place to the grantee, and there was no temporal limit on this conveyance." PA 066. Further, he argued that the "Deed's language is clear" and "[t]here can be no other reasonable interpretation. . . ." PA 067. In his response to the Petitioner's motion for summary judgment, he argued similarly. PA 109, 115.

At the hearing on this matter, the Respondent's counsel doubled down on the Respondent's position that this was an *unambiguous* deed. At the hearing below, the Circuit Court indicated that it agreed with the Respondent's reading of the 1905 Deed and that the time limit applied only to "the additional consideration in the event that this thing really was a gusher. . . ." PA 140. The Circuit Court then invited the Petitioner's counsel to place any additional argument or objections on the record, at which point the following discussion occurred:

> Mr. Wagoner [Counsel for Petitioner]: Just to be clear, I just - - so I don't have to put anything else on the record, the ruling today is based entirely on the four corners of the document. You're not looking at the option or the - - the subsequent tax treatment or any of that.
>
> The Court: No, I'm reading the document.
>
> Mr. Wagoner: Okay. And that's what the order will reflect?
>
> Ms. Hedrick [Counsel for Respondent]: Yes.
>
> The Court: Yes.
>
> Mr. Wagoner: Fair enough.
>
> The Court: And I think - - in both your briefs, I think it indicates that, you know, what the judge is supposed to do here is interpret this deed, and I looked at the - - I looked at this deed and did my

> best in trying to reconcile the less than optimal drafting of this instrument . . . .

PA 139-140. The Respondent then prepared a proposed order referencing extrinsic evidence and legal conclusions (*see*, *e.g.*, paragraphs 17 and 68 of the proposed order below, referring to a 1968 Deed and the remaining chain of title; *see also* paragraphs 43 through 45 of the proposed order below, referencing legal principles regarding extrinsic evidence and ambiguity in a deed) that the Respondent's counsel agreed would not be included in the Order and that the Court agreed it had not considered. PA 147-155. The Petitioner filed an objection to the Respondent's proposed order. PA 157-160. As addressed in the objection, "[t]o the extent that any other documents in the respective chains of title are susceptible of different meanings, those meanings were not placed at issue before the Court. . . ." PA 157. As also addressed in the objection, "[t]he Court specifically indicated at the hearing that its decision was based upon the four corners of the document and not extrinsic evidence" and "[i]t is therefore improper to suggest in the Order that the Court relied on extrinsic evidence." PA 158. The Circuit Court entered the Order as written, which included the conclusion that "[t]he Court does not find the 1905 Deed or this provision ambiguous." PA 171.

The Respondent, in his brief to this Court, again attempts to introduce extrinsic evidence not developed below or relied upon by the trial court for its ultimate conclusion. The Respondent specifically directs this Court to the "option" and subsequent tax treatment that the Circuit Court stated were not a part of its decision. (Resp't Br. at pp. 1-3.) The Respondent's conduct and argument are improper.

The "general rule is that when a nonjurisdictional question has not been decided at the trial court level, and is then first raised before [the appellate] Court, it will not be considered on appeal." *Klein v. McCullough*, 245 W. Va. 284, 291, 858 S.E.2d 909, 916 (citing Syl. pt. 2, *Sands v. Security Trust Co.,* 143 W. Va. 522, 102 S.E.2d 733 (1958)). "The reasons behind this

rule are many, including that 'it is manifestly unfair for a party to raise new issues on appeal'" and that "'there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.'" *Klein*, 245 W. Va. at 291, 858 S.E.2d at 916 (quoting *Whitlow Bd. of Educ. of Kanawha Cty.*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993)). Here, the Circuit Court provided its ruling and the rationale behind such ruling at the hearing and in its Order. In doing so, the Circuit Court specifically acknowledged that the 1905 Deed was unambiguous and the option agreement and the subsequent tax history (*i.e.*, extrinsic evidence put forth now by the Respondent) did not factor into its decision. PA 139-140. The Respondent's counsel agreed. *Id.* It would be manifestly unfair for this Court to decide an appeal based on arguments and evidence that the Petitioner did not have an opportunity to develop below and that were not a part of the Circuit Court's decision.

> The Supreme Court of Appeals of West Virginia has held:
>
> > Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.

Syl. pt. 4, *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 241 W. Va. 335, 825 S.E.2d 95 (2019) (internal quotations and citation omitted). Judicial estoppel may be invoked *sua sponte* by the appellate court. *Id.* at 347, 825 S.E.2d at 107 n.18. Here, the Respondent is now taking a contrary position in this very action – that the deed is ambiguous – to that taken in their briefing and at oral argument below. The Respondent benefitted from the prior position by ensuring he received the ruling he originally requested – on the four corners of the document alone – and in so

doing harmed the Petitioner by denying him of the ability to develop the issue at hearing or at least place additional evidence or argument on the record. The Respondent is therefore estopped from asserting the ambiguity of the document and the need for resort to extrinsic evidence in this appeal.

Lastly, to the extent that this Court chooses to delve into the extrinsic evidence not relied upon below, that evidence is simply not persuasive. "A contract of sale is merged in a conveyance made in pursuance of it, and, if there is any conflict between the papers, the deed controls." Syl. pt. 3, *Harman v. Dry Fork Colliery Co.*, 80 W. Va. 780, 94 S.E. 355 (1917). This is so because parties can, and frequently do, change the specific terms of the deal between the two. Here, we know that the Parties to the 1905 Deed changed the interest granted, from "the one half part of his royalty" in the option and to one-half of the oil and gas in place in the deed. The option also makes no mention of the incomplete additional compensation or the time limit. The terms of the exchange evolved and the law is clear that the deed controls. The alleged option is simply irrelevant.

The subsequent tax treatment is no more persuasive. The jurisprudence of this state is replete with cases of erroneous tax tickets, tax payments, and tax sales, including those which the Respondent ultimately conceded, after three years of litigation, precluded his claims that initiated this lawsuit. PA 122-123; *see Orville Young, LLC v. Bonacci*, 246 W. Va. 26, 34, 866 S.E.2d 91, 99 (2021) (duplicate assessments of same owner's interest); *see also Wagner v. Beavers*, 85 W. Va. 631, 102 S.E. 668 (1920) (assessed as one-fourth but tax payer owned 100% of lot). Moreover, as the Respondent states in his Complaint, and it is not disputed, any interest he has comes through a 1932 tax deed for delinquent 1927 taxes. PA 012. It is likely no coincidence that the original grantees to the 1905 Deed stopped paying taxes shortly before the 25-year limit was set to expire, and did not redeem that interest shortly after that period had run. Regardless of their

intent, what is certain is that, after 1932, none of the original parties to the 1905 Deed – R. K. Eberhart (grantor) or Hugh B. Kane, E. L. Carson and Frank Wester (grantees) – owned any interest in the Subject Lands. The Court's task is to ascertain the intent of the parties to the 1905 Deed, not the lay opinions of non-parties. Any subsequent actions, by non-parties to the 1905 Deed, cannot meaningfully inform the intentions of the actual parties to that deed.

As discussed more fully above, this Court can and should decide this case based upon the four corners of the 1905 Deed. However, to the extent this Court determines that the 1905 Deed is ambiguous, this case should be remanded to the Circuit Court so that those issues can be fully and fairly developed and addressed below.

III. 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. The Petitioner's proffered interpretation is the only one that allows the Court to give effect to the 1905 Deed in its entirety. Accordingly, the Petitioner respectfully renews its request that this Court reverse the Circuit Court and direct the entry of summary judgment in favor of the Petitioner. Alternatively, as addressed above, if this Court determines that the 1905 Deed is ambiguous, then this case should be remanded to the Circuit Court for further development of the record in that respect.

Respectfully submitted this 25th day of July, 2024.

/s/ Edmund L. Wagoner

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CERTIFICATE OF FILING

I hereby certify that on the 25th day of July, 2024, I filed the foregoing "Reply Brief" using the File and ServeXpress system which will send notification of such filing to counsel of record as follows:

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