IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-752

SEVERIN POA GROUP, LLC,

Petitioner,

v.

EARL J. NICHOLSON and
JOYCE A. NICHOLSON

Respondents.

AMICUS CURIAE BRIEF
BY SHIBEN ESTATES, INC., A WEST VIRGINIA CORPORATION

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I. STATEMENT OF INTEREST

SEI is one of the larger holders of fee interests in oil, gas and minerals in the State of West Virginia. Collectively, SEI holds fee interests in oil, gas and minerals in tracts of land in the State of West Virginia underlying thousands of acres and across multiple counties, including, Marshall, Wetzel, Harrison, Tyler, Lewis, and Braxton counties. Said interests are conservatively valued at tens of millions of dollars. SEI is actively involved in the purchasing, selling, leasing, and/or development of oil, gas, and minerals within the State of West Virginia. The value of these interests may be significantly affected by the issues presented on this appeal. Although it is true that the value of the interests held by SEI may be significantly affected by the issues presented on this appeal, it is unclear what the amount of any significant effect might be. In order to determine the amount of the effect, it would be necessary to do title examinations of all SEI tracts, of which there are many.

Among many other tracts, SEI owns a substantial interest in a tract of land in Wetzel County generally known as the Samuel Efaw Tract, which contains approximately 60 acres. In addition to SEI, at least two of the "Mineral Owners" which have previously filed as *Amici Curiae* in the pending appeal, i.e. Country Roads Minerals, LLC ("Country Roads") and LaCore Agriculture, LLC ("LACORE") also own interests in the Samuel Efaw Tract. EQT Production Company (or related entities) is the common lessee of the Samuel Efaw Tract from SEI, Country Roads and LACORE in separate leases. Those three parties, SEI, Country Roads and LACORE, have become involved in a dispute with each other and with EQT Production Company ("Efaw Dispute"), which is not yet in litigation, as to whether, on the one hand, SEI owns 15/16^{ths} of the Samuel Efaw Tract oil and gas, and Country Roads and LACORE, and others correspondingly own parts or all of the remaining $1/16^{th}$, or, on the other hand, whether Country Roads and LACORE own parts of 1/2 of the oil and gas underlying the Samuel Efaw Tract and SEI correspondingly owns a 1/2 interest in the Samuel Efaw Tract also.

Having stated the nature of the dispute, it will no doubt be obvious to the Court that the *Amici Curiae* parties which have already been granted leave to file their *Amici* brief and SEI, which is now moving for leave to file its *Amicus* brief, all stand to gain or lose significantly from said Efaw dispute, depending on how the SCAWV rules on this appeal. If the SCAWV reverses the decision of the WV ICA, Country Roads and LACORE stand to benefit significantly and, correspondingly, SEI stands to lose significantly. On the other hand, if the SCAWV affirms the decision of the WV ICA, SEI stands to benefit significantly and correspondingly Country Roads and LACORE stand to lose significantly.

SEI knows of no other pending dispute between or among SEI and all or some of the *Amici* parties to the pending appeal, and SEI knows of no likely benefit or harm to it as a result of how the SCAWV may rule in the pending appeal, other than with respect to the Efaw dispute, and SEI knows of no likely harm or benefit to Country Roads or LACORE as a result of how the SCAWV may rule in the pending appeal other than with respect to the Efaw dispute.

II. ARGUMENT

A. West Virginia case law going back over 100 years has consistently held that the reservation of 1/16 of the oil and gas in place is just that and not a reservation of 1/2 of oil and gas in place.

Severin POA cites and discusses the West Virginia cases identified below from the early 1900s. None of them "plainly dictate" as contended by Severin POA Group, LLC ("Severin POA") that the 1902 Severin deed which literally reserved 1/16 of the oil and gas underlying the land really reserved a 1/2.

Kilcoyne v. Southern Oil Company, 61 W.Va. 538, 56 S.E. 888 (1907) ("Kilcoyne")

Severin POA recites that McDougal sold and conveyed to Conaway one-sixteenth of the oil underlying a parcel of land in Wetzel County in 1899, Severin POA then argues:

"Plainly the custom/prevailing understanding in 1899, as summarized by the Supreme Court, was that a reservation or conveyance of 1/16th operated as an effective reservation or conveyance of 1/2 of the oil and gas estate. "Petitioner's Brief at 9."

However, the *Kilcoyne* case stated a different conclusion as to what McDougal deeded to Conaway:

> "The conveyance from McDougal to Conaway passed to him a one-sixteenth of the oil and gas, whether in place or royalty is immaterial in the determination of the cause, which was not affected in any way by any of the subsequent conveyances or lease." 61 W.Va. 538, 540, 541, 56 S.E. 888.

After granting to Conaway 1/16th of the oil and gas within and underlying the land in 1899, and nothing more, McDougal signed a lease to C. L. Johnson in 1903 and then in 1904 granted a second 1/16th of the oil to Sartelle and "one-half of all gas royalties" that might be paid under the lease. Finally, McDougal sold in 1905 to Kilcoyne all of McDougal's right, title and interest in and to the oil and gas underlying the tract. The SCAWV, in *Kilcoyne,* held, as to the second grant of a 1/16th, of the oil and one-half of all gas royalties that:

As to the final right, title and interest conveyance to Kilcoyne, the SCAWV held that McDougal had already divested himself of ownership and therefore Kilcoyne got nothing.

The *Kilcoyne* case primarily addressed who was entitled to the royalties under the lease, but the *Kilcoyne* case did hold that the two grantees of 1/16th of the oil each got the 1/16th interests conveyed to them and Sartelle got one-half of the gas royalties, and there doesn't seem to be any suggestion that either got 1/2 of either oil or gas in place.[1]

McCoy v. Ash, 64 W.Va. 655, 63 S.E. 361 (1908) ("*Ash*")

Mr. and Mrs. Ash sold "one-sixteenth of all the oil and gas underlying all of a certain tract or parcel of land…" 64 W.Va. 655, 63 S.E. 361

As to *Ash*, Severin POA argues that:

> "…the West Virginia Supreme Court plainly noted that in the early 1900s in West Virginia, a statement in a deed of conveyance of 1/16th was a plain declaration that the parties were facilitating the sale of half of the underlying mineral asset, Id., 657 (stating that the evidence is plain that these parties were dealing for the sale of half of Ash's entire royalty." Petitioner's Brief at 10.

However, there's nothing in the *Ash* decision stating that a conveyance of one-sixteenth in the early 1900s was a "plain declaration that the parties were facilitating the sale of half of the underlying mineral asset." (emphasis added). Instead, what Judge Brannon stated in *Ash* was:

> "A dispute arose as to the right to one-half the royalty; that is one-sixteenth of the oil, coming from the well on the Little Gorrell tract." 64 W.Va. 655, 63 S.E. 361.

The dispute was not about the ownership of the oil in place, but rather about the right to half of the royalty, and of course, 1/2 of the then standard 1/8th royalty is 1/16th of the oil coming

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[1] Later, the SCAWV concluded in *Paxton v. Benedum-Trees Oil Co.*, 80 W.Va. 187, 94 S.E. 472 (1917) that *Kilcoyne*'s conclusion that "the purchaser of one-sixteenth of the oil in place was entitled to receive one-half of the royalties or one-sixteenth of the oil delivered to him in the pipe line…was not sound and is repudiated by the case of *Headley v. Hoopengarner*, 60 W.Va. 626, 55 S.E. 744, cited to support it" 80 W.Va. 187, 193, 94 S.E. 472, 474, 475. Regardless of what either of the purchasers of 1/16 interests were entitled to receive as royalty, the *Kilcoyne* case does not address whether either purchaser was entitled to a one-half of the oil in place.

from the well. Since the purchaser had been conveyed 1/16th of all the oil and gas underlying all of a certain tract, the decision in Ash, in effect says that if you are deeded 1/16th of the oil and gas in place, you own the right to 1/16th of the oil coming out of the well, assuming the royalty is 1/8th.

Horner v. Gas Co., 71 W.Va. 345, 76 S.E. 662 (1912) ("*Horner*")

Severin POA argues that:

> "In *Horner*, the Court was firm that the law in west Virginia in the relevant timeframe required the Court to look to the practical circumstance of the parties, and the events surrounding the transaction in delivering the true intent of the parties in an early 1900s deed transaction - an industry specific analysis which wholly aligns with the concept of the Estate Conception (Misconception) Theory and legacy of the 1/8th royalty, discussed below." Petitioner's Brief at 11.

Severin POA then offer 4 quotes from *Horner*, none of which say or suggest what is included in the Severin POA argument set out above. What Judge Brannon said in the 4th of the *Horner* quotes offered by Severin POA was preceded by the following, although the following is not included in the portion quoted by Severin POA:

> "We have thus far treated the case as shown by documents. But certain oral evidence was given going strongly to sustain the construction placed by the Philadelphia Company and the circuit court upon the deed… Is this evidence admissible to explain the Deed? It may be said that the deed is ambiguous." 71 W.Va 345, 349, 76 S.E. 662, 664.

Yes, oral evidence is admissible to explain an ambiguity and always has been in West Virginia and most states. However, none of the four quotes on Petitioner's Page 11 offers any support for Severin POA's argument quoted above about the law in the relevant timeframe requiring the court to look at practical circumstances of the parties in an early 1900s deed or doing an industry specific analysis. Where this argument came from is unclear.

The *Horner* case, in fact, says little or nothing at all about whether the grant or reservation of a 1/16th of all of the oil and gas conveys 1/2 of all of the oil and gas in place.

The 1899 grant in *Horner* was "all of the one-half of the royalty, being the one-sixteenth, of all the oil and one-half of all of the gas within the tract of 44½ acres." 71 W.Va. 345, 346, 76 S.E. 662. Mr. Horner took essentially the same position as Severin POA that the grant quoted above of "all of the one-half of the royalty, being the 1/16th, of all the oil and 1/2 of all the gas" gave to Horner and Sands "…one-half of the very oil and gas themselves in the earth, not a mere part of the oil when brought forth by development. The Philadelphia company which was operating for oil and gas on the property argued to the contrary.

In resolving the dispute, Judge Brannon noted that "the grant is 'one-half of the royalty'; that is the thing granted." 71 W.Va. 345, 348, 76 S.E. 662, 663. In other words, *Horner* does not deal with a grant or reservation of a 1/16th interest in all of the oil and gas in the ground. It deals with a grant of 1/2 of the royalty and, as a result, there's really nothing in the decision that tells us whether a reservation or grant of a 1/16th of the oil and gas in place actually conveys ½ of the oil and gas in place. It is just not a question addressed by this case.

What Judge Brannon held as to the meaning of "1/2 of the royalty" was that the grant by the Martins, "only intended to pass the half of what they were authorized to transfer, half of the royalty they had reserved, that is half of the eighth of the oil and half the $300.00 for each gas well". 71 W.Va 345, 348, 16 S.E. 662, 663. So, in other words, a grant of 1/2 of the royalty conveys "half the eighth of the oil and half of the $300.00 for each gas well". 71 W.Va. 345,348. All of this is correctly quoted by Severin POA in the first of their 4 quotes.

Judge Brannon held that Horner was wrong in asserting that he and his partner, Sands, owned "one-half of the very oil and gas themselves in the earth, not a mere part of the oil when brought forth by development." What Judge Brannon held was simply that a deed granting all of the 1/2 of the royalty, being at that time the 1/16th, conveys to the purchaser exactly that, "half of what they were authorized to transfer, half of the royalty they had reserved." 71 W.Va. 345, 348, 76 S.E. 662, 663. Judge Brannon also stated this:

> "Rent reserved does not imply right or title to take the oil or gas themselves, royalty reserved implies right to receive from another a return for the use of the land..." 71 W.Va. 345, 350, 76 S.E. 662, 664.

There is nothing in *Horner* which states that the conveyance or reservation of a 1/16th of all of the oil and gas in place equals a 1/2 interest in all of the oil and gas in place.

Lockhart v. United Fuel Gas Co., 105 W.Va. 69, 141 S.E. 521 (1928) ("Lockhart")

In footnote 9 to their brief, Severin POA argues:

> "The language of *Lockhart v. United Fuel Gas Co.*, 105 W.Va. 69, 141 S.E. 521 (1928) also supports Petitioner's position and the Circuit Court's ruling (in *Nicholson*), as such language indicates that the terms 1/16th and 1/2 were used interchangeably to commonly refer to 1/2 of the oil and gas estate." Petitioner's Brief at 12 (footnote 9).

To the contrary, however, the *Lockhart* decision does not support the Petitioner's position or the Circuit Court's ruling, as alleged, and the reason given for the alleged "support", i.e. that "such language indicates that the terms 1/16th and 1/2 were used interchangeably to commonly refer to 1/2 of the oil and gas estate" is not in the decision. The SCAWV in *Lockhart* noted that the deed contained this grant:

> "...a one undivided sixteenth interest in and to all the oil... as well as the one undivided half interest in and to the royalty reserved, or to be reserved, in any gas well that may be drilled on said tract of land, it being the true intention of the grantor herein to convey... one-half of the one-eighth of the oil reserved, or to be reserved, in any oil and gas lease... as well as the undivided half interest in to the royalty reserved, or to be reserved in any such lease, for each and every gas well to be drilled on said tract." 105 W.Va. 69, 70, 71, 141 S.E.521, 522.

The *Lockhart* SCAWV looked first at the initial part of the grant language and concluded that a grant of "one undivided sixteenth interest in and to all the oil under" said tract of land, standing alone, conveyed 1/16th of the oil in place. After granting 1/16th of the oil in place, the deed conveyed one-half of the royalty reserved in any gas well. From all of this SCAWV concluded:

> "Standing alone it seems plain that the grantors conveyed one-sixteenth of the oil in place: ...thus we have granted, so far, one-sixteenth of the oil and one-half of the gas each in place." 105 W.Va. 69, 72, 141 S.E. 521, 522.

In other words, the SCAWV recognized that this is not a case which draws the conclusion that Severin POA is asking the Court to draw. It does not conclude that the grant of a 1/16th of the oil in and under the land conveys a 1/2 interest in place. 105 W.Va. 69, 72, 141 S.E. 521, 522.

However, as quoted above, this particular granting clause did not "stand alone" but rather also contained language "explaining" the grant. The explanation given in the grant clause of the deed, as set forth in the last half of the above quote, was that the "true intention of the grantor" (was) to convey to the party of the second part the one-half of the one-eighth of the oil reserved or to be reserved..." 105 W.Va. 69, 70, 71, 141 S.E. 521. According to the SCAWV, the explanation given in the granting clause "enlarges" the original grant of an undivided one-sixteenth interest in the oil in the premises to a grant of one-half of the oil and gas royalties therein – in effect a grant of one-half of the oil and gas in place." 105 W.Va. 69, 74, 141 S.E. 521, 523. For our purposes, the key point is that, without any explanatory material, the grant of a 1/16th of the oil and gas in place is just exactly that and not a grant of 1/2 of the oil and gas in place, as Severin POA urges the Court to hold. However, the Court concluded that the explanatory material had the effect of enlarging the grant of 1/16th of the oil and gas in place to a grant of 1/2 of the oil and gas in place. The fact that the explanatory material had the effect of enlarging the 1/16th grant, in no way supports Severin POA's theory that a 1/16th grant of oil and gas in place is the same as a 1/2 grant of the oil and gas in place. There is nothing in the

Lockhart decision suggesting that "the terms 1/16th and 1/2 were used interchangeably to refer to 1/2 of the oil and gas estate.

Of course, there is no explanatory material in the deed under consideration on this appeal; rather, what was granted in the Nicholson deed was 1/16th of the oil and gas in place and "standing alone" a grant of 1/16th of the oil and gas in place means exactly that, nothing more, nothing less.

United Carbon Co. v. Presley, 126 W.Va. 636, 29 S.E.2d 466 (1944) ("Presley")

In *Presley* the deed in that case contained this reservation:

> "It is expressly understood that there is excepted and reserved from the operation of this conveyance and the same does not convey the one-half of the oil and gas royalty upon and as to said two tracts of land, containing 20 acres, more or less, and 38 acres, more or less, that is to say the said Shatto reserves the undivided one-sixteenth of the oil underlying said two small tracts of land;..." 126 W.Va. 636, 638, 29 S.E.2d 466, 467.

Thus, the issue in *Presley* involved a reservation of "one-half of the oil and gas royalty" but also contained explanatory language, apparently designed to better define what was meant by a reservation of "one-half of the oil and gas royalty." The explanation was: "that is to say the said Shatto reserves the undivided one-sixteenth of the oil and gas underlying said two small parcels of land." However, it should be obvious that the fact that the grantor in *Presley* chose to equate a reservation of 1/2 of the oil and gas royalty with 1/16th of the oil and gas underlying said two parcels of land in no way means that the law alone would draw that conclusion. The grantor in *Presley*, like grantors in all other deeds, was free to further define his/her reservation any way he chooses to do so, but that definition by the grantor in that one case is not binding on other parties in other deeds as a principle of law. There is nothing at all in the Presley case suggesting that the SCAWV has or should equate 1/2 of oil and gas royalty with 1/16th of the oil and gas underlying the land. The *Presley* grantor told the grantee, and any others reading the deed, that as far as that deed is concerned, the reservation of 1/2 oil and gas royalty is equivalent to a reservation of 1/16th of the oil and gas in place. However, the SCAWV concluded that the reservation of 1/2 of the oil and gas royalty in one clause and the reservation of an undivided 1/16th of the oil and gas underlying two parcels actually contained a "repugnancy between the two clauses." 126 W.Va. 636, 638, 639.

All that *Presley* holds is that a reservation of half of the royalty means that the grantor who made the reservation is entitled to 1/2 thereof, or more simply stated 1/2 equals 1/2.

Paxton v. Benedum-Trees Oil Co., 80 W.Va. 187, 94 S.E. 472 (1917) ("Paxton")

Severin POA mentions *Paxton*, but chooses not to rely on it. A fair reading of all of the West Virginia cases which have allegedly addressed the issue lead to the conclusion, we believe, that *Paxton* is the leading West Virginia case as to the issue now on appeal, i.e. whether the reservation or grant of a 1/16th of the oil and gas in place in the early 1900s constituted a reservation or conveyance of 1/2 of the oil and gas in place.

The lengthy granting clause in the *Paxton* deed stated:

> "Witnesseth, that the said parties of the first part in consideration of the respective amounts hereinafter provided for, the said parties of the first part do grant and convey unto the parties of the second part the 1/16th of all the oil and 1/2 of all of the gas within and underlying the several and respective tracts of land hereinafter described, including in this conveyance the 1/2 of all the royalties, incomes and rentals that may hereafter arise therefrom or accrue upon the real estate hereinafter described by virtue of any oil and gas lease, or leases now on said several tracts of land or which may hereafter be placed on the said several tracts of land or any of them..." 80 W.Va., 187, 189, 94 S.E. 472, 473.

The contention of the Paxtons with respect to the effect of the grant of 1/16th of all of the oil was that it conveyed to Kemper 1/16th of the oil and nothing more. The Paxtons further contended that having granted to Kemper 1/16th of the oil, they, the Paxtons, necessarily reserved, and did not convey, the remaining 15/16th of the royalty and that they (Paxtons) would be entitled to the royalty rate (1/8) applied to 15/16th of the ownership:

> "Paxton contended that the effect of that deed was to convey to Kemper one-sixteenth of the oil, he, Paxton, being entitled to 1/8th of 15/16th as royalty…" 80 W.Va. 187, 190, 94 S.E. 472, 474.

After discussion of many West Virginia cases and the arguments of the parties, the SCAWV adopted Paxton's arguments and rejected the arguments of Kemper and Benedum-Trees to the contrary.

Before so concluding the Court first identified the principal issue in the *Paxton* case, noting that the construction of a deed is based on the language in the deed itself and not language taken from subsequently executed documents such as the lease in *Paxton*:

> "The interest of Kemper and those claiming under him is fixed by the deed and cannot be affected by expressions in a paper subsequently made to which Kemper was not a party." 80 W.Va. 187, 191, 94 S.E. 472, 474.

The Court then went on to ask and answer the question at issue in *Paxton* and also on this appeal in the *Nicholson* case:

> "What is the effect of the language 'the 1/16th of all the oil within and underlying the several tracts of land'? 80 W.Va., 187, 191, 94 S.E. 472, 474.

Benedum-Trees contended that when Mr. Paxton (having previously deeded 1/16th of the oil to Mr. Kemper) leased all of the oil to Benedum-Trees' predecessor, he impliedly covenanted that his lessee should have quiet enjoyment of all of the oil. Benedum-Trees then argued that this implied covenant of quiet enjoyment as to all the oil was broken by reason of the 1/16th interest held by Kemper and argued that Benedum-Trees, was entitled to take 1/2 of Paxton's royalty and turn it over to the Kemper interest. The SCAWV rejected that argument:

> "The defendant contends that when Paxton subsequently made the lease to its assignor purporting to lease all of the oil, he impliedly covenanted that his lessee should have quiet enjoyment of all of the oil. This covenant was broken it

contends by reason of the outstanding Kemper interest, and because of such breach it (the defendant) is entitled to take one-half of Paxton's royalty and turn it over to the Kemper interest. If this deed conveyed one-sixteenth of the oil and, that is all it purports to convey by the language now under consideration, Paxton's breach of the covenant for quiet enjoyment would not enlarge the Kemper interest." 80 W.Va. 187, 191, 192, 94 S.E. 472, 474.

The Court, in concluding that Kemper's interests by virtue of a deed to 1/16th of the oil is not enlarged to a 1/2 interest, discussed several prior cases and in the process held:

"If the Kemper interests under the deed is one-sixteenth of the oil in place then the owners of his interest would be entitled to one-sixteenth of the royalty." 80 W.Va. 187, 192, 94 S.E. 472, 474.

In support of its conclusion that a conveyance (or reservation) of 1/16th of the oil entitles the grantee (or grantor) of that interest to 1/16th of the royalty and not more, the Court pointed out that to try to equate a 1/16th interest to a 1/2 interest would result in Mr. Paxton losing half of his royalty in that case just by having deeded a 1/16th of the oil to Mr. Kemper. The Court then goes on to point out that if Mr. Paxton had sold a 1/8 of the oil in place and subsequently made a lease such as that involved in that case he would lose all of his royalty:

"Upon this reasoning, if he had sold one-eighth of the oil in place and subsequently made a lease such as that involved here, he would lose all of his royalty." 80 W.Va. 187, 192, 94 S.E. 472, 474.

"It thus appears that the claim of the Kemper interest to one-half of the royalty oil cannot be supported upon the language attempting to convey one-sixteenth of the oil underlying the land." 80 W.Va. 187, 193, 94 S.E. 472, 475.

The SCAWV also concluded that the second part of the grant, the grant of 1/2 of the royalties, rents and income was a grant of 1/2 of the oil in place:

"We are clearly of the opinion that the grant of one-half of the royalties, rents and income from the oil is a grant of one-half of the oil in place." 80 W.Va. 187, 194.

We will briefly discuss two cases decided by SCAWV after *Paxton*. In *Manufacturer's Light & Heat Co. v. Knapp*, 102 W.Va. 308, 135 S.E. 1 (1926) there was a sale of "...the undivided 1/16th in all the oil underlying said land; also the undivided 1/2 of their interest in the gas underlying said tract"…. 102 W.Va. 308, 309, 135 S.E. 1. Notwithstanding the fact that the deed conveyed "the undivided 1/16th in all the oil", the circuit court had concluded that this 1/16th language invested in the grantees "1/2 of the royalty oil". The SCAWV rejected that interpretation and overruled the circuit court decision in the *Manufacturer's Light & Heat Co.* case:

> "The language of the paper, transferring one-sixteenth of the oil in place or one-sixteenth of the 'oil royalty' does not require interpretation. How can one-sixteenth equal one-half?"

The conclusion of the Court was essentially the same as its conclusion in *Paxton* - 1/16th means 1/16th and 1/2 means 1/2. In this regard see Syllabus Pt. 1 of *Manufacturer's Light & Heat Co.*:

> **"1. Mines and Minerals – Grant of undivided one-sixteenth of oil underlying land and undivided half of gas (subject to previous lease), including undivided one-sixteenth of oil royalties and one-half gas well rentals held to vest in grantees one-sixteenth of oil and one-half of gas in place.**
>
> The grant of the undivided one-sixteenth in all the oil underlying a tract of land and an undivided one-half of all the gas therein (subject to lease previously made), including the undivided one-sixteenth of the oil royalty and one-half of the gas well rentals together with the right of ingress and egress in, through and upon the land for oil and gas purposes, vests in the grantees one-sixteenth of the oil and one-half of the gas in place." 102 W.Va., 308, 135 S.E. 1, 5, Syllabus Pt. 1.

The other case post-*Paxton* which should be mentioned is *Davis v. Hardman*, 148 W.Va. 82, 133 S.E.2 77 (1963). It should be mentioned here only because it modified part of *Paxton* i.e., it modified the first Syllabus Pt. in the *Paxton* case. However, it did not modify or change or overrule in any way the *Paxton* holding that a grant (or reservation) of 1/16th of all the oil and gas is a grant (or reservation) of 1/16th of all the royalty and not more or less. Syllabus Pt. 1 in *Paxton*, later modified in *Davis v. Hardman*, stated:

> "1. MINES AND MINERALS – Grant of Royalties
> A grant of the royalties, rents and income arising from the production of the oil from land is a grant of the oil in such land." 80 W.Va. 187.

The SCAWV, in *Hardman*, recognizing that Syllabus Pt. 1 in the *Paxton* case had been understood as intended to state a hard and fast rule of law (i.e., that a grant of the royalties, rents and income arising from the production of the oil from land is a grant of the oil in place in such land) concluded that the application of this rule as a hard and fast rule of law rather than a rule of construction had resulted in a lot of past confusion in the law.

As a result, the SCAWV decided to modify the rule stated in Syllabus Pt. 1 of *Paxton* to be merely a rule of construction which would not be applied if the Court finds other language in the instrument in question showing a different intention than that stated in the granting or reserving language. On the other hand, where the Court finds instead a valid written instrument which expresses the intent of the parties in plain and unambiguous language then there is no need for judicial construction or interpretation, and the language in the instrument will be applied and enforced according to such intent:

> "The rule enunciated in *Paxton v. Benedum-Trees Oil, Co.*, *supra*, is but a rule of construction and the function of the Court in any situation such as that presented by the present case is to ascertain the true intent of the parties as expressed by them in the deed, lease or other written instrument under consideration. 'A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.' *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, Pt. 1 Syl., 128 S.E.2d 626. In the construction of a deed or other legal instrument, the function of a court is to ascertain the intent of the parties as expressed in the language used by them." 148 WV 82, 88, 89.

The reservations in the *Hardman* deeds were reservations of the oil and gas royalty "when produced" making it clear that the grantor did not intend to reserve oil and gas in place but rather only when produced.

B. Since West Virginia case law has long held that a reservation of 1/16 of the oil and gas in place is 1/16 and no more, there is justification for importing Texas law.

Severin POA discusses at some length the "Estate Misconception Theory" and argues that the holding of the WV ICA runs afoul of that theory. There is no way of knowing whether the WV ICA holding now on appeal to this Court "runs afoul" of the "Estate Misconception Theory" in West Virginia, simply because that theory has never been discussed or applied in West Virginia jurisprudence, at least not by that name insofar as we can determine. Severin POA in advocating a need to supplement or replace West Virginia law by importing Texas law, urges the SCAWV to "create a rebuttable presumption that the Estate Misconception Theory is applicable to any archaic oil and gas transaction which uses a fraction that is a multiple of $1/8^{th}$". Petitioner needs to first explain to the Court exactly what the Estate Misconception Theory is and why it needs to be applied under West Virginia law. As noted above there is currently no such theory under West Virginia law, or at least such a thing has never been cited or discussed by that name. Severin POA cites and discusses several Texas cases which it believes contain reasoning in support of the creation of a new presumption under West Virginia law.

In *Van Dyke v. Navigator Group*, 668 S.W.3d 353, 2023, Tex. Lexis 144, 66 Tex. Sup. J. 333 (2023), the Supreme Court of Texas concluded that the belief that a lessor, after leasing the oil and gas rights for production, retained only a $1/8^{th}$ interest was a mistaken belief that "ran rampant in instruments in this time involving the reservation or conveyance of a mineral interest – so much so that courts have taken judicial notice of this widespread phenomenon." 668 S.W.3d 353, 363. Insofar as we are aware, no West Virginia cases have taken judicial notice of the alleged "widespread phenomenon" which allegedly existed in Texas i.e., the mistaken belief that apparently "ran rampant" in instruments of that time. There is no evidence in West Virginia that there was any mistaken belief that the lessors of oil and gas rights retained only a 1/8 after leasing their oil and gas rights for production or that such a belief "ran rampant" in West Virginia or constituted a "widespread phenomenon". The Texas Supreme Court in Van Dyke quoted earlier decisions which it had issued a number of years previously. There are no similar decisions in West Virginia, and no one has argued that there are. Thus, the pervasiveness of the problems relating to estate misconception (all the lessor owns after a lease is a one-eighth and not a possibility of reverter as to 8/8), and the legacy 1/8 in Texas may have justified more aggressive theories and presumptions to address the problems than in West Virginia where there is no evidence in case law that there were any such problems and certainly not any such problems "running rampant."

In fact, as discussed at length above, there are no West Virginia cases which support the argument that West Virginia case law has equated a reservation of a 1/16 with a reservation of a one-half. No West Virginia case says that. We agree with Severin POA's argument that "the foregoing line of cases should be relied upon to serve as a platform" for either reversal of the WV ICA's decision or affirmance. We are generally in agreement as to the relevant cases, but not as to what the cases hold. If there were any West Virginia cases which have held that the reservation or conveyance of 1/16 of oil and gas in place is a reservation or conveyance of 1/2 of the oil and gas in place or cases holding that the terms 1/2 and 1/16 were used interchangeably then Severin POA might well have a better case for reversal, but there are no such cases as discussed above.

In Texas there are at least some cases like Van Dyke holding that the reservation of 1/2 of 1/8 of the mineral raises a presumption that 1/8 was used as a term of art referring to the "mineral estate" and if not rebutted would lead to the conclusion that the deed itself reserved a

1/2 interest in the entire mineral estate as discussed above. There are no cases or findings of fact in West Virginia which justify creating such a presumption.

In _Van Dyke_ the Supreme Court of Texas made it clear, however, that the presumption then created in that case was applicable strictly to "double-fraction" (e.g. 1/2 of 1/8) cases and not to cases in which there was no double-fraction but rather only a single fraction which is a multiple of 1/8th as to which no presumption was apparently deemed necessary by the Supreme Court of Texas.

> "First we conclude that the deed itself reserved a 1/2 interest in the mineral estate. Antiquated instruments that use 1/8 within a double fraction raise a presumption that 1/8 was used as a term of art to refer to the mineral estate." 668 S.W.3d 353, 359 (emphasis added)

The major reason for drawing a distinction between deeds using a double fraction (such as 1/2 of 1/8) and deeds which use a single fraction (such as 1/16) was principally that the use of double fractions presumes purposefulness, i.e. that there was a purpose for using such a double fraction rather than the product of the double fraction. In other words, why use 1/2 of 1/8 unless something more then 1/16 was intended?

> "As we explained in _Hysaw_, and as we reiterated above, the very use of the double-fraction is itself the primary reason to presume purposefulness." 668 S.W.3d 353, 366.

As to the presumption of purposefulness the Court concluded that it would be odd to say 1/2 of 1/8 if all that was intended by 1/2 of 1/8 was 1/16:

> "Specifically, when courts confront a double-fraction involving 1/8 in an instrument, the logic of our analysis in _Hysaw_ requires that we begin with a presumption that the mere use of such a double fraction was purposeful and that a 1/8th reflects the entire mineral estate, not just 1/8th of it. Indeed, it would be odd to say 'one-half of one-eighth' rather than simply 'one-sixteenth" if all that was intended by 1/2 of 1/8th was 1/16th." 668 S.W.3d 353, 364. (emphasis in the original)

Stated otherwise, the Supreme Court of Texas concluded in *Van Dyke* that a deed which refers to 1/2 of 1/8th is presumably the result of an archaic mistake, whereas a deed which uses a reservation or grant of 1/16th may or may not be the product of an archaic mistake, it may simply be a decision to grant or reserve a 1/16th. Not long after *Van Dyke* was decided, the Eighth District of the Court of Appeals of Texas in El Paso concluded in *Johnson v. Clifton*, 2023 Tex App. Lexis 4925, 2023 WL 4443016 (2023) that:

> "Here, as the appellees point out, we do not have a double-fraction in the granting clause, and therefore, they contend the *Van Dyke* presumption does not apply. However, the estate misconception doctrinate is applicable not only when a deed contains a double-fraction but also when it uses a fraction that is a multiple of 1/8th.

In other words, the Court of appeals seemingly rejected the reasoning of the Supreme Court of Texas in *Van Dyke* and decided instead to expand the presumption created in *Van Dyke*. Importantly, the Supreme Court of Texas in *Van Dyke* had rejected the argument of the White parties in that action to the effect that double-fractions are "merely an elementary arithmetic formula with no additional meaning, so that only a 1/16th interest was ever reserved". 668 S.W.3d 353, 358.

The opposing parties, the Mulkeys, contended that a "double-fraction reflects a term of art common at the time the deed was drafted and that the use of this term of art reserved one-half of the mineral interest". 668 S.W.3d 353, 358.

The argument of both sides in *Van Dyke* impliedly recognized that if their deed had reserved a 1/16th interest then the only thing reserved in the deed would have been a 1/16th interest. The Mulkeys' fallback argument was that if they lost as to whether the double-fraction reserved only a 1/16th, they should win the case anyway under the Texas presumed-grant doctrine. The Mulkeys in effect admitted that if the deed had reserved only a 1/16th they would lose but for the operation of the "presumed-grant doctrine":

> "Alternatively, the Mulkey parties assert that even if the deed had only reserved a 1/16th interest, they gained title to the remaining 7/16th by operation of the presumed-grant doctrine at some point after 1924..." 668 S.W.3d 353, 358.

See also, the later quote in Van Dyke:

> "Even if we were less persuaded by the double-fraction analysis, however, the Mulkey parties argue that we still would have to recognize their present day ownership of one-half of the mineral estate. That is, even if the '1/2 of 1/8th reservation meant only a 1/16th mineral interest in 1924, they argue that the record conclusively establishes that they acquired the other 7/16th interest through the presumed-grant doctrine'." 668 S.W.3d 353, 366.

So far as we can determine, the presumed-grant doctrine has never been applied in West Virginia, at least not as to similar facts. The Supreme Court of Texas in Van Dyke explained how the presumed-grant doctrine works in Texas:

> "We agree with the Mulkey parties. The presumed-grant doctrine, 'also referred to as title by circumstantial evidence, has been described as a common law form of adverse possession'" (citation omitted) The doctrine requires its proponent to establish three elements: (1) a long-asserted an open claim, adverse to that of the apparent owner; (2) nonclaim by the apparent owner; and (3) acquiescence by the apparent owner in the adverse claim. (citation omitted)" 668 S.W.3d 353, 366.

Although not mentioned in the Severin POA brief, they seem to be advocating not only that the double-fraction presumption be adopted in West Virginia, but that the presumed grant also be adopted.

The Supreme Court of Texas in Van Dyke also recognized that the distinction between a double fraction and a single fractions is emphasized by evidence that the grantor also chose to use a double fraction (1/2 of 1/8) in one transaction and chose to use a single fraction (1/16) which is the product of a double fraction in another transaction. Such evidence proves that the Grantor knew how to convey a 1/16 without the "circumlocution of a double fraction."

"The White parties point to another transaction occurring in 1926 in which the Mulkey parties conveyed a 1/16 interest in the minerals to a third party. That 1/16 interest, however, refers to the mineral interest of an entirely different property, not any property subject to this lawsuit. We cannot see how a wholly distinct transaction sheds any light on the one before us. And our doubts about relevance are heightened because the 1926 transaction illustrates that the very same grantors could (and did) refer to a 1/16 interest directly and not via the circumlocution of a double-fraction. When what they actually wanted was to convey exactly and mathematically a $1/6^{th}$ interest, that is precisely what they did." 668 S.W.3d 353, 367.

The findings in *Van Dyke* seem to suggest that *Johnson v. Clifton* is not a logical extension of *Van Dyke*. It in fact seems to run against the finding in *Van Dyke* to the effect that 1/16 can be expressed directly and not through the circumlocution of a double-fraction and that using $1/16^{th}$ is the proper way to "exactly and mathematically" convey a $1/16^{th}$ interest. Lawyers in Texas will eventually learn what exactly the El Paso Court of Appeals hoped to create by deciding that it would expand the *Van Dyke* presumption or create a new presumption applicable to single fractions such as $1/16^{th}$. In short we don't yet know how all of this will play out in Texas. What we do know is that West Virginia has no need for any of this complicated Texas law.

Not only is there no need to import a complicated and contradictory Texas body of law to West Virginia, there is a clear difference between industry-wide patters in Texas and the patterns in West Virginia that might have given rise to some of the additional case law and legal theories in Texas.

III. CONCLUSION

Based on West Virginia case law holding that a reservation of 1/16 of oil and gas in place means exactly what it says and does not convey to the grantee 1/2 of the oil and gas in place and based on no "rampant" or "widespread" problems relating to oil and gas conveyances or reservations in West Virginia which might justify the creation of a presumption such as the ones created in Texas, it appears that the WV ICA properly decided the case and its decision should be affirmed.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-752

SEVERIN POA GROUP, LLC,

Petitioner,

v.

EARL J. NICHOLSON and
JOYCE A. NICHOLSON

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing ***"Amicus Curiae Brief by Shiben Estates, Inc., a West Virginia Corporation"***, in support of Respondents, was filed and served using the File and Serve Xpress system which will send notification of such filing to all counsel of record this 24th day of May, 2024.

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