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.

BRIEF OF PETITIONER SEVERIN POA GROUP, LLC

Frank E. Simmerman, Jr. (WVSB # 3403)
Chad L. Taylor (WVSB # 10564)
Frank E. Simmerman, III (WVSB # 11589)
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Facsimile: (304) 623-4906
fes@simmermanlaw.com
clt@simmermanlaw.com
trey@simmermanlaw.com

Counsel for Petitioner Severin POA Group, LLC

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I. ASSIGNMENTS OF ERROR

A. THE WV ICA ERRED IN REVERSING THE TRIAL COURT'S RULING AS THE WV ICA DISREGARDED LONG STANDING WEST VIRGINIA CASE LAW, FROM THE SAME ERA AS THE 1902 RESERVATION, WHICH PLAINLY DICTATES THAT A RESERVATION OF A 1/16th IS A RESERVATION OF ½ OF THE OIL AND GAS ESTATE – AND AS THE ESTATE MISCONCEPTION THEORY HAS A SOLID, AND EXISTING, FOUNDATION IN WEST VIRGINIA JURISPRUDENCE WHICH NECESSITATES CREATION OF A REBUTTABLE PRESUMPTION AS A RULE FOR FRACTIONAL MINERAL ESTATE LITIGATION AND TITLE INTERPRETATON IN WEST VIRGINIA

B. THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS, ("WV ICA"), ERRED IN REVERSING THE TRIAL COURT'S RULING AS THE WV ICA FAILED TO ACKNOWLEDGE THAT THE TERMS 1/8th, AND ITS PROGENY, 1/16th, ARE TERMS OF ART IN THE EARLY 1900s WEST VIRGINIA OIL AND GAS INDUSTRY – SUCH THAT A RESERVATION OF "1/16th OF ALL THE OIL AND GAS IN AND UNDER SAID LAND" IS PLAINLY A RESERVATION OF ½ OF THE OIL AND GAS ESTATE[1]

C. THE WV ICA ERRED IN REVERSING THE TRIAL COURT'S RULING AS THE WV ICA DISREGARDED HIGHLY PERSUASIVE FOREIGN AUTHORITY WHICH DICTATES THAT A RIGID, ARITHMATIC, MECHANICALLY APPLIED APPROACH IS NOT THE PROPER LENS FOR EXAMINATION OF EARLY OIL AND GAS CONVEYANCES/RESERVATIONS WITH FRACTIONAL PROVISONS TIED TO THE 1/8th TERM OF ART – SUCH AS THE 1/16th PROVISION BEFORE THIS COURT – AND THE APPROPRIATE ANALYSIS PLAINLY DICTATES THAT THE RESERVATION AT ISSUE IS A RESERVATION OF ½ OF THE OIL AND GAS ESTATE CONSISTENT WITH RECENT TEXAS JURISPRUDENCE – JURISPRUDENCE WHICH ALIGNS WITH EARLY 1900s WEST VIRGINIA PRECEDENT

D. ALTERNATIVELY, THE WV ICA ERRED IN FAILING TO FIND THAT THE 1902 DEED, AND THE AT ISSUE 1/16th RESERVATION/TERM, ARE AMBIGUOUS SUCH THAT EXTRINSIC EVIDENCE MUST BE CONSIDERED – EVIDENCE WHICH CONCLUSIVELY ESTABLISHES THAT THE PARTIES INTENDED AND OPERATED UNDER THE FRAMEWORK THAT THE 1/16th RESERVATION IN THE 1902 DEED IS PLAINLY A RESERVATION OF ½ OF THE OIL AND GAS ESTATE – THUS SEVERIN POA IS VESTED WITH ½ OF THE OIL AND GAS ESTATE UNDER THE PARCEL

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[1] Given that this Assignment of Error is a principle which is subsumed in the core of all arguments presented below, no separate argument section is directly tethered to this Assignment of Error.

II. STATEMENT OF THE CASE

Petitioner Severin POA Group, LLC, ("Petitioner or Severin POA"), is asking this Court to reverse the WV ICA's decision that a provision contained in an April 18, 1902, Deed was a reservation of a 1/16th interest in an oil and gas mineral estate under a 117.55-acre parcel, ("the Parcel"). As set forth below, the WV ICA performed simple arithmetic, not the necessary contextual and industry specific legal analysis, to reach an unjustifiable holding – a holding contrary to Doddridge County Circuit Judge Timothy L. Sweeney's decision, long-standing West Virginia jurisprudence, the terms of art before the Court, and recent, highly persuasive foreign authority.[2]

A. F.W. Severin/Severin POA's Chain Of Title, A Summary Of Oil And Gas Activities On The Parcel Prior To The 1902 Deed, And Antero Resources Corporation's Conclusion That The 1902 1/16th Reservation Reserved ½ Of The Oil And Gas Estate In F.W. Severin, And Thus His Heirs, Including Severin POA.

As of January 1, 1902, F.W. Severin was vested with one hundred percent (100%) of the surface, oil, gas and hydrocarbon fee estate related to 224 contiguous acres in the New Milton District of Doddridge County, West Virginia – a portion of which is comprised of the Parcel/117.55-acre parcel at issue. (See Appx. 375-376, Appx. 501-527).

Related to the 224-acre estate, it is uncontested that pre – 1902 substantial oil and gas activities/operations were occurring on F.W. Severin's 224-acre tract. For example, by lease dated December 27, 1897, F.W. Severin leased a portion of his oil and gas unto The South Penn Oil Company, reserving a traditional 1/8th royalty interest,[3] free of cost, for "all oil produced and saved

[2] Of note, the most on point foreign decision is Johnson v. Clifton, 2023 Tex. APP. LEXIS 4925, 2023 WL 4443016 (Ct. App. Texas, July 10, 2023), a case decided after the close of briefing in the WV ICA Appeal process – briefing having closed in the WV ICA on April 5, 2023.

[3] This is a critical point – and plainly evidences the 1902 parties' knowledge of, and familiarity with, the 1/8th concept prior to the 1902 Deed/reservation – realities ignored by the WV ICA.

from the premises", and also establishing therein a flat rate gas payment of $200.00 per year "for the gas from each and every well drilled on said premises." (Appx. 528). Similarly, July 26, 1898, F.W. Severin entered into an oil and gas lease with the Carter Oil and Gas Company for a portion of his mineral estate, similarly reserving a traditional 1/8th royalty interest, free of cost, for "all oil produced and saved from the premises." (Appx. 531-532).

Within this factual context which unequivocally contains the "legacy 1/8th royalty", by handwritten deed, ("the Deed"), dated April 18, 1902, F.W. Severin conveyed to L.D. Nicholson his interest in the Parcel (a 117.5 acre portion of his 224 acre total fee estate), subject to the following oil and gas estate reservation: "the parties of the first [F.W. Severin] also reserve the one sixteenth of all the oil and gas in and under said land." (Appx. 375-376).

Stated differently, F.W. Severin reserved in himself, and his successors such as Severin POA, ½ of the oil and gas in place, and related oil and gas royalties, by an express reservation of "one sixteenth of the oil and gas in an under said land" – known commonly as a one-half of the royalty interest reservation, being a 1/2 of an 1/8, or 1/16th. See Id. As will be discussed below, in 1902, this was a common and accepted practice in West Virginia for reserving such interests, a one-half oil and gas/royalty interest, under West Virginia jurisprudence and title/abstracting practices in 1902. (Appx. 186-188).

At the Circuit Court level Richard Starkey, Esq., the lone expert disclosed at the Circuit Court level, by Antero Resources Corporation, opined as follows: "(1) the deed reservation in question in this action reserves an undivided one-half interest of the oil and gas; and (2) the land book records involving the assessment of the interest at issue in this action evidence that the parties to the deed intended the reservation to mean one-half of the oil and gas interest." (Appx. 187).[4]

[4] As part of a confidential settlement reached between Petitioners and Antero, Mr. Starkey's opinions were ultimately withdrawn.

The reasoning behind such an opinion is that $1/16^{th}$ was a term of art/oil and gas trade in 1902, as it was 1/2 of the traditional 1/8 royalty.

During discovery, Severin POA reviewed, analyzed, and presented the Doddridge County Land Books to the Circuit Court, starting immediately after the 1902 F.W. Severin – L.D. Nicholson transaction. From 1902 through 1911 the oil and gas estate was not separately recorded/itemized on the Doddridge County Land Books. Beginning in 1912, the entries are as follows:

LAND BOOK YEAR/NAME	ACREAGE DESCRIPTION	MINERAL ESTATE DESCRIPTION
1912 – F.W. Severin	224 Acres – Robert's Fork	1/2 C O G
1913 – F.W. Severin	224 Acres – Robert's Fork	All C, ½ O.G.
1914 – F.W. Severin	224 Acres – Robert's Fork	C ½ " "
1915 – F.W. Severin	224 Acres – Robert's Fork	½ " "
1916 – F.W. Severin	224 Acres – Robert's Fork	½ " "
1917 – F.W. Severin	224 Acres – Robert's Fork	½ " "
1918 – F.W. Severin	224 Acres – Robert's Fork	½ O.G.
1919 – F.W. Severin	224 Acres – Robert's Fork	½ OG
1920 – F.W. Severin	224 Acres – Robert's Fork	½ O.G.
1921 – F.W. Severin	224 Acres – Robert's Fork	½ COG.
1925 – F.W. Severin	224 Acres – Robert's Fork	C.O.G.

(Appx. 501 – 522).[5]

The best evidence, from the relevant timeframe, indicates that the 1902 reservation was a reservation of ½ of the oil and gas estate, as recognized by the Circuit Court, consistent with general transactional practice/custom in 1902 and Judge Sweeney's conclusion.

Concerning the present dispute, it is only when Antero Resources Corporation, ("Antero"), unilaterally and independently determined that Severin POA was vested with a ½ mineral estate

[5] There is no extrinsic evidence from the era of the 1902 Deed which supports Respondents' position/construction.

in the Parcel that the Respondents first challenged Severin POA's entitlement to ½ of the oil and gas mineral estate.

In June of 2013 Antero approached the heirs of F.W. Severin, effectively Severin POA, concerning lease modifications which would allow for modern production methods (pooling and/or unitization), noting therein that "if not I need to send all living heirs of F.W. Severin modifications [sic] and the ½ interest would be divided out among each." (emphasis added) Id.

Ultimately, consistent with Antero's independent/unilateral title determination that Severin POA owned a ½ interest in the mineral estate under the Parcel, the F.W. Severin heirs were paid an up-front bonus payment on a ½ oil and gas estate ownership basis – and multiple horizontal Marcellus Shale legs were drilled on the parcel, with payments being made to Severin POA on a ½ oil and gas estate ownership basis up and until this litigation was commenced. (Appx. 384).

B. The Procedural Background And The Lower Court Orders.

In April of 2021, Respondents filed a declaratory judgment claim seeking a declaration that pursuant to the Deed J.D. Nicholson became vested with 15/16ths of the oil and gas estate, and F.W. Severin solely reserved 1/16th of the oil and gas estate. (Appx. 17-25).

On June 14, 2021, Severin POA filed its Answer to Amended Complaint, Affirmative Defenses and Counterclaims, therein asserting a competing Counterclaim which requested that the "Court declare the parties' respective rights, interests and obligations related to both mineral ownership and royalty ownership/payment within the framework of the April 18, 1902, Deed and the subsequent developments." (Appx. 128-129).

At the Circuit Court level, discovery occurred related to the competing declaratory judgment claims of Respondents, Severin POA and Antero – Antero having unilaterally aligned itself with Petitioner based upon its independent title research. Interpretation and construction of the 1902 Deed was submitted to the Court, by agreement of the parties, at the dispositive motion stage. Id., 172.

By Declaratory Judgment Order entered September 28, 2022, the Circuit Court held that "construction of the deed on the date of its execution, April 18, 1902, supports the conclusion that the reservation of 1/16th of the oil and gas operates to reserve ½ of the oil and gas estate under West Virginia law in 1902 and the early 1900s." (Appx. 565).

The Respondents appealed to the WV ICA – with the WV ICA reversing the Circuit Court's holding by Opinion filed November 13, 2023, and thereby effectively vesting a 15th/16th oil and gas estate in Respondents and a 1/16th oil and gas estate in Petitioner. (Appx. 663).

III. SUMMARY OF ARGUMENT

At issue in this case is the interpretation of a reservation contained in a 1902 Deed, which provides that "the parties of the first [F.W. Severin] also reserve the one sixteenth of all the oil and gas in and under said land." (Appx. 375-376).

The WV ICA's analysis adhered to strict rules of arithmetic – not the rule of law – in reversing the Circuit Court's opinion – and in so doing created a plethora of legal pitfalls by disrupting long-standing West Virginia precedent and title practices. The most basic problem with the WV ICA's simplistic and flawed approach is that in the law a reservation of "one-sixteenth" equaled one half in the context of reservations of mineral interests at the time of the 1902 conveyance/reservation at issue.

To expand, the rules that courts must utilize are fundamentally not those of arithmetic but are rather those of detailed and comprehensive/industry specific textual analysis, interpretation and construction – within the framework of the law, custom/usage at the time of a transaction and the parties' understanding at the time of a given transaction. The WV ICA summarily failed to perform the necessary task of determining the meaning of the 1/16th reservation when drafted in 1902, even if the rigid and abstract use of the same words might generate a different meaning today.

Consistent with long standing West Virginia jurisprudence, foreign precedent and title customs in existence at the time the instrument at issue was drafted in 1902, authority which aligns with how leading oil and gas jurisdictions analyze such issues pursuant to the accepted oil and gas doctrine known as the "Estate Misconception Theory", the WV ICA failed to correctly hold that the reservation, the equation "one-sixteenth", equals one-half of the mineral estate in the context of the 1902 Deed.

This Court should treat this appeal as an opportunity to create a rule for application to archaic fractional reservations, and to cure the WV ICA's errors.

In performing a complete and through analysis, avoiding the WV ICA's pitfalls, this Court should hold that antiquated instruments, such as the Deed, which use fractional reservations or conveyances in the oil and gas industry raise a rebuttable presumption that fractions were used as oil and gas terms of art to refer to what was believed and commonly understood to be the entire, misconceived mineral estate, "the 1/8th mineral estate", in archaic oil and gas transactions – thus the 1/16th reservation at issue is an actual and effective reservation of a ½ interest in the mineral estate consistent with the Estate Misconception Theory and existing early 1900s West Virginia case law, unless otherwise rebutted. Such a framework would avoid the inaccurate result created by the WV ICA and would serve West Virginia litigants and courts by creating a flexible framework for analysis of 1/8th fractional cases – a framework which will reduce the undesirable byproducts of the WV ICA's holding, e.g. title instability and wasteful litigation.

Alternatively, should the Court conclude that the 1902 instrument/reservation is ambiguous, the only conclusion this Court can reach, looking at the actual conditions which existed prior to and post the 1902 reservation and the parties' own, practical construction of the underlying 1902 instrument (particularly the land book records – the best temporal evidence available to the parties and the Court) is that the 1902 instrument reserved ½ of the oil and gas estate in Severin POA. Accordingly, the WV ICA's Opinion must be reversed on this alternative ground – an alternative framework which would allow for the consideration of case and fact specific custom/usage development – which serves the ends of justice/preservation of the true intent of archaic fractional oil and gas conveyances/reservations.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in West Virginia Rule of Appellate Procedure 18(a), oral argument is necessary in this case.

The decisional process will be significantly aided by oral argument. Specifically, this case is suitable for Rule 20 oral argument because it involves an issue of fundamental public importance, to wit, the WV ICA's decision jeopardizes numerous real property titles and disrupts West Virginia oil and natural gas customs and practices. Moreover, this case generally involves fundamental issues of oil and natural gas instrument construction and application related to the Estate Misconception Theory and treatment of archaic fractional mineral reservations, which are issues of first impression in the modern era of West Virginia oil and gas jurisprudence.

V. STANDARD OF REVIEW

"Where the issue on an appeal from the circuit court's ruling is clearly a question of law . . . we apply a *de novo* standard of review." Syl. Pt. 1 Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995).

Further, when reviewing a lower court's decision under a *de novo* standard, no deference is afforded to the lower court's ruling. As stated by this Honorable Court: "[w]hen employing the *de novo* standard of review, we review anew the findings and conclusions of the circuit [or lower] court, affording no deference to the lower court's ruling." Blake v. Charleston Area Med. Ctr., Inc., 201 W.Va. 469, 475, 498 S.E.2d 41, 47 (1997), citing West Virginia Div. of Env. Protection v. Kingwood Coal Co., 200 W.Va. 734, 745, 490 S.E.2d 823, 834 (1997).

VI. ARGUMENT

A. As The WV ICA's Purported Factual Differentiation Of This Matter From Existing, Early 1900s West Virginia Jurisprudence Was Incorrect, And Is Contrary To A Leading Oil And Gas Commentator's Independent Observations From 1931, The WV ICA's Opinion Should Be Reversed And This Court Should Declare That Severin POA Is Vested With A ½ Mineral Estate Under The Parcel.[6]

In Kilcoyne v. Southern Oil Company, 61 W.Va. 539, 56 S.E. 888 (1907), in 1899 McDougal sold and conveyed to Conway one-sixteenth of the oil underlying a parcel of land in Wetzel County. Subsequently, McDougal leased the land for oil and gas purposes, the royalty to be one-eighth of the production. As summarized by the later decision of Paxton v. Benedum-Trees Oil Co., 80 W.Va. 187, 94 S.E. 472, in the context of the 1899 oil and gas transaction Kilcoyne "held that the purchaser of the 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." Paxton, 193. 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 ½ of the oil and gas estate.

In McCoy v. Ash, 64 W.Va. 655 (1908), William A. Ash and his wife sold[7] to Isaac McCoy "one-sixteenth of all the oil and gas underlying all of a certain tract or parcel of land" located in

[6] It is telling that there is a clear line of early 1900 West Virginia cases which all involve fractional multiples of the legacy 1/8th royalty – and such a reality demonstrates the clear prevalence of the 1/8th royalty in this era in West Virginia, and that the 1/8th fraction served as a guidepost/reference point for early 1900 reservations/conveyances.

[7] There is no indication in the opinion as to the date(s) of deeds/instruments.

the McElroy District of Tyler County, West Virginia, and litigation ensued as to the right to one half[8] of the royalty; that is one sixteenth of the oil, coming from an oil well producing on what was referred to as "the little Gorrell Tract". (emphasis added).

In addressing the application of the underlying transaction as to ownership of mineral production proceeds from "the little Gorrell Tract", the West Virginia Supreme Court plainly noted that in the early 1900s in West Virginia, a statement in a deed of a 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 "[t]he evidence is plain that these parties were dealing for the sale of half of Ash's entire royalty. Where is any reason for the sale of half of the royalty in the Home Farm and the exception of the royalty in the little piece of Gorrell land?").

Pursuant to, and consistent with the foregoing, the reservation of 1/16th set forth in the 1902 handwritten Deed plainly reserved ½ of the oil and gas estate consistent with the logic of McCoy, such that a ½ interest in the oil and gas estate should be confirmed by this Court as being vested in the heirs of F.W. Severin.

Similar to McCoy, in Horner v. Gas Co., 71 W.Va. 345 (1912), the West Virginia Supreme Court was again called upon to interpret "one-sixteenth" language in the context of an 1899 deed/mineral transaction.

More specifically, in Horner, by deed dated the 18th day of December, 1899, Martin and wife granted to L. S. Horner and C. S. Sands for cash "all of the one half of the royalty, being the one sixteenth, of all the oil and one half of all the gas within" a tract of 44 ½ acres located in Harrison County, West Virginia. (emphasis added) Id.

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[8] The reality that the parties in McCoy were fighting over a ½ interest demonstrates the custom and understanding of one-sixteenth fractional language in the early 1900s within West Virginia jurisprudence/abstracting practices.

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 determining 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 Theory and legacy of the 1/8th royalty, discussed below:

> We are enabled to say that by the deed to Horner and Sands Martin and wife only intended to pass the half of what they were authorized to transfer, half of the royalty they had reserved, that is, half the eighth of the oil and half the $ 300.00 for each gas well. **This Michael lease existing, and surely known to the parties, and providing taxes or dues or rents for the use of the land for oil and gas, shall we not say that the parties treated with eyes open to it, meaning to transfer to Horner and Sands half of what the lease gave to the landowners, a fraction of oil produced, and a specific rental or royalty for a gas well?**
>
> **I confidently assert that the parties contracted with a view to the Michael lease, meaning to pass to Horner and Sands one half of what that lease gave to Martins**. That lease gave light and direction to the transfer to Horner and Sands; that light reflects on the deed to Horner and Sands, and other light would be misguiding. We must interpret the transfer to Horner and Sands by that lease.
>
> We cannot believe that for the sum of $ 445.00 Martin and wife would sell absolutely in fee that large fraction of oil and gas, and thus renounce control so as to debar themselves from again leasing the entirety. We have placed ourselves in the situation of the parties at the time of the transfer to Horner and Sands, having the fact of the Michael lease as a circumstance then existing and known to the parties.
>
> By our cases it is settled that oral evidence may be accepted, to aid in construction of a deed, where there is ambiguity, to apply the deed to its subject matter, **to show the circumstances surrounding the parties so as to place the court in their place and circumstance, to reflect their intent**; but prior or contemporaneous conversations of the parties are not admissible. Crislip v. Cain, 19 W. Va. 438; Long v. Perine, 41 W. Va. 314; Martin v. Railroad Co., 48 W. Va. 542.

(emphasis added) Horner, 349-350.

Fundamentally, consistent with Horner, given that a fair reading of Horner aligns with the foundational principles of the Estate Misconception Theory, Severin POA submits that when viewed through the lens of applicable West Virginia authority from the relevant timeframe, the

Circuit Court's decision was firmly rooted in West Virginia law/the legacy 1/8th royalty and the WV ICA's decision, which is detached from the actual logic and rationalization of early 1900s case law, should be reversed.[9]

Finally, also relevant to the present discussion is United Carbon Co. v. Presley, 126 W.Va. 636 (1944). In United Carbon Co., the interpretation/construction of a reservation contained in a 1907 Deed, which stated as follows was at issue:

> 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 and gas underlaying said two small parcels of land. . . . Id. (emphasis added).

In determining that this reservation vested in the grantor pursuant to the 1907 Deed ½ of the value of the asset/mineral development, the West Virginia Supreme Court expressly held in Syl. Pt. 1, that "in a reservation in a deed of conveyance reading: one half of the oil and gas royalty upon and as to said two tracts of land . . . that is to say that the said Shatto reserves the undivided one sixteenth of the oil and gas underlaying said" land, the latter clause is definitive of the term "royalty" used as a measurement of yield of oil and gas rather than ownership thereof in place, and the reservation, properly construed, entitles grantor and his successors in title, upon development of the land under an oil and gas lease providing for a royalty of one-eighth, to receive one-half of such royalty." Although United Carbon Co. involves a royalty interest, not an interest in fee, the fundamental logic of United Carbon Co. again supports of construction that the reservation contained in the 1902 handwritten Deed vested ½ of the mineral estate in F.W. Severin and that

[9] 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, as such language indicates that the terms 1/16th and ½ were used interchangeably to commonly refer to ½ of the oil and gas estate.

oil and gas customs embedded in early 1900s oil and gas jurisprudence illustrate that the terms ½ and 1/16th were used interchangeably – realities which should be confirmed by this Court.

Perhaps more persuasive than any self-interested parties' position or interpretation of archaic case law, Severin POA further calls the Court's attention to Walter L. Summers' 1931 observations contained in 10 Tex. L. Rev. 1 (December, 1931) – Mr. Summers being the founder and initial author/editor of Summers Oil and Gas, a leading oil and gas treatise to this day.

Contrary to the WV ICA's fleeting examination of West Virginia jurisprudence, Summers noted in 1931 after a thorough and independent review of the then existing body of West Virginia case law applicate to the 1/16th issue now before this court (including detailed analysis of the following West Virginia cases Harris, Kilcoyne, Toothman, Paxton, Lockhart, and Knapp):

> The grantors had in mind that under existing or future leases they would be entitled to receive one-eighth of the oil produced as royalty and a certain gas well rental.[10] They could have granted one-half of the oil and gas rents and royalties, or they

[10] This concept noted by Summers is now known and referred to as the legacy of the 1/8th royalty – yet another concept overlooked by the WV ICA. Speaking further, contrary to the WV ICA's basic arithmetic, oil and gas leases of a certain vintage, specifically the early 1900s, almost always set forth a 1/8th royalty, and the prevailing belief was that a royalty interest would always be 1/8 and that this was the entire estate which remained vested in the mineral owner upon leasing oil and gas. See Toothman v. Courtney, 62 W.Va. 167, 174 (1907) (noting that 1/8 is the usual royalty and there "would be a presumption that a one-eighth is the royalty contemplated"); see Syl Pt. 1, Carter v. Tyler County Court, 45 W.Va. 806 (1899) (stating that "[w]here a party holds a lease upon land for oil and gas purposes, upon the usual terms and conditions, paying one-eighth of the oil produced as royalty, the oil while it remains in situ must be regarded as realty, and as remaining the property of the lessor until brought to the surface"); see Rymer v. South Penn Oil Co., 54 W.Va. 530, 542 (1904) (noting the "usual" one-eighth royalty); see also U.S. Shale Energy II, LLC v. Laborde Props., L.P., 551 S.W.3d 148, 153 (Tex. 2018) (utilizing the legacy of the 1/8th royalty doctrine in construing a 1951 deed); Hysaw v. Dawkins, 483 S.W.3d 1, 6 (Tex. 2016) (applying doctrine to a 1947 will that conveyed a royalty interest); KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 75 (Tex. 2015) (recognizing that a "one-eighth royalty appears to have been commonplace in the general era in which the 1960 deeds were executed"). Indeed, some courts and commentators have recognized that leases containing royalties larger than one-eighth did not become common until the mid-1970s. See Graham v. Prochaska, 429 S.W.3d 650, 657 (Tex. App.—San Antonio 2013, pet. denied) (citing 1 Smith & Weaver, Texas Law of Oil & Gas § 2.4[B][1], at 2-64 (2d ed. 1998)) (noting that in the 1970s royalties larger than 1/8th became more commonplace in leases); see also IV. What Courts Consider to Divine 'Objective Intent,' 2019 TXCLE-ACAP 11-IV, 2019 WL 4579707 (noting that "it was not until the 1970s that royalty interests greater than 1/8 became increasingly common.") (citing Garrett v. Dils Co., 157 Tex. 92, 299 S.W.2d 904, 907 (Tex. 1957) (taking "judicial knowledge of the fact that the usual royalty provided in mineral leases is one-eighth").

> could have accomplished the same result by conveying one-half of one-eighth of the oil produced and one-half of the oil and gas well rentals, but they simplified the fractions by conveying one-sixteenth of the oil and one-half of the gas. This may have simplified the transactions, but it complicated the grants.
>
> There is plenty of evidence from decided cases in West Virginia that a reference by a lessor to one-sixteenth of the oil may mean a half interest in the royalty or of the oil in place.[11]

Id., 14, 27.

As Summers teachings are consistent with the conclusion of Judge Sweeney that the term "one-sixteenth" was used synonymously with the term "one-half" in the West Virginia oil and gas industry – which wholly aligns with the rationalization of the Estate Misconception Theory and the 1/8th legacy royalty – the foregoing line of cases should be relied upon to serve as the platform for reversal of the WV ICA's decision – a decision which is devoid of a solid foundation in early 1900s case law.[12]

Accordingly, Petitioner respectfully requests that the WV ICA's Opinion be reversed as The WV ICA's conclusions are: (1) contrary to long-standing West Virginia case law; and (2)

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[11] The WV ICA's suggestion that Judge Sweeney's conclusion that the 1/16th reservation at issue reserved ½ of the mineral estate in Severin POA, a decision rendered by a Circuit Court lying in the hot bed of West Virginia's modern oil and gas production, was "non-sensical" simply is not consistent with a tenured and practical understanding of West Virginia oil and gas law and title practice.

[12] Although omitted from the WV ICA's Opinion, the only case which Respondents can conceivably cite to in an attempt to contradict Summers is the often criticized decision of Manufacturers' Light & Heat Co. v. Knapp, 102 W. Va. 308, 135 S.E. 1 (1926), which found a grant of "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. . . vests in the grantees one–sixteenth of the oil and one–half of the gas in place." Id. at Syl. Pt. 1. That being said, Professor Summers was highly critical of Knapp, noting that the trial court in Knapp was likely correct in its conclusion, and that the West Virginia Supreme Court's decision in Knapp ran afoul of existing West Virginia precedent: "The trial court seemed to think that it conveyed one-half of the rents and royalties under the existing lease and one-half of the fee interest, but the supreme court [in *Knapp*] held that it merely conveyed a one-sixteenth fee and royalty interest in the oil, and a one-half fee and royalty interest in the gas. It seems very possible that the trial court was right, for there is plenty of evidence from decided cases in West Virginia that a reference by a lessor to one sixteenth of the oil may mean a half interest in the royalty or of the oil in place." Summers, *Transfers of Oil and Gas*, 10 Tex. L. Rev. at 27

totally divorced from the oil and gas industry specific reality that, as rooted in West Virginia case law, the term "one-sixteenth" was plainly used to refer to "one-half" of a mineral estate in archaic West Virginia oil and gas transactions.

B. As The WV ICA's Holding Erodes The Legacy of the 1/8th Royalty, Conflicts With Recent Precedent From Other Leading Oil And Gas Jurisdictions, And Runs Afoul Of The Estate Misconception Theory, The WV ICA's Holding Should Be Reversed And This Court Should Create A Rebuttable Presumption That The Estate Misconception Theory Is Applicable To Mineral Reservations Which Contain Multiples Of The Legacy 1/8th Royalty To Eliminate Title Uncertainty And Disruption Caused By The WV ICA's Opinion.

Foreign courts have repeatedly, and recently, addressed the application of the Estate Misconception Theory and the historical use of 1/8 as the standard oil and gas royalty in the context of "fraction" or "double fraction" interpretative cases – and have repeatedly found that "a mechanically applied, mathematical approach" is simply not appropriate in the context of interpreting archaic oil and gas transactions rooted in fractional conveyances/reservations – findings which are wholly consistent with the afore-noted West Virginia jurisprudence from the early 1900s. See Hysaw v. Dawkins, 483 S.W.3d 1, 12 (Sup. Ct. Texas, 2016); see also Johnson v. Clifton, 2023 Tex. APP. LEXIS 4925, 2023 WL 4443016 (Ct. App. Texas, July 10, 2023).[13]

First, in Heyen v. Hartnett, 235 Kan. 117 (1984), the Supreme Court of Kansas examined whether an assignment and conveyance of a 1/16th interest in and to oil, gas and other minerals constituted an assignment of a 1/16th interest, or an assignment/conveyance of a ½ interest, an issue nearly identical issue to the present issue before this Court.

[13] Petitioner again notes that this matter was decided after the close of briefing in the WV ICA Appeal process – briefing having closed in the WV ICA on April 5, 2023 – and that the Estate Misconception Theory was thoroughly briefed by Petitioner/Severin POA at the WV ICA level – and summarily ignored by the WV ICA.

Heyen involved an action for a declaratory judgment to construe a 1925 mineral deed and to determine the ownership of the parties in the oil and gas and other minerals located in a certain tract of land in Stafford County, Kansas, when the 1925 handwritten Deed provided as follows in relevant parts:

> Witnesseth: That the said party of the first part, for and in consideration of the sum of One Dollar and other valuable considerations. Dollars ($ 1.00) To us in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, release and forever quitclaim unto the said party of the second part and to heirs and assigns forever an undivided 1/16 interest in and to all of the oil, gas and other minerals whatsoever in and under the following described lands situate in Stafford County, State of Kansas, to-wit . . . . (emphasis added).

Id., 118.

After noting that there was no existing oil and gas lease on the tract at the time the mineral deed was executed in 1925, and that the Plaintiffs were seeking a declaration that they owned 15/16 of the oil and gas estate, and that the Defendants were suggesting a ½ interest reading of the 1925 Deed, the same factual scenario present in this matter, the Court went on to further note that the deed was ambiguous and then described in detail the logic behind the Court's conclusion that the 1/16th conveyance was a grant of ½ of the oil and gas estate.

Heyen referenced Shepard, Executrix v. John Hancock Mutual Life Ins. Co., 189 Kan. at 134-35, as an authority in which there is an excellent discussion of this early day misconception and misuse of the fraction "1/16th" when "1/2" was really intended in mineral deeds/transactions, stating as follows:

> It is not uncommon for parties to mineral deeds or reservations, where a royalty or mineral interest is conveyed or reserved subject to an existing oil and gas lease, to confuse the fractional interest conveyed or reserved. Such confusion occurred in the instant deed. The reservation states 'an undivided 1/4 of the landowners 1/8 royalty, or, 1/32 of the interest in and to oil, gas or other minerals . . . in and under the said land.

This court has previously considered fractional discrepancies created by such confusion. (Lathrop v. Eyestone, [170 Kan. 419, 227 P.2d 136 (1951)]; Froelich v. United Royalty Co., [178 Kan. 503, 290 P.2d 93 (1955), modified 179 Kan. 652, 297 P.2d 1106 (1956)]; Magnusson v. Colorado Oil & Gas Corp., [183 Kan. 568, 331 P.2d 577 (1958)].)

In the Magnusson case it was pointed out that it was not only persons in the petroleum industry who made this type of inadvertent mistake, but on occasion the mistake has been made by courts, and it was said:

As the most common leasing arrangement provides for a one-eighth royalty reserved to the lessor, the confusion of fractional interests stems primarily from the mistaken premise that all the lessor-landowner owns is a one-eighth royalty.

In conveying minerals subject to an existing lease and also assigning a corresponding fractional interest in the royalties received, mistake is often made in the fraction of the minerals conveyed by multiplying the intended fraction by one-eighth.

Thus, if a conveyance of an undivided one-half of the minerals is intended, the parties will multiply one-half by one-eighth and the instrument will erroneously specify a conveyance of one-sixteenth of the minerals upon the assumption that one-sixteenth is one-half of what the grantor owns.

An ambiguity is created because the instrument will also show that the conveyance of one-sixteenth of the minerals is meant to entitle the grantor to one-half of the royalty. Of course, an undivided one-half of the minerals is needed to carry one-half of any royalties reserved. (l.c. 576.)

Consistent with the reasoning above, the Court in Heyen ultimately held that the handwritten, ambiguous mineral deed of 1925 should be construed to convey to the grantees an undivided ½ interest in the oil and gas and other minerals in and under the land in question, even though the deed expressly delineates the conveyance as a 1/16th interest, so as to carry out the intent of the parties. Id., 125-126.

Second, Texas has similarly reviewed archaic fractional reservations and labeled the issue before this Court the "Estate Misconception Theory" – in generally confirming that fractional references, such as a 1/16th reservation, indicate an intent to reserve ½ of the mineral estate given that the term "1/8" was widely used as a term of art to refer to the total mineral estate.

In Hysaw, the Texas Supreme Court stated as follows:

> A related issue that may be implicated in double-fraction cases is the theory of 'estate misconception.' This theory refers to a once-common misunderstanding (perpetuated by antiquated judicial authority) that a landowner retained only 1/8 of the minerals in place after executing a mineral lease instead of a fee simple determinable with the possibility of reverter in the entirety. '**For example, a lessor who has leased the entire mineral estate, but desires to sell-one half [sic] of the minerals, would assume that he owned 1/8 of the minerals due to the existing lease . . . [and] would use the fraction 1/16, or a double fraction, 1/2 of 1/8, to convey 1/2 of what he perceived he owned**.' Laura H. Burney, The Regrettable Rebirth of the Two—Grant Doctrine in Texas Deed Construction, 34 S. TEX. L. REV. 73, 89 (1993).
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> See also FN 10. Concord Oil Co., 966 S.W.2d at 459-60; Graham, 429 S.W.3d at 658; see Frank W. Elliott, Jr., The Fractional Mineral Deed 'Subject to' a Lease, 36 TEX. L. REV. 620, 622 (1958) (describing the 'greatest source of confusion" in construing mineral deeds is that '[t]he lessor often thinks of his ownership as a 1/8th royalty interest rather than a possibility of reverter in all the minerals').

Hysaw v. Dawkins, 483 S.W.3d 1, 12 (Sup. Ct. Texas, 2016) (emphasis added).

By opinion dated February 17, 2023, in Van Dyke v. Navigator Group, 2023 Tex. LEXIS 144, 66 Tex. Supp. J. 333 (Texas, February 17, 2023), the Texas Supreme Court revisited the Estate Misconception Theory in the context of a double fraction dilemma in a judicial attempt to substantially reduce the frequency of fractional reservation/conveyance cases by creating a governing framework/rule, therein creating the following rebuttable presumption:

> 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.' That presumption is readily rebuttable, however. If the text itself has provisions—whether express or structural—illustrating that a double fraction was in fact used as nothing more than a double fraction, the presumption will be rebutted. Id., * 8.

More specifically, in Van Dyke, the Texas Supreme Court thoroughly examined the two foundational principles which serve as "objective indications" that fractional references linked to the concept of the 1/8th fraction were linked to the landowner's misconception that the 1/8th was the entirety of the oil and gas estate, stating:

> The estate-misconception theory reflects the prevalent (but, as it turns out mistaken) belief that, in entering into an oil-and-gas lease, a lessor retained only a 1/8 interest in the minerals rather than the *entire* mineral estate in fee simple determinable with the possibility of reverter of the entire estate. Id. at 10; Concord Oil Co. v. Pennzoil Expl. & Prod. Co., 966 S.W.2d 451, 460 (Tex. 1998). Therefore, for many years, lessors would refer to what they *thought* reflected their entire interest in the 'mineral estate' with a simple term they understood to convey the same message: '1/8.' This widespread and mistaken belief ran rampant in instruments of this time involving the reservation or conveyance of a mineral interest—so much so that courts have taken judicial notice of this widespread phenomenon. Hysaw, 483 S.W.3d at 9-10. Therefore, the very use of 1/8 in a double fraction 'should be considered patent evidence that the parties were functioning under the estate misconception.' Laura H. Burney, The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction, 34 S. Tex. L. Rev. 73, 90 (1993). We made this point in Hysaw, citing 'commentators' who have observed that 'there is 'little explanation' for the use of double fractions to express a fixed interest absent a misunderstanding about the grantor's retained ownership interest or use of 1/8 as a proxy for the customary royalty.' 483 S.W.3d at 10-11.
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> The second rationale—the special meaning that 1/8 acquired in the standard-royalty context—provides an additional objective indication of what parties meant by using 1/8 within a double fraction. We said in Hysaw that we had 'no doubt' that "[t]he near ubiquitous nature of the 1/8 royalty—dubbed by some as 'the legacy of the 1/8 royalty' or 'historical standardization' —is something that 'influenced the language used to describe the quantum of royalty in conveyances of a certain vintage.' *Id.* at 9-10. This prevalent belief and confusion resulted in parties mistakenly assuming the landowner's royalty would *always* be 1/8. Therefore, parties would use the term 1/8 as a placeholder for future royalties *generally*—without anyone understanding that reference to set an arithmetical value. Once again, this pervasive misunderstanding long ago led us to take judicial notice in this specific context of double-fraction royalties. Garrett, 299 S.W.2d at 907.

Van Dyke subsequently created its own progeny, Johnson v. Clifton, 2023 Tex. APP. LEXIS 4925, 2023 WL 4443016 (Ct. App. Texas, July 10, 2023), which bears directly on the issue before this Court. Johnson has logically extended the rebuttable presumption created in Van Dyke to any fractional conveyance/reservation in archaic oil and gas transactions that is a multiple of the $1/8^{th}$ legacy royalty pursuant to the Estate Misconception Theory.

As the Court noted in Johnson when holding that a conveyance of an "undivided one-hundred and twenty-eighth (1/128) interest in and to all of the oil, gas and other minerals" was a 1/16th mineral interest conveyance with a 1/16th floating royalty interest:

> [T]he estate-misconception doctrine is applicable not only when a deed contains a double fraction but also when it uses a fraction that is a multiple of 1/8. As an example, the court in Hysaw noted that a grantor who has 'leased the entire mineral estate, but desires to sell-one half [sic] of the minerals, would assume that he owned 1/8 of the minerals due to the existing lease . . . [and] would use the fraction 1/16, or a double fraction, 1/2 of 1/8, to convey 1/2 of what he perceived he owned.' Hysaw, 483 S.W.3d 10.
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> [I]n other words, the estate-misconception doctrine may apply in situations in which the granting clause contains a double fraction, such as 1/2 of 1/8th, as well as when it contains a multiple of a 1/8th fraction, such as 1/16th.

Johnson, 26-27.

With this framework in mind, the primary question that comes to the forefront is how can the WV ICA's opinion stand when the WV ICA acknowledged that the Court "must consider what commonly accepted practices and customs used in 1902 would have then affected the construction of any deeds, such as the deed at issue herein" – yet the WV ICA wholly ignored foundational oil and gas customs and practices relevant to construction and interpretation of the Deed and fractional reservations – concepts firmly rooted in existing case law? The simple answer is that it cannot.[14]

To expand, the WV ICA chose to ignore all commonly accepted practices and customs in crafting a flawed and rigid Opinion which erodes West Virginia mineral title custom and practice by using terms such as "non-sensical" to describe the concept that the industry specific fractional

[14] The WV ICA's Opinion is self-defeating. The WV ICA makes this declaration then relies on case law from 1917, Paxton v. Benedum-Tres Oil Co., 80 W. Va. 187, 94 S.E. 472 (1917), and 1928, Lockhart v. United Fuel Gas Co., 105 W.Va. 69, 141 S.E. 521 (1928), as somehow controlling and "overruling" legal precedent/customs embodied in case law which was effiective/controlling precedent at the time of the 1902 transaction at issue, such as Harris v. Cobb, 49 W.Va. 350, 38 S.E. 559 (1901). Realities such as this undercut the WV ICA's rulings as it is a basic legal principle that contracts, such as Deeds, are viewed in the context of the law that existed at the date of creation/execution.

reservation at issue, the 1/16th reservation, was a reservation of ½ of the mineral estate in the concept of this archaic mineral transaction – a transaction rooted in the legacy of the 1/8th royalty and the Estate Misconception Theory, doctrines which embody and vividly describe the accepted customs and practices used in 1902.

The WV ICA applied rudimentary mathematical principles to a legal problem which is more akin to the Pythagorean theorem than rudimentary addition or subtraction. The ICA's omission is particularly glaring as West Virginia case law from the era of the Deed teaches that the Court should have looked at: (1) whether or not the 1902 parties were aware of oil and gas activity on the Parcel; (2) whether or not the 1902 parties contracted with existing leases; and (3) the general circumstances surrounding the parties of the time of the 1902 Deed – established principles of West Virginia law which align with the Estate Misconception Theory and evidence that, as early as 1912, the concept of evaluating the role of the 1/8th legacy royalty in the context of archaic West Virginia oil and gas transactions was firmly rooted in West Virginia jurisprudence. See Horner, 349-350 (1912); see also Summers, 10 Tex. L. Rev. 1 (noting that there is plenty of evidence from early 1900 West Virginia oil and gas jurisprudence that the term "one-sixteenth" was used to mean 1/2.).

For these reasons, the WV ICA's opinion should be reversed and this Court should align itself with leading oil and gas jurisdictions which have performed a meaningful and vigorous analysis of the Estate Misconception Theory and legacy of the 1/8th royalty, and find that the 1902 reservation at issue, the 1/16th reservation, reserved ½ of the mineral estate in Severin POA's chain of title. In so ruling this Court, similar to Texas, should also 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 1/8th.[15]

The rationale behind reversal of the WV ICA's opinion and creation of such a presumption is embodied in Van Dyke. This Court should adopt such a model as it "avoids the arbitrary, unfair, and inaccurate results that would necessarily follow from adopting either extreme," i.e., that is always interpreting a conveyance or reservation of a fraction which is a multiple of one-eighth (1/8) based on the assumption the estate misconception theory is at play, juxtaposed to a rigid arithmetic application. Van Dyke, 668 S.W.3d at 365. At the same time, "it also avoids reinventing the wheel in every individual case." Id. Moreover, such a model would be "flexible even as it advances stability and predictability from case to case." Id. Finally, the Van Dyke presumption deters "[w]asteful litigation" involving fractional oil and gas exceptions or reservations which are a multiple of one-eighth (1/8), which will "proliferate absent clear guidance for the courts and the public" in light of the WV ICA's decision.[16]

[15] Petitioner notes that creating such a default rule will also address the WV ICA's concern that it would be impossible for an early 1900s party to only have reserved a 1/16th interest – as it will allow for the presentation of evidence to rebut the presumption in fact specific context/analysis, such as consideration, number of heirs, land book treatment close in proximity to an archaic transaction, etc.

[16] Reliance on Texas law is not foreign to this Court when considering complex oil and gas issues. See e.g., Cotiga Dev. Co. v. United Fuel Gas Co., 147 W. Va. 484, 502, 128 S.E.2d 626, 638 (1962) (noting that "it is our judgment that the fairest and most equitable rule is the one suggested by the Texas case previously referred to herein" when addressing damages sustained in conjunction with violations of a contractual obligation to develop and market gas); Wellman v. Energy Res., Inc., 210 W. Va. 200, 205, 557 S.E.2d 254, 259 (2001) (citing a "seminal" case from Texas when analyzing how to treat "right to cure" provisions in oil and gas leases); W. Virginia Dep't of Highways v. Farmer, 159 W. Va. 823, 828, 226 S.E.2d 717, 720 (1976) (relying in part on Texas case law for the proposition that "where the surface of land conveyed by deed is sand and gravel, a straight mineral reservation does not include the sand and gravel").

C. Alternatively, This Court Can Determine That The 1902 Handwritten Deed Is Ambiguous/Contains A Latent Defect; And That The Totality Of The Record, Including The Opinions Of Richard Starkey, Esq., And The Related Land Books, Lead To The Inescapable Conclusion That ½ Of The Oil And Gas Estate Is Vested In Severin POA.

The general rule is that "[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." Syl. Pt. 1, Cotiga Development Co. v. United Fuel Gas Co, 147 W. Va. 484, 128 S.E.2d 626 (1963).

However, when a deed is unclear or ambiguous on its face, the Court must look to evidence of the parties' intent in construing the deed. Zimmerer v. Romano, 223 W. Va. 769, 778-79, 679 S.E.2d 601, 610-11 (2009) (citing Syl. Pt. 1 State v. Herold, 76 W. Va. 537, 85 S.E. 733 (1915) ("For ascertainment of the intent of the parties to a deed in which the description of the subject matter is inconsistent, contradictory and ambiguous, extrinsic evidence is admissible.").

Under West Virginia law, "[t]he 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.' " Payne v. Weston, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995) (quoting Syl. pt. 1, in part, Shamblin v. Nationwide Mut. Ins. Co., 175 W.Va. 337, 332 S.E.2d 639 (1985).

As to latent ambiguity, "a latent ambiguity is one which arises not upon the words of the instrument, as looked at in themselves, but upon those words when applied to the object sought to be accomplished by the contract or the subject which they describe." Syl. Pt. 10, in part, Paxton v. Benedum-Tres Oil Co., 80 W. Va. 187, 94 S.E. 472 (1917); see also Syl. Pt. 2 and 3, Bank v. Catzen, 63 W.Va. 535, 60 S.E. 499 (1908) (stating that "[w]hen, in attempting to apply a deed to its subject matter or the parties thereto, a latent ambiguity of any kind is disclosed, parol evidence is admissible to a limited extent, to show what was intended, not only by the instrument considered as a whole, but also by particular words or clauses thereof . . . Parol evidence, admissible for such purpose, is generally limited to the subject-matter, the relation of the parties thereto, their prior and subsequent conduct, their situation, and all the facts and circumstances existing at the time of the execution of the instrument.").

In Gastar Exploration, Inc. v. Rine, 239 W.Va. 792, 806 S.E.2d 448 (2017), the West Virginia Supreme Court was recently asked to determine whether a reservation of one-half of the oil and gas was ambiguous, such that it was appropriate to consider extrinsic evidence to determine the parties' intent.

In Gastar, in 1957, the Franklins, who owned a parcel of land in fee, sold the tract to the Yohos, reserving one-half of the oil and gas. Id., 796. For twenty years post sale, the tax assessments reflected that the Franklins owned an undivided one-half interest in the oil and gas and that the remaining undivided one-half interest in the oil and gas, as well as the surface, were owned by the Yohos. In 1977, the Yohos conveyed "the same property" to the McCardles by deed which contained identical reservation language that was used in the 1957 deed. Id.

After 1977, the Yohos were not assessed for any taxes on the surface for the oil and gas, but their former assessment was transferred to the McCardles, who proceeded to pay the assessed taxes for over 30 years. Id., 797. After Ms. McCardle signed an oil and gas lease with Gastar Exploration, the Yoho heirs - through their estate administrator Gary Rine - filed a lawsuit, alleging therein that the Yohos had not conveyed their interest in the oil and gas to the McCardles. Id.

Initially, the Circuit Court of Marshall County decided that the 1977 deed was unambiguous and that the Yohos had reserved an undivided one-half interest in the oil and gas in the 1977 deed. Id. On appeal, the Court reversed and remanded the case, holding that the circuit court erred in finding the 1977 deed unambiguous. In reaching this holding, the Court noted the longstanding contract rule that if a deed is ambiguous on its face, a court must look to extrinsic evidence of the parties' intent--including the parties' conduct "before and after" delivery of the deed. Id., 800-801. Further, the Court noted that a deed will be rendered ambiguous if reasonable minds might disagree as to its meaning and that the deed at issue was poorly drafted and reasonable minds could disagree as to exactly what had been conveyed/reserved, particularly because the deed contained no expressed intentions by the Yohos regarding the one-half oil and gas reservation. Id.

Here, similar to Gastar, this Court may determine that reasonable minds can interpret the reservation of "one sixteenth of all the oil and gas in and under said land" contained in the 1902 Deed in diametrically opposed ways.

To expand, the WV ICA's logic, which notes at pg. 10 that the one-sixteenth language could be interpreted as ambiguous in other settings, again falls short.

Contrary to the WV ICA's abbreviated analysis, it is not the "other language" which creates the ambiguity in the present case – the ambiguity arises from the very use of the 1/16th fraction.

Heyen vividly describes this latent/instinsic ambiguity:

> Thus, if a conveyance of an undivided one-half of the minerals is intended, the parties will multiply one-half by one-eighth and the instrument will erroneously specify a conveyance of one-sixteenth of the minerals upon the assumption that one-sixteenth is one-half of what the grantor owns.
>
> An ambiguity is created because the instrument will also show that the conveyance of one-sixteenth of the minerals is meant to entitle the grantor to one-half of the royalty. Of course, an undivided one-half of the minerals is needed to carry one-half of any royalties reserved. (l.c. 576.)

If the Court explores this alternative, fact specific avenue, Severin POA respectfully submits that, similar to Gastar, the post-1902 transaction land book/tax records bear heavily as to ownership, as they unequivocally demonstrate that the parties placed a construction upon the 1902 reservation of 1/16th which, yet again, was wholly ignored by the WV ICA.[17] See also Camden v. McCoy, 48 W.Va. 377, 37 S.E. 637 (1900) (internal citation omitted) (stating that "[if] the words or terms of a contract are equivocal, resort may be had to the circumstances under which the contract was executed and to the contemporaneous construction given to the contract by the parties. . . . The subsequent acts are admitted to show how the parties understood their contract, and are a practical construction of it. . . . It is a familiar doctrine that when the terms of an agreement are in any respect doubtful or uncertain and the parties to it have by their own conduct placed a construction upon it which is reasonable such construction will be adopted by the court, because it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract.").[18]

For these alternative reasons, this Court can effectively reinstate the Circuit Court's finding on alternative, fact specific grounds, such that Severin POA remains vested with a ½ interest in the oil and gas estate at issue and thereby vacate and reverse the WV ICA's flawed Opinion.

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[17] In its Opinion, the WV ICA make the factually unsupported statement at pg. 6 that even if the WV ICA found the 1/16th reservation ambiguous the Court would still have found in favor of the Nicholsons. Such unsupported *dicta* is pure conjecture as it: (1) has no stated factual basis; (2) is contrary to the best evidence – the land books from the relevant timeframe, which the Gastar Court directs the parties to review/present; (3) is contrary to the circumstances that existed at the time of the 1902 Deed; and (4) is contrary to the construction given by the parties and third parties – including Antero Resources Corporation, the current Marcellus Shale operator/producer which independently determined that the 1/16th fractional reservation vested ½ of the mineral estate in Petitioner/Severin POA.

[18] See also Palmer v. Newman, 91 W.Va. 13, 21, 112 S.E. 194, 197 (1922) (internal citations omitted) (reinforcing the practical construction doctrine and stating "[t]ell me what you have done under such a deed, and I will tell you what that deed means.").

VII. CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that this Court reverse the WV ICA's Opinion and align with leading oil and gas jurisdictions which have performed a meaningful and vigorous analysis of the Estate Misconception Theory and legacy of the $1/8^{th}$ royalty, principles embodied in existing West Virginia case law, and create a default rule to govern archaic West Virginia oil and gas fractional transactions: 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 $1/8^{th}$ – a paradigm consistent with West Virginia jurisprudence and prevailing foreign authority.

Further, in so finding, Petitioner respectfully requests that this Court reverse the WV ICA's holding and find that the 1902 reservation at issue, the $1/16^{th}$ reservation, reserved ½ of the mineral estate in Severin POA's chain of title.

Alternatively, Petitioner respectfully requests that this Court find that the $1/16^{th}$ reservation is ambiguous and that this Court fairly weigh the extrinsic evidence in the developed and stipulated record in this matter, extrinsic evidence which leads to the inescapable conclusion that Severin POA is vested with a ½ interest in the oil and gas estate at issue - and that the flawed Opinion of the WV ICA must be vacated and reversed.

[signature page follows]

Respectfully submitted,
Petitioner Severin POA Group, LLC,
By Counsel:

Frank E. Simmerman, Jr. (WVSB # 3403)
Chad L. Taylor (WVSB# 10564)
Frank E. Simmerman, III (WVSB # 11589)
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Facsimile: (304) 623-4906
fes@simmermanlaw.com
clt@simmermanlaw.com
trey@simmermanlaw.com

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

The undersigned hereby certifies that the attached "**BRIEF OF PETITIONER SEVERIN POA GROUP, LLC**" was served upon the following via the Court's electronic filing system on April 15, 2024:

Andrew R. Cutright
Roger L. Cutright
Cutright Law PLLC
455 Suncrest Towne Centre, Suite 201
Morgantown, WV 26505
Phone: (304) 943-7933
Fax: (304) 212-5825
arcutright@cutrightlawwv.net
rlcutright@cutrightlawwv.net
Counsel for Respondents

Other Parties:

Antero Resources Corporation, Steptoe & Johnson PLLC, 400 White Oaks Blvd., Bridgeport, WV 26330, 304-943-8000, Justin.Rubenstein@Steptoe-Johnson.com

Rockwell Resources LLC, Bowles Rice PLLC, 600 Quarrier St., Charleston, WV 25301, 304-347-1100, gpatterson@bowlesrice.com

JEC Production LLC, Bowles Rice PLLC, 600 Quarrier St., Charleston, WV 25301, 304-347-1100, gpatterson@bowlesrice.com

Mark A. Koelzer, PO Box 1311, Garrison, North Dakota 58540

Shelley A. Chase a.k.a. Shelly A. Chase, PO Box 1023, Garrison North Dakota 58540-1023

Patty L. Sayler, PO Box 702, Garrison, North Dakota 58540-0702

Rick Koelzer, 7900 Highway 2E, Minot, North Dakota, 58701

Robert J. Koelzer, PO Box 295, Garrison, North Dakota 58540

Jean L Nyquist, 255 Viking Ct., Erie, Colorado 80516

Collette Chambellan 255 Viking Ct, Erie CO 80516

Gregg J Colle 113 Five Oaks Circle, Beaufort SC 29902

Sally Lauer, PO Box 130, Seneca, Kansas 66538

Michael Lauer current address is unknown

Andrea Lauer current address is unknown

Timothy Lauer current address is unknown

Donald J. Lauer, 3700 Aspen Ave N Apt 1 Albuquerque NM 87110-5601

James E. Lauer, 3915 Saguaro Blvd, San Antonio, Texas 78253

Barbara L. Bochsler, PO Box 963, Mt. Angel, Oregon 97362

Brixey Maizano, a.k.a. Brixey Marzano, 2410 11th Ave. CT. SE, Puyallup, Washington 98372

Leah Severin, 6201 W Olive Ave Apt 307 Glendale AZ 85302

Angela J. Counsilman, 5010 119th St. NE, Marysville, Washington 98271

Theresa L. Severin, 5010 I1 9 St. NE, Marysville, Washington 98271

Charlotte L. McClow, 2630 NW Garryanna Dr. #3, Corvallis, Oregon 97330-3667

Gary Frederick Severin, 11020 Highway 10, Ellensburg, Washington 98926

John Patrick Severin, 802 Rhea Lane, Walla Walla, Washington 99362

Jane Marie Severin, 6730 Hermosa Vista Dr. #39, Mesa, Arizona 85215

Donna Laha, PO Box #4184, South Colby, WA 98384

David Joseph Severin, 2033 2nd Ave. #2103, Seattle, Washington 98121

Collen Bracket, 4664 Old Yellowstone Trail N., Livingston, Montana 59047

Betty Ann Severin, 3531 Denmark Rd., Ellensburg, Washington 98926

Sally Jean Urie, 75400 LaCresta Dr., Palm Desert, California 92211

JoAnne Perry, 1520 Cottonwood Ave., Firecrest, Washington 98466

Susan L. Dahl, 4940 Saunders Ave., Loomis, California 95650

Rebecca Severin, PO Box 1323, Ellensburg, Washington 98926

Carole Mize, a.k.a. Carole Purdum, 1205 NE 35th St. Topeka, Kansas 66617

Robert K. Gruetze, 10205 N Parkside, Nine Mile Falls WA 99026

Mark Gruetze, 303 Hummingbird Circle, Cranberry Twp., Pennsylvania 16066

Gerald "Jerry" Francis Severin, PO Box 970 Collierville, Tennessee 38027

Jolene A Hitz, 17862 Pflaum Lane, Silverton, OR 97381

Gayle M Smith, 880 Player Dr N, Keizer, OR 97303

Carol J Berning 9922 114th Street NE, Mt Angel, OR 97362

Chris J Bochsler11840 Wilco Hwy, Mt Angel, OR 97362

Amy J Aman,10520 Boehmer Road, Mt Angel, OR 97362

Edie L Rouleau 11050 Highway 10 Ellensburg, WA 98926

Cynthia C. Cloyd 512 Sand Dollar Ct Ft Collins CO 80525

Joyce M. Durham 6202 E McKellips Rd Unit 12 Mesa AZ 85215

Janice A. Severin-Souder 8929 Texas Trail Terrell, TX. 75160

Catherine J. Jinneman 5256 Royce Dr Mt. Dora, FL 32757

Janelle C Shiner 321 Cokes Ridge Circle Duncan SC 29334

Christopher D Colle PO Box 940 Idaho Springs Co 80452

Annette Colle 223 Maison Dr. Box 12 Myrtle Beach SC 29572

Frank E. Simmerman, III (WVSB# 11589)