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.

REPLY BRIEF OF PETITIONER SEVERIN POA GROUP, LLC

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I. INTRODUCTION

As is now apparent to the Court from the thorough briefing of the parties and the amicus briefs, there are two (2) main schools of thought in West Virginia which relate to the meaning of fractional reservations in archaic oil and gas instruments which bear an "8^{th}" denominator.

Severin POA Group, LLC, ("Severin POA or Petitioner"), primarily advances the informed and oil and gas industry specific school of thought – that fractional reservations contained in early 1900s instruments must be read in their industry and fact specific context and that doing so logically leads to the conclusion that fractional references contained in archaic oil and gas instruments are references to what was perceived and understood as the entire mineral estate in this timeframe – "the $1/8^{th}$ mineral estate". Thus, an exception or reservation of a $1/16^{th}$ estate is an exception or reservation of a ½ mineral interest – the same conclusion reached by the Circuit Court and the Marcellus Shale oil and gas operator in this matter, Antero Resources Corporation.

Respondents advance the contrary position, that archaic fractional reservations which contain fractional denominators involving multiples of 8 should be rigidly read and mathematically applied without context or reference to the "$1/8^{th}$ mineral estate" or the circumstances and conditions of the parties when they contracted in the early 1900s – the exacting position adopted by the West Virginia Intermediate Court of Appeals, ("WV ICA"), a conclusion also reached by the historic shallow oil and gas well operator in this matter.

As is probably also now apparent to this Court, no matter how this issue is resolved, the Court's ultimate decision will have profound impacts upon West Virginia oil and gas title opinions, title practices and oil and gas royalty payments, both historically and prospectively.

To expand, certain groups of attorneys and mineral abstractors, and oil and gas operators, rendered and relied upon mineral title opinions premised upon the reality that a $1/16^{th}$ exception or reservation set forth in early 1900s West Virginia oil and gas instruments is an exception or reservation of ½ of the oil and gas estate in fee, whereas other attorneys and abstractors in West Virginia issued incompatible title opinions wherein they opined that, mathematically, an exception of 1/16th in an archaic oil and gas transaction was just that: an exception or reservation of 1/16th of the oil and gas estate.[1]

The thrust behind these preliminary comments is that they highlight the importance of this case in the context of West Virginia oil and gas law and the necessity for this Court to reach the correct conclusion and craft a proactive, forward looking decision – a decision which both resolves the present dispute and creates a rule-based framework for analysis of archaic, fractional oil and gas exceptions and/or reservations in West Virginia with meaningful thought given to the understanding and use of the term "1/8th" in early West Virginia oil and gas jurisprudence and land practices. Plainly, as will be set forth below, these concepts are grounded in existing West Virginia caselaw which firmly support the construction that a fractional reservation with an "8th" denominator was a reference to the entire oil and gas estate, the estate being misconceived. Thus, in this case, the Petitioner is vested with a ½ interest in the mineral fee estate by virtue of its 1902 1/16th reservation.

Petitioner submits that only through this lens can this Court honor and preserve the plain language of this instrument and other archaic oil and gas instruments in West Virginia – while providing all oil and gas stakeholders with a clear framework for future transactions and title analysis.

Such concepts and considerations are completely foreign to, and absent from, the WV ICA's opinion and the arguments presented by Respondents, who merely wish to leave West

[1] Stated differently, there presently is uncertainty of title in West Virginia as to the issues which are the subject of this appeal, as argued by Respondents, and Respondents' arguments wholly fail to foster certainty of title related to this oil and gas industry specific issue in West Virginia.

Virginia oil and gas law and title practices in a general state of disarray through piecemeal analysis of historic West Virginia and relevant foreign caselaw. In large measure, Respondents' analysis does not support the very arguments they present, as summarily made evident by one of the brightest oil and gas minds of the 20th century, Professor Summers, whose unbiased analysis of fractional reservations/exceptions/West Virginia caselaw the Respondents glaringly ignore.

Premised upon the additional arguments below, this Court should reverse the WV ICA's Opinion and align with leading oil and gas jurisdictions which have performed a meaningful and proactive analysis of the Estate Misconception Theory and legacy of the 1/8th 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 1/8th – a paradigm consistent with existing West Virginia jurisprudence and prevailing foreign authority.

Alternatively, as will also be discussed below, Petitioner respectfully requests that this Court find that the 1/16th 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.

II. ARGUMENT

A. As The Concept Of A One Sixteenth Mineral Reservation Being A Reservation Of One Half Of The Mineral Estate Is Firmly Rooted In Early West Virginia Jurisprudence, A Concept Glaringly Ignored By The Respondents, 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.

More persuasive than any self-serving litigants' position or interpretation of archaic case law, Severin POA again calls the Court's attention to Professor 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 Respondents' presentation of West Virginia jurisprudence, Summers noted in 1931, after a thorough and independent review of the then existing body of West Virginia case law applicable 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), as follows:

> 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. They could have granted one-half of the oil and gas rents and royalties, or they 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. (emphasis added).[2]

Id., 14, 27.

Professor Summers' teachings are summarily ignored by the Respondents in their briefing. Indeed, rather than address the reality that the only third party who has performed a West Virginia

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[2] There are factual differences in the early 1900s caselaw. The WV ICA's error, in part, is that the early 1900s West Virginia caselaw overwhelmingly supports the construction that 1/16th fractional reservations were made in the context of the 1/8th legacy oil and gas royalty, and thus were effective reservations/exceptions of ½ of the oil and gas estate.

context and timeframe appropriate analysis of the issue now before this Court has firmly sided in the Petitioner's camp, the Respondents wholly fail to diffuse Professor Summers' conclusions – choosing instead to perform piecemeal case illustrations which are designed to serve Respondents' ends – not to fairly represent the state of early 1900s West Virginia jurisprudence. To expand, as is known to the informed oil and gas stakeholder, the term "one-sixteenth" was used synonymously with the term "one-half" in the early West Virginia oil and gas industry – and this concept, as well as the Estate Misconception Theory, has a foundation in existing West Virginia case law.

Indeed, what is significant about the foregoing West Virginia cases discussed in Professor Summers' law review article is that the conveyance or reservation at issue was always dealing with a one-sixteenth (1/16) interest, and in each case this Court ultimately found a one-sixteenth (1/16) to be a one-half (1/2) – just through varied reasoning and analysis. Thus, it is readily apparent how oil and gas stakeholders came to treat, and continue to treat, one-sixteenth (1/16) oil and gas conveyances and reservations from the early 1900s in West Virginia to mean one-half (1/2) of the oil and gas estate.[3]

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) totally divorced from the oil and gas industry specific reality that, as rooted in West Virginia case law noted by Professor Summers, the term "one-sixteenth" was plainly used to refer to and was synonymous

[3] Manufacturers' Light & Heat Co. v. Knapp, 102 W. Va. 308, 135 S.E. 1 (1926), which was criticized by Professor Summers, is the lone outlier to this statement. See Summers, Transfers of Oil and Gas, 10 Tex. L. Rev. at 27 (emphasis added) (stating that "[t]he 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."). (emphasis added).

with the term “one-half” of a mineral estate in archaic West Virginia oil and gas transactions given the belief that the estate to which the land or mineral owner was entitled was a “$1/8^{th}$” interest.

B. As The WV ICA’s Holding Erodes The Legacy of the $1/8^{th}$ Royalty, And In So Doing Destroys The Integrity And Intent Of Early 1900s Oil And Gas Instruments And Reservations With Fractional Denominators, Leaving West Virginia Oil And Gas Practices In A State Of Chaos, The ICA’s Opinion Must Be Reversed And Severin POA’s ½ Oil And Gas Estate Must Be Confirmed.

As set forth above, the concept of the legacy and significance of the $1/8^{th}$ royalty is embedded in existing West Virginia jurisprudence and it is undisputable that in the early 1900s parties in West Virgnia plainly contracted, in the oil and gas setting, with reference to the legacy $1/8^{th}$ royalty. See also 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).

This is a fundamental point which both the ICA and the Respondents fail to acknowledge. Indeed, the ICA’s opinion alters and destroys the integrity of the instrument at issue, the 1902 Deed, and the integrity and plain language of numerous other early 1900s oil and gas instruments and exceptions/reservations, through a mathematical analysis. Such analysis is simply not warranted as it defies the plain language and intent of early 1900s oil and gas contracting parties, West Virginia jurisprudence and common sense.

Specific to this appeal, it is uncontested that pre – 1902, substantial oil and gas activities/operations were occurring on F.W. Severin’s 224-acre tract, the larger tract from which the 117.55-acre parcel was severed. 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,[4] free of cost, for "all oil produced and saved from the premises". (Appx. 528). Similarly, on 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, reserving a traditional 1/8th royalty interest, free of cost, for "all oil produced and saved from the premises." (Appx. 531-532). The fact that these leases subsequently expired is of no weight. The parties contracted based upon their experiences – that the 1/8th royalty was the operative oil and gas estate.

With these facts in the minds of the parties, 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).

The record on appeal is unequivocal that from 1902 through 1911, the oil and gas estate was not separately recorded/itemized on the Doddridge County Land Books. Beginning in 1912,[5] the entries are as follows:

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[4] 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 and Respondents.

[5] It now appears that Respondents are somehow challenging these land books entries and the reality that substantial oil and gas activities were occurring on the parcel at issue prior to and after 1902. Respondents appear to be regretting their failure to perform discovery on these issues below and to not develop a factual record related to these issues and issues such as laches, etc. This was the Respondents' chosen course, yet the Respondents have now attempted to inject issues of fact into this appellate process – an odd approach given their presentation that the case law is so clear/that factual development is irrelevant. See Respondents' Brief, pg. 1 (now arguing that there is "disputed extrinsic evidence" – evidentiary support which Petitioner submits cannot be ignored if true meaning is to be given to the archaic, 1902 instrument at issue).

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).[6]

Stated practically, parties do not draft and execute contracts in a vacuum, they contract based upon the facts and circumstances known to the parties at the time of drafting and execution of an agreement, i.e. life experiences such as the existence of oil and gas wells and activities on a parcel. In this case the facts as they existed in the context of the handwritten 1902 Deed and reservation. See White v. White, 64 W.Va. 30, 35, 60 S.E. 885 (1908) (stating that "[g]enerally the significance of language, verbal or written, depends upon the situation of the parties, their prior and subsequent conduct, the nature of the subject matter, the purposes they had in view and all the surrounding facts and circumstances. It sometimes means more and sometimes less than the words employed signify in their usual and ordinary acceptation."); McNeer, Talborr & Johnson v. C. & O. Ry. Co., 76 W.Va. 803, 808, 86 S.E. 887 (1915) (stating that "[w]ords in a written contract are not to be interpreted without reference to their context."); Connolly v. Bruner, 48 W.Va. 71, 89, 35 S.E. 927 (1900) (stating that [i]t is a fundamental proposition that custom and usage are

[6] There is no background evidence from before or immediately after the 1902 Deed which supports Respondents' reading of the 1902 Deed as the Respondents wholly failed to present any evidentiary support from this highly relevant timeframe at the Circuit Court level.

supposed to enter and form a part of all contracts where the use or custom prevails, in reference to the matter to which the contract relates, and that the contracting parties are not only presumed to be acquainted with such usage, but contract with reference to it.") (internal citation omitted); Syl Pt. 1, Tide Water Oil Sales Corp. v. Harper, 113 W.Va. 643, 169 S.E. 454 (1933) (stating that "[a] party to a contract will not be permitted to take advantage of an apparent change in the use of technical terms in any particular business or trade. The meaning of such words must be construed as of the date of the contract."); Syl. Pt. 5, Raleigh Lumber Co. v. Wilson & Son, 69 W.Va. 598, 72 S.E.2d 651 (1911) (stating that "[i]n an action involving the interpretation of a contract, a custom or usage, consistent with the terms of the contract, peculiar to the subject matter thereof, known to the parties, and probably intended to be included in the contract, as shown by their situation and purposes, the nature of the subject matter and the attendant circumstances, is admissible in evidence.").

The WV ICA's ruling, and the Respondents' arguments, are defeated by their departure from reality and common sense. The parties here, in 1902, contracted and created a one-half mineral reservation in the hot bed of West Virginia oil and gas development at the time, Doddridge County, by reference to the $1/8^{th}$ oil and gas estate.

Any other finding ignores the parties' context in 1902, the subject matter of the reservation, and the customs and usage which were generally prevalent in Doddridge County, West Virginia in this timeframe, see Appx. 187-188 (expert opinion of Richard Starkey, Esq., stating that "(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 this 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.).[7]

The deeper problem with the WV ICA's and the Respondents' logic and flawed ruling is that it leaves attorneys, abstractors, oil and gas stakeholders and courts across West Virginia in a reactive and passive position, not in a position of certainly of title as suggested by Respondents.

Stated differently, Respondents' arguments, and the WV ICA's opinion, leave all oil and gas stakeholders in flux – as is apparent from a review of the conflicting title opinions in this litigation, Professor Summers' article, and the historic West Virgnia jurisprudence noted above and previously briefed to this Court – given that there is simply no real guidance given as to how parties should assess title certainty in the fractional, oil and gas denominator setting.

Speaking further, the only default rule which embodies existing West Virginia case law and preserves the integrity and legacy of the 1/8th royalty is for this Court to create a rebuttable presumption that the Estate Misconception Theory, as previously briefed, is applicable to any archaic oil and gas transaction which uses a fraction that is a multiple of 1/8th – a presumption which can be rebutted by case specific evidence – evidence which is absent from the record in this appeal. Such a finding and rule, unlike the WV ICA's reasoning and Opinion, would provide a workable framework for West Virginia oil and gas stakeholders, a framework which accounts for the fact specific nature of each case.[8]

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[7] The parties jointly agreed to make this Expert Witness Disclosure part of the Appellate Record/Appendix. Petitioner is at a loss how the Respondents can now argue that this Court should simply ignore the Expert Opinions of Richard L. Starkey, Esq. If Respondents had a valid objection, they certainly waived the same by agreeing to make this Expert Witness Disclosure part of the Appellate Appendix. It is also telling that Respondents included the Expert Witness Disclosure as part of their Intermediate Court of Appeals Appendix.

[8] Severin POA is aware that such a ruling may require remand of this matter to the Circuit Court for additional factual development.

Indeed, the rationale behind such a rule is sound and is embodied in Van Dyke v. Navigator Group, 2023 Tex. LEXIS 144, 66 Tex. Supp. J. 333 (Texas, February 17, 2023). Such a framework "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. And 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.[9]

[9] 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"). Additionally, the Respondents suggestion that single fraction reservations should be treated differently than double fraction reservations is without merit. Although ignored by Respondents, as recently noted in oil and gas jurisprudence: [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. [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 v. Clifton, 2023 Tex. APP. LEXIS 4925, 2023 WL 4443016, 26-27 (Ct. App. Texas, July 10, 2023).

Consistent with the foregoing, 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 apply the default rule noted above to hold that the 1902 reservation at issue, the 1/16th reservation, reserved ½ of the mineral estate in Severin POA's chain of title as the record before this Court overwhelmingly supports such an application of the default rule.

C. Alternatively, This Court Can Create A Default Rule, Premised Upon Existing West Virginia Contract Law, That Fractional Denominators In Archaic Oil And Gas Instruments/Transactions Are Ambiguous And Thus The True Intent Of The Contracting Parties Should Be Explored, Defined And Preserved By Informed Judicial Decisions Which Examine Extrinsic Evidence – An Alternative Framework Which Preserves The True Intent And Integrity Of Industry Specific Early 1900s Oil And Gas Instruments And Again Leads To The Conclusion That Severin POA Is Vested With ½ Of The Oil And Gas Estate Pursuant To The 1902 1/16th Reservation.[10]

The West Virginia Supreme Court has repeatedly held that the "the polar star that should guide us in the construction of deeds as of all other contracts is what was the intention of the party or parties making the instrument, and when this is determined, to give effect thereto, unless to do so would violate some rule of property." Gastar Exploration Inc. v. Rine, 239 W. Va. 792, 798, 806 S.E.2d. 448, 454 (2017) (internal quotations and alterations omitted). And that, "[a]ll rules of construction must yield to the expressed intention of the parties if that can be ascertained." Davis v. Hardman, 148 W. Va. 82, 89, 133 S.E.2d 77, 81 (1963). Indeed, the goal of any contract dispute is for a court to find the true meaning of the contract, not to perform shorthand, formulaic analysis as the WV ICA did here.

Additionally, this Court has repeatedly noted that "[i]n deeds, contracts, and other instruments, both technical and nontechnical, words are sometimes given meanings variant from

[10] Such a rule also would avoid the extreme, mathematic approach adopted by the WV ICA as the rule would be one of flexible interplay insofar as it allows for case and timeframe specific analysis.

the significations they ordinarily have, and, when it is manifest that the parties intended them to have a restricted or peculiar signification, such intention will be respected and enforced by the courts." Syl. Pt. 1, Bank v. Catzen, 63 W. Va. 535, 60 S.E. 499 (1908).

More specific to the oil and gas litigation context, this Court has previously acknowledged that contracts in the oil and gas industry which appear clear on their face can actually be ambiguous,[11] and thus require further case specific analysis. See Energy Development Corp. v. Moss, 214 W. Va. 577, 586, 591 S.E.2d 135, 143 (W. Va. 2003) ("We also agree with the lower court that a document that may appear on its face to be free from ambiguity, may be deemed latently ambiguous."); see also Syl. Pt. 2, Bell v. Wayne United Gas Co., 116 W. Va. 280, 181 S.E. 609 (1935) ("Oral testimony of the general usages of the gas business, which must have been in the minds of the parties at the time of entering into the contract, is admissible to explain an ambiguity in a written contract for the purchase of gas, whether the ambiguity is latent or patent.").[12]

Stated succinctly, the Respondents and the WV ICA's reliance upon mathematical application in the present dispute is akin to stuffing a square peg in a round hole. This case involves

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[11] Petitioner has always presented this alternative argument, not an "inexplicable" argument as suggested by Respondents.

[12] See also this Court's recent decision in The Hansen-Grier Family Trust v. Haywood & Haywood, No. 22-0422 (Filed May 24, 2024) (Noting in Syl. Pt. 4 that "the term 'ambiguity' is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning" and confirming a Circuit Court's conclusion that a reservation in a deed was ambiguous where it could mean one of four things.). Here, as previously made known to the Court, there are six (6) interpretations to date of the 1902 Deed reservation, three (3) of which support Petitioner's arguments – the Circuit Court's decision, Antero Resources Corporation's title opinion, and Petitioner's reading – and three (3) of which support Respondents' position – the WV ICA's Opinion, the shallow oil and gas operator's title opinion, and Respondents' reading of the 1902 Deed reservation. Reasonable minds, both judicial and otherwise, are uncertain and disagree as to the meaning and intent of the 1902 1/16th Deed reservation.

a specialized, 1902 era specific term of art – the use of the fraction 1/16 in the context of the legacy 1/8th royalty – a term of art which creates a ½ oil and gas estate reservation or exception. Such a presentation is not "non-sensical" as labeled by the WV ICA and Respondents, but rather it is a concept embraced and validated by courts in leading oil and gas jurisdictions abroad and the case law noted above. See e.g., Heyen v. Hartnett, 235 Kan. 117, 124 (1984) (stating that "[w]e believe that the use of the fraction '1/16' in the initial clause of this mineral deed was simply an error commonly made in the early days of oil and gas conveyancing." There was an "early day misconception and misuse of the fraction '1/16th' when '1/2' was really intended."); Hysaw v. Dawkins, 483 S.W.3d 1, 10 (Tex. 2016) (stating a landowner "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."); Summers, Transfers of Oil and Gas, 10 Tex. L. Rev. at 9-14 (1931) (discussing, albeit not by title, the concept of estate misconception in reviewing the West Virginia cases Knapp and Horner discussed above); The Regrettable Rebirth of the Two–Grant Doctrine in Texas Deed Construction, 34 S. Tex. L. Rev. 73, 89 (1993).

Given the WV ICA's failure to discern the true meaning of the 1902 reservation at issue, this Court should alternatively weigh the extrinsic evidence and find that Severin POA is vested with ½ of the oil and gas estate – as this is the only conclusion which can be reached from the record in this matter given that the parcel at issue was the subject of prior oil and gas production and as the land books from the relevant era. The best evidence available to the Court demonstrates that Severin POA's predecessor in title owned ½ of the oil and gas estate. See (Appx. 501 – 522), Chart, supra. Further, in so holding and as an alternative framework to the default rule noted above, this Court should hold that one-sixteenth (1/16) or other fractions which are multiple of one-eighth (1/8) in antiquated oil and gas instruments are ambiguous and the polar star in determining intent is relevant extrinsic evidence from the era in which the instruments were drafted and executed as such an alternative rule based framework would fulfill the Court's ultimate purpose and function in preserving the true meaning of archaic, industry specific oil and gas instruments.

D. As The Respondents "Adequate Briefing" Arguments Are Nothing More Than Red Herrings, They Should Be Disregarded By This Court And The Court Should Spend Its Resources Examining The Merits Of This Important Dispute And Rendering A Thorough Opinion Which Aids Oil And Gas Stakeholders And Resolves The Present Dispute.

From the onset of this litigation, the Petitioner and the Respondents have been like two ships passing in the night – and this theme continues in the appellate briefing. The Respondents' gamesmanship has now reached a new height – as the Respondents now argue that Severin POA did not adequately brief or preserve issues at the trial court or WV ICA when the Respondents are fully aware that all issues presented in this appeal were more than adequately preserved by Severin POA's argument presentation to both the trial court and the WV ICA. See Appx. 357-446, 491-533, 560-563 (Severin POA's trial court briefings raising the points noted in West Virginia case law/Professor Summers teachings, the Estate Misconception Theory, the legacy of the 1/8th royalty, the term of art argument, and alternatively stating an ambiguity/extrinsic/best evidence argument); see also Appx. 614-644 (Severin POA's WV ICA brief, containing argument sections A-E, arguing as follows: (A) the Circuit Court was correct in viewing and interpreting the 1902 handwritten Deed on the date of its execution on April 18th, 2022, thus most of the precedent cited by the Nicholsons has no relevance to the present dispute; (B) the Circuit Court was correct in its conclusion that construction of the deed on its date of execution leads to the conclusion that a reservation of 1/16th of the oil and gas estate reserved ½ of the oil and gas estate under West Virginia law of the early 1900s; (C) the Circuit Court's holding was correct as the record solely contains custom/usage testimony with supports the construction that the 1902 reservation was a term of art which reserved ½ of the oil and gas estate in Severin POA; (D) the Circuit Court's holding was correct as its logic aligns with precedent from other leading oil and gas jurisdictions which have addressed the Estate Misconception Theory; and (E) alternatively, the Circuit Court's decision was ultimately the correct outcome because the 1902 Deed is ambiguous as it contains a latent defect which, when viewed in the totality of evidentiary support, leads to the inescapable conclusion that ½ of the oil and gas estate is vested in Severin POA.

In light of the foregoing, Severin POA respectfully requests that this Court disregard Respondents' red herring arguments – arguments which are not founded or supported by the record. Further, such arguments are yet another attempt by Respondents to hide from the true meaning and intent of the 1902 Deed/reservation at issue through grossly incomplete and inaccurate argument presentation – presentation divorced from the realities of this record in its entirety, and the realities surrounding execution and construction of the 1902 Deed and fractional 1902 reservation of ½ of the oil and gas estate in Severin POA.

III. CONCLUSION

For the reasons set forth above, Severin POA respectfully requests that this Court reverse the WV ICA's Opinion and hold that the 1902 Deed $1/16^{th}$ reservation vests ½ of the oil and gas estate in Severin POA. Severin POA respectfully submits that such a ruling, and reversal of the WV ICA, is necessary to preserve the integrity of the 1902 Deed/reservation and to align West Virginia with leading, sister 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. In so doing, Severin POA asks this Court to create a default rule to govern archaic West Virginia oil and gas fractional transactions to provide clarity to all oil and gas stakeholders: 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 historic West Virginia jurisprudence and prevailing foreign oil and gas authority.

Alternatively, Petitioner respectfully asks this Court to vacate and reverse the WV ICA's holding by finding that the $1/16^{th}$ reservation is ambiguous and that case specific, evidentiary support confirms the fact that Severin POA owns ½ of the oil and gas estate. Within this holding, Severin POA again respectfully advocates that the Court consider a rule-based framework which allows for flexible interplay of case specific facts and developments so that fractional denominator exception/reservations in historic oil and gas transactions are clarified prospectively for West Virginia oil and gas stakeholders.[13]

Respectfully submitted,
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By Counsel:

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[13] For the reasons set forth herein, Petitioner similarly requests that this Court deny any and all relief sought by the "*Amicus Curiae* Brief by Shiben Estates, Inc., a West Virginia Corporation."

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 "**REPLY BRIEF OF PETITIONER SEVERIN POA GROUP, LLC**" was served upon the following via the Court's electronic filing system on June 17, 2024:

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