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OF WEST VIRGINIA

No. 23-752 – *Severin POA Group, LLC v. Earl J. Nicholson and Joyce A. Nicholson*

KIRKPATRICK, Justice, dissenting:

By handwritten deed dated April 1, 1902, the predecessors in interest of Petitioner Severin POA Group LLC ("Severin") conveyed to the predecessors in interest of Respondents Earl J. and Joyce A. Nicholson a 117.55-acre tract, subject to the following reservation: "the parties of the first [Severin] also reserve the one sixteenth of all the oil and gas in and under said land." Severin and the Nicholsons are before us now, with Severin contending that, by the quoted language, a one-half interest in the oil and gas estate was reserved to it and the Nicholsons contending that only a one-sixteenth interest was reserved. Because I find the usage of the definite article "the" significant in construing the subject deed and that "the," coupled with the historical context within which the reservation was made, evidences an intent to reserve one half of the underlying mineral estate, I respectfully dissent from the majority's determination that a mere one-sixteenth interest in the oil and gas estate was reserved.

More than a century ago, the parties' predecessors negotiated the sale and purchase of the subject land, with Severin's predecessors making the reservation at issue. At the time this reservation was made, a one-eighth royalty rate was standard and nearly universal. *See, e.g.*, *Paxton v. Benedum-Trees Oil Co.*, 80 W. Va. 187, 189, 94 S.E. 472, 473 (1917) (referencing "the usual one-eighth" royalty); *Kilcoyne v. S. Oil Co.*, 61 W. Va. 538, 541, 56 S.E. 888, 888 (1907) (referencing "the prevailing one-eighth royalty");

Jackson v. Dulaney, 67 W. Va. 309, 311, 67 S.E. 795, 795 (1910) (referencing "the usual one eighth part of the oil as royalty"). Indeed, in the years leading up to the reservation at issue, Severin's predecessors themselves had entered into oil and gas leases covering the land, pursuant to which they reserved that prevailing royalty. Against this backdrop, the reservation was made, and contrary to the majority's position, external evidence such as this *can* reveal a latent ambiguity:[1] "A latent ambiguity, which does not appear upon the face of the document, however, may be created by intrinsic facts or extraneous evidence." *Energy Dev. Corp. v. Moss*, 214 W. Va. 577, 585, 591 S.E.2d 135, 143 (2003) (quoting *Kopf v. Lacey*, 208 W. Va. 302, 307, 540 S.E.2d 170, 175 (2000)); *see also Snider v. Robinett*, 78 W. Va. 88, 94, 88 S.E. 599, 601 (1916) ("It is an old and familiar rule that, when the ambiguity is thus raised by extrinsic evidence, it may be removed by the same means." (quoting 3 Jones on Evid. § 472)). The prior, substantial leasing activity on the subject land, in conjunction with the historical significance of the one-eighth royalty, discloses a latent ambiguity in the reservation.

Specifically, as the majority found, the reservation of "the one sixteenth of all the oil and gas" conceivably could have reserved *a* one-sixteenth of the oil and gas in and under the land. However, Severin's predecessors reserved "*the* one sixteenth of all the oil and gas in and under said land." (Emphasis added.) "The," as it is a definite article, functions "to indicate that a following noun or noun equivalent is definite or has been

[1] *See* Maj. Op. p. 9 ("Additionally, Severin Group may not point to extrinsic evidence to create ambiguity in the 1902 Deed.").

previously specified by context or by circumstance" or "to indicate that a following noun or noun equivalent is a unique or a particular member of its class." "The," Merriam-Webster, https://www.merriam-webster.com/dictionary/the (last visited Nov. 11, 2026). Thus, having chosen "the" to precede "one sixteenth," "the one sixteenth" is also rationally taking on a circumstance- or context-specific meaning or is otherwise unique. In particular, given one-sixteenth's direct mathematical relation to half of the standard royalty rate, "*the* one sixteenth" could reasonably be read to reserve the specific one-sixteenth that is half of the standard royalty. *See Gastar Expl. Inc. v. Rine*, 239 W. Va. 792, 799, 806 S.E.2d 448, 455 (2017) ("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." (quoting Syl. Pt. 4, *Est. of Tawney v. Columbia Nat. Res., L.L.C.*, 219 W. Va. 266, 633 S.E.2d 22 (2006)). Thus, the prevailing royalty rate, undoubtedly known to and previously reserved by Severin's predecessors, exposes the reservation's ambiguity. *See Collins v. Treat*, 108 W. Va. 443, 446, 152 S.E. 205, 206 (1930) ("A latent ambiguity arises when the instrument on its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain." (quoting 22 C.J.S. § 1192)); *Paxton*, 80 W. Va. at 188, 94 S.E. at 473, Syl. ("[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.").

When a deed is determined to be ambiguous, as with any ambiguous contract, a court must search for the parties' intent. "[T]he 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." *Totten v. Pocahontas Coal & Coke Co.*, 67 W. Va. 639, 642, 68 S.E. 373, 374 (1910). "Exploring the intent of the contracting parties often, but not always, involves marshaling facts extrinsic to the language of the contract document. When this need arises, these facts together with reasonable inferences extractable therefrom are superimposed on the ambiguous words to reveal the parties' discerned intent." *Energy Dev. Corp.*, 214 W. Va. at 586, 591 S.E.2d at 144 (quoting *Fraternal Ord. of Police, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 101 n.7, 468 S.E.2d 712, 716 n.7 (1996)). The deed "will be interpreted and construed as of the date of its execution," Syllabus Point 2, in part, *Oresta v. Romano Bros., Inc.*, 137 W. Va. 633, 73 S.E.2d 622 (1952), and "in light of the customs and usages then prevalent." *Energy Dev. Corp.*, 214 W. Va. at 588 n.18, 591 S.E.2d at 146 n.18 (2003); *see also* Syl. Pt. 5, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962) ("Evidence of usage or custom may be considered in the construction of language of a written instrument which is uncertain or ambiguous but may not be considered to alter the legal effect of or to engraft stipulations upon language which is clear and unambiguous."). Also, extrinsic evidence, such as "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" may be examined to ascertain the contracting parties' intent. Syl Pt. 3, in part, *Bank v. Catzen*, 63 W. Va. 535, 60 S.E. 499 (1908).

Standing in the position of the contracting parties over one hundred years ago, mindful of the circumstances surrounding the execution of the deed and construing the reservation at issue in light of those circumstances, it is plain that Severin is vested with a one-half interest in the underlying oil and gas estate. In addition to the one-eighth royalty rate that was prevailing at the time of the reservation, the reservation was also made following recent, successive leasing activity on the land that reserved to Severin's predecessors a one-eighth royalty interest. Further, the property is situated in Doddridge County, and the Doddridge County land books reflect, for a period of years following the reservation, the reservation of one-half of the coal, oil, and gas by Severin's predecessors. Without question, that familiar and common royalty rate was in the minds of the parties' predecessors at the time of the subject reservation, and the Doddridge County land books reflect subsequent activity consistent with a reservation of half of the underlying mineral estate. Superimposing these facts on the ambiguous "the one sixteenth," Severin's predecessors' intent to reserve a specific one-sixteenth—that is, half of the standard royalty rate—is manifest.[2] *See Bank*, 63 W. Va. at 539, 60 S.E. at 501 ("[Technical words,] [l]ike nontechnical words, . . . sometimes have a peculiar meaning, ascertained by reference to

[2] As a practical matter, in drafting a reservation clause in a deed, attorneys (and scriveners) would ordinarily employ the use of the article "a" or "an" to reserve an undivided interest in and to a mineral estate or another aspect of property.

the subject-matter, the situation, and purposes of the parties, and the surrounding circumstances."). Severin's predecessors, in reserving a context- and circumstance-specific one-sixteenth, reserved half of the royalty rate prevailing during the time the parties made the reservation. And reserving this specific one-sixteenth operates as a reservation of one-half of the underlying oil and gas estate because a reservation of half of a one-eighth royalty interest effectively reserves half of the underlying oil and gas estate. *Paxton*, 80 W. Va. at 194, 94 S.E. at 475 ("We are clearly of the opinion that the grant of one-half of the royalties, rents, and income from the oil is a grant of one-half of the oil in place."); *United Carbon Co. v. Presley*, 126 W. Va. 636, 639, 29 S.E.2d 466, 467 (1944) ("It is true . . . that the reservation of 'one half of the oil and gas royalty upon and as to said tracts of land', without more, would have effected a legal reservation of one-half of such minerals in place.").

For these reasons, I believe the majority did not give effect to the parties' intent. Severin's predecessors intentionally reserved a context-specific one-sixteenth, or one-half of the standard royalty interest, thereby reserving one-half of the underlying oil and gas estate.[3] "In deeds, contracts, and other instruments, both technical and

[3] Although a rule of construction requiring construing the deed against the grantor could suggest that Severin's predecessors reserved only one sixteenth of the entire oil and gas estate, it is well settled 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). "*The* one sixteenth" plainly evidences the intent to reserve half of the standard one-eighth royalty interest, so there is no need to resort to that rule of construction. *Bank*, 63 W. Va. at 539, 60 S.E. at 501 ("The court will not resort to arbitrary

nontechnical, words are sometimes given meanings variant from the significations they ordinarily have, and, when it is manifest that the parties intended them to have a restricted or particular signification, such intention will be respected and enforced by the courts." *Bank*, 63 W. Va. at 535, 60 S.E. at 499, Syl. Pt. 1. In view of the prevalence of the one-eighth royalty, the choice to use the definite article "the" to precede "one sixteenth of the oil and gas" operated as a particular signification that Severin's predecessors were reserving half of the standard one-eighth royalty, and this is confirmed by the land books reflecting the subsequent activity related to this reservation. Accordingly, I respectfully dissent.

rules of construction, if, without so doing, the intention of the parties can be ascertained." (quoting Devlin on Deeds § 1012)).