STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

DANNY WEBB and DANNY WEBB CONSTRUCTION, INC.,
Respondent Below, Petitioners

vs.) No. 16-0640 (Fayette County Civil Action No. 16-C-9)

NORTH HILLS GROUP, INC,
Petitioner Below, Respondent

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OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners, respondents below, Danny Webb ("Mr. Webb") and Danny Webb Construction, Inc. ("Webb Construction"), by counsel George A. Patterson, III, Ronda L. Harvey, and Roger G. Hanshaw, appeal from an order entered June 7, 2016, by the Circuit Court of Fayette County. By that order, the circuit court denied the motion to dismiss of Mr. Webb and Webb Construction (collectively "Webb Petitioners") and further concluded that Respondent, petitioner below, North Hills Group, Inc. ("North Hills Group"), was entitled to a declaration for termination of an Oil and Gas Lease entered into with Webb Construction. Additionally, by the order, the circuit court granted an injunction against the Webb Petitioners directing that they cease and desist any further activities on the leased property. The Webb Petitioners raise nine assignments of error, which we have distilled and summarized into six relevant issues, *i.e.*, whether the circuit court erred by: (1) failing to apply the clear and unambiguous terms of the Oil and Gas Lease and otherwise failing to apply properly the terms of the lease in concluding that North Hills Group had a right to terminate it; (2) failing to address the estoppel effect of North Hills Group's acceptance of certain payments; (3) disregarding the testimony of the West Virginia Department of Environmental Protection ("WVDEP") representative; (4) admitting improper extrinsic evidence and inadmissible hearsay and opinion evidence; (5) piercing the corporate veil of Webb Construction; and (6) granting the cease and desist injunction. North Hills Group, by counsel Kevin W. Thompson and David R. Barney, filed a timely response, seeking to have this Court affirm the order of the circuit court.

This Court has considered the parties' briefs, the appendix record designated for our review, the pertinent authorities, and oral argument. We find no new or substantial questions of law or prejudicial error, and affirm, albeit on different reasoning, the lower court's termination of the Oil and Gas Lease as well as its issuance of the cease and desist injunction. However, our *de novo* review compels the conclusion that the circuit court's piercing of the corporate veil of Webb Construction, without supporting evidence, was clear error thereby

meeting the limited circumstances for issuance of a memorandum decision reversing the circuit court on that ground. For these reasons, a memorandum decision affirming, in part, and reversing, in part, the decision of the circuit court is appropriate pursuant to Rule 21(c) and (d) of the Rules of Appellate Procedure.

North Hills Group is a small West Virginia corporation with real estate holdings in Fayette County, West Virginia. There are five families involved in the corporation. One person is an original shareholder and the remaining shareholders consist of heirs to parents or spouses. Patricia Hamilton is the current President of North Hills Group and testified on its behalf during the course of the proceedings before the circuit court. Mr. Webb is the sole shareholder and President of Webb Construction, a West Virginia corporation engaged in the oil and gas business including the trucking of waste or disposal fluids from oil and gas operations to underground injection disposal sites in Fayette County, West Virginia.

On or about April 17, 2008, the North Hills Group, by its then President, Philip D. Mooney, entered into an Oil and Gas Lease with Webb Construction. The Oil and Gas Lease described land situated in Fayette County, West Virginia, consisting of some 3,624 acres, more or less, as conveyed to North Hills Group by deed dated August 1, 1975. We observe that the Oil and Gas Lease contains traditional clauses that one would expect to find in an oil and gas lease in West Virginia.[1] Of significance here, the Oil and Gas Lease contains a granting and land description paragraph and primary and secondary term paragraphs providing for termination unless extended by payment of a delay rental. Additionally, and somewhat atypical of traditional oil and gas leases in West Virginia, a paragraph was included that granted Webb Construction the right to inject salt water or brine in any well proven unproductive of oil, gas, and/or coalbed methane, and to store gas in any depleted formation. This injection and/or storage right was said to continue beyond the primary or secondary term of the lease and was to continue the Oil and Gas Lease for so long as salt water or brine injection or gas storage continued together with an annual injection payment of $3,624.00.

Much of the parties' dispute centers around two paragraphs in the Oil and Gas Lease. The first, unnumbered, paragraph, which is the granting provision, states that North Hills Group grants and leases the land to Webb Construction

> for the purpose of prospecting, exploring by geophysical and other methods, drilling both verically (sic) and horizontally,

[1]See generally, Robert T. Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia* (1951), for discussion of typical oil and gas lease provisions.

> mining, operating for, producing and storing oil and/or natural gas and/or coalbed methane (hereinafter along with natural gas collectively called and included in the word "gas"), or all three, including, but not as a limitation, casinghead gas, casinghead gasoline, gas-condensate (distillate), coalbed methane and any substance, whether similar or dissimilar, produced in a gaseous state, together with the right to construct and maintain pipelines, telephone and electric lines, storage and transfer tanks, broadcast or communication towers, ponds, roadways, plants, equipment and structures thereon which are necessary to produce, save, store and take care of said oil and gas, and the further exclusive right to inject air, gas, water, salt water, brine *and other fluids from any source* into the subsurface strata and any and all other rights and privileges *necessary, incident to, or convenient for* the economical operation of said land, alone or jointly with neighboring land, for the production, saving, storing and taking care of oil and gas and the injection of air, gas, water, brine *and other fluids* into the subsurface strata. . . .

(Emphasis added).

The second primarily disputed paragraph is number 14, which provides:

> Lessee is further granted the right to inject *salt water or brine* in any new well or wells drilled or located upon the leased premises which *prove unproductive* of oil and or gas and/or coalbed methane in addition to the lessee's existing licensed salt brine disposal wells, provided such activities are licensed by the State and/or Federal government and to store natural gas in any depleted formation thereunder, and in the event such salt brine injection and/or such gas storage enterprise continues beyond the primary or secondary term of this lease, then the lease shall continue in full force and effect so long as lessee shall continue paying lessor annually thereafter the sum of Three Thousand Six Hundred Twenty-Four Dollars ($3,624.00) for such privilege so long as such activity continues.

(Emphasis added).

In September 2008, shortly after entering into the Oil and Gas Lease, Webb Construction obtained a permit from the WVDEP to use a well on the leased property, identified as well 508 or NHG 1A ("508/1A"), as an injection well for oil and gas waste water. The WVDEP permit documents of record provide a description of materials to be injected into the 508/1A well as "Oil and Gas waste fluids (produced and flowback),[2] corrosion inhibitor, bacteria control, Hcl sticks." (Footnote added). The WVDEP well permit and/or repermitting application documents indicate that the North Hills Group 508/1A well "was originally drilled and completed by Peake Petroleum Company in 1982 to a depth of 280'. It was determined to be an unsuccessful project, the Weir Sandstone was perforated in 1983 and the Ravencliff formation was plugged in 1986." Importantly, the permit application provided that "[i]n 2008 the well was worked over and converted into a Class 2D oil and gas waste water UIC well."[3] Webb Construction's application further indicated that "[t]his well and plant has been operating as a Class 2D injection facility for oil and gas waste fluids since 2002." The permit documents also indicate that Webb Construction is "authorized to inject Class II fluids brought to surface in connection with conventional oil or natural gas production and may be commingled with waste water from gas plants. . . ."

Although Mr. Webb testified that approximately $80,000.00 was spent to rework the 508/1A well in an effort to obtain production, there is nothing in the record documenting that Webb Construction applied for or obtained a permit from WVDEP to allow Webb Construction to drill on the 2008 leased premises or rework the 508/1A well for production purposes. With respect to his efforts to rework the 508/1A well, Mr. Webb testified that he injected so much water into the disposal well on his own deeded adjacent property that he hoped "it would push gas to [the 508/1A] well." At one point, according to Mr. Webb, there was gas pressure, but it was lost. That is when the decision was made to turn the 508/1A well into an injection well. Mr. Webb testified that it was "sort of a two-part thing. You really couldn't lose. If it didn't produce gas, we could always convert it to an injection well."

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[2]Definitions of "produced" and "flowback" are found in the Rules Governing Horizontal Well Development of the WVDEP Oil and Gas Division. Specifically, produced water "means any water originating from subsurface formations that is brought to the surface along with oil or natural gas." 35 W. Va. CSR § 8-11.1.d. Flowback water is distinguished as water from hydraulic fracturing activities. 35 W. Va. CSR § 8-9.1.b.3.

[3]UIC wells are underground injection control wells regulated through the Underground Injection Control Program which established five classes of wells. Class II wells include those for injecting fluids brought to the surface in connection with conventional oil or natural gas production and that may be commingled with waste water from gas plants, or which include fluids from enhanced recovery of oil or natural gas. 47 W. Va. § CSR 13-4.2.a.b.

We observe that the record is somewhat muddled concerning the leased premises and the 508/1A well due to the fact that Webb Construction operates oil and gas waste water injection facilities that include the neighboring property with a permitted injection disposal well. The record is to the effect that, in 2001, North Hills Group sold Webb Construction an approximately five acre parcel of property adjacent to the leased premises at issue here. The 2001 deed additionally conveyed all the right, title, and interest in and to an unplugged and unproductive gas well that was located on the deeded property and identified as Well 460 or North Hills Group 1. This well was first drilled in 1981 by Amoco and included the right to inject salt water or brine as disposal in the Weir Formation. Mr. Webb testified that in connection with the five acre parcel sale, he told the representatives of North Hills Group that he would be injecting salt water or brine. To Mr. Webb, the terms "salt water" and "brine" are "all the same as" waste water from natural gas operations. Mr. Webb indicated that he had been operating with injection of natural gas waste water on his deeded property since 2001. Initially, he used pits for the waste fluids of coalbed methane operations which were high in chlorides. Those pits have been closed and cleaned out. Tanks were installed and are currently in use. At some point, apparently subsequent to entering into the Oil and Gas Lease, Webb Construction installed pipelines running from the operations on the deeded property to the 508/1A well on the leased premises for the purpose of pumping fluids from the tanks to the 508/1A well.

On behalf of North Hills Group, Ms. Hamilton testified that she attended a Fayette County Commission meeting in November 2014, where she heard discussion regarding fracking[4] waste water operations taking place in Fayette County. Subsequently, she learned that residents of the area were representing that Webb Construction was performing these operations on North Hills Group property. This information began an investigation of the property by North Hills Group that resulted, among other things, in their conclusion that exploration and drilling had never commenced on the leased premises and that substances other than salt water or brine had been injected into the 508/1A well. Thus, the North Hills Group Board met and determined that the Oil and Gas Lease had terminated and undertook efforts to effect termination. By letter dated July 24, 2015, North Hills Group informed Webb Petitioners that the Oil and Gas Lease was terminated due, in part, to a lack of development operations and the injection of off-site waste material other than salt water, brine, or natural gas. North Hills Group requested that injection activity cease and that, within a reasonable time, equipment be removed, the premises reclaimed, and the well shut down in accordance with regulatory requirements. They further indicated that remediation

[4]Fracking, or hydrofracking, is a method of stimulating production of a well by pumping large quantities of water and fracturing chemicals and fluids at high volume and pressure. 8 Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* 406 (2016).

of ground and surface waters may be required. Webb Construction disputed that the Oil and Gas Lease had terminated. Later, North Hills Group refused to accept the December 17, 2015, annual injection payment of $3,624.00. Thereafter, North Hills Group filed its Petition for Declaratory Judgment and for Injunctive Relief.

Mr. Webb testified that he believed Webb Construction had the absolute right to inject fluid of any kind from any source so long as it was within compliance guidelines of his WVDEP permit. He considers anything that comes out of a natural gas well to be "produced fluid" that can be injected under the permit. He also acknowledges that he does not make any determination as to whether "produced fluid" contains fracking fluid because, in his experience, 99.9 percent of all natural gas wells have been fracked. Thus, he expects there to be diesel and oil range substances in flowback fluids together with what he calls "produced fluid." Webb Construction hauls and injects fluids from natural gas wells making no distinction about the nature or composition of the water. Webb Construction has collected fluids at fracking sites that then have been injected into the 508/1A well. The way the Webb Construction business is operated, anything that comes out of a natural gas well can go back in a permitted natural gas well, regardless of the make-up of the fluid. He stated that he had no idea how much fluid he had injected. Nor did he know what was in the injected fluid as he left the testing to others and relied on WVDEP to inform him if it included impermissible substances. Mr. Webb further testified to his belief that injection of fluids could continue and hold the Oil and Gas Lease into perpetuity so long as the annual injection payment was made.

The record reflects that no drilling or other operations aimed at exploring or producing oil and gas were conducted pursuant to a permit on the leased premises. The evidence is uncontroverted that no royalty payments were made. There is no dispute that there was payment and acceptance of a delay rental in the amount of $72,480.00, which allowed Webb Construction to defer the commencement of drilling operations for forty-eight months. Additionally, the record reflects annual injection payments of $3,624.00 from Webb Construction to North Hills Group in 2012, 2013, and 2014, and the refusal of the 2015 payment.

In this declaratory judgment action, we are called upon to review the circuit court's declaration of the rights, status, and other legal relations arising from an Oil and Gas Lease. "A circuit court's entry of a declaratory judgment is reviewed *de novo.*" Syl. pt. 3, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995). A *de novo* review is required "because the purpose of a declaratory judgment action is to resolve legal questions." *Id.* at 612, 466 S.E.2d at 463. We observe, however, that "any determinations of fact made by the circuit court in reaching its ultimate resolution are reviewed pursuant to a clearly erroneous standard." *Id.*

This Court must also undertake a review of the circuit court's issuance of an injunction. In that regard, we have held:

> In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, *West v. National Mines Corp.*, 168 W. Va. 578, 590, 285 S.E.2d 670, 678 (1981), we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law *de novo*. Syllabus Point 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).

Syl. pt. 1, *State v. Imperial Mktg.*, 196 W. Va. 346, 472 S.E.2d 792 (1996).

Our consideration of this matter is additionally guided by the fact that this action was brought pursuant to the Uniform Declaratory Judgments Act ("UDJA"), W. Va. Code § 55-13-1 *et seq*., according to which courts in West Virginia have the "power to declare rights, status and other legal relations whether or not further relief could be claimed." W. Va. Code § 55-13-1 (1941) (Repl. Vol. 2016).

Moreover, our review of the Oil and Gas Lease is informed by the unique character of an oil and gas lease. We have held:

> An oil and gas lease (or other mineral lease) is both a conveyance and a contract. It is designed to accomplish the main purpose of the owner of the land and of the lessee (or its assignee) as operator of the oil and gas interests: securing production of oil or gas in paying quantities, quickly and for so long as production in paying quantities is obtainable.

Syl. pt. 1, *McCullough Oil, Inc. v. Rezek*, 176 W. Va. 638, 346 S.E.2d 788 (1986).

Additionally, principles of contract law generally apply to oil and gas leases. *See generally*, *Jolynne Corp. v. Michaels*, 191 W. Va. 406, 411-12, 446 S.E.2d 494, 499-500 (1994). Accordingly, "[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 Dev. Co. v.*

United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1962).

In summary, the core arguments of the Webb Petitioners are that Webb Construction had a right to operate, at their discretion, either oil and gas wells or injection disposal wells on the leased premises. They assert that the Oil and Gas Lease does not require Webb Construction to conduct exploration and drilling operations. In any event, they also argue that Webb Construction actively sought to produce oil and gas on the leased premises but that the 508/1A well proved unproductive and was therefore properly converted to an injection well. Next, the Webb Petitioners contend that Webb Construction injects fluids authorized by paragraph 14 of the lease, which gives the right to inject salt water or brine, and that the granting paragraph of the lease, which includes not only salt water and brine but also "any other fluids from any source," authorizes injection of oil and gas waste water or produced fluids into the well. We consider all these core arguments together with those arguments of North Hills Group that seek to uphold the findings and conclusions of the circuit court.

We accept the contention of the Webb Petitioners that the Oil and Gas Lease is not a standard lease, despite its title, but, rather, it is a "dual purpose lease." Webb Petitioners submit that the title is not reflective of the substance of the lease. They argue that, under a dual purpose lease, Webb Construction has "separate rights" to: (1) explore for oil and/or gas, and (2) use the leased land for injection purposes. Thus, they assert that the Oil and Gas Lease may be maintained in either of two ways. First, it may be maintained by paying royalties from production. Second, it may be maintained by injecting fluids and making an annual injection payment.

The flaw in the argument of the Webb Petitioners is that, in stressing the stated dual purpose, they conflate the language of the granting clause addressing the exploration and production purposes together with the stated separate right of injection found in paragraph 14. It is only in doing so that the Webb Petitioners can contend that Webb Construction has the right to inject into the 508/1A well fluids other than salt water or brine, and fluids from off-premises sources, so as to hold the North Hills Group property by continuing to inject fluids and making the annual injection payment of $3,624.00. At this point in our discussion, we find it necessary to note that the Oil and Gas Lease failed to define certain terms and language. One of those was "brine," which is typically defined as "[w]ater impregnated with salt frequently produced with oil." 8 Williams & Meyers, *Oil and Gas Law* 106 (2016). If the contract language is found to be unambiguous then "[i]t is the safest and best mode of construction to give words, free from ambiguity, their plain and ordinary meaning." Syl. pt. 3, *Bennett v. Dove*, 166 W. Va. 772, 277 S.E.2d 617 (1981). Thus, we find that in those instances where the Oil and Gas Lease used the term "brine," it plainly and unambiguously meant water with salt.

Contrary to the Webb Petitioners' argument, the purpose of the granting clause is explicitly for "the purpose of prospecting, exploring by geophysical and other methods, drilling both verically (sic) and horizontally, mining, operating for, producing and storing oil and/or natural gas and/or coalbed methane (hereinafter along with natural gas collectively called and included in the word "gas"), or all three . . . ." When the granting clause references the "right to inject air, gas, water, salt water, brine, and other fluids from any source," it is not incorporating and expanding the injection right contained in paragraph 14. Rather, the granting clause is strictly limited to the purpose of exploring, operating for, producing, and storing oil and gas. We consider the granting clause with acknowledgment of the oil and gas exploration and production industry practices using geophysical and horizontal drilling techniques, including fracturing, which use injection of various fluids to explore and, ideally, produce oil and gas. For instance, water may be used as a matrix with chemicals and other substances to stimulate production. Liquified gas may also be injected for stimulation purposes. Further, salt water and brine are naturally produced, sometimes in large volume, in both conventional and unconventional methods of exploring and drilling for oil and gas.[5]

The Oil and Gas Lease also contains termination provisions known in the industry as habendum clauses that are critical to this Court's reasoning. "One of the conveyancing portions of an oil and gas lease is the 'habendum' clause, also known as the 'term' clause. The purpose of the habendum clause in an oil and gas lease (or other mineral lease) is to define and limit the duration of the lessee's estate." *McCullough Oil, Inc. v. Rezek*, 176 W. Va. 638, 642, 346 S.E.2d 788, 793 (1986) (citing Robert Donley, *The Law of Coal, Oil, and Gas in West Virginia and Virginia* § 65a (1951)). Significantly, the habendum clause here provides a primary term of one year that continues "as long thereafter as oil and gas, or either of them, is produced . . . or as long as gas or *brine* is stored therein." Webb Construction was granted the option to extend for a secondary term of four years by prepaying a delay rental covering the four-year option in the amount of $72,480.00. This delay rental covers the given privilege of deferring the commencement of drilling operations for forty-eight months. "Drilling operations" is defined in the Oil and Gas Lease as including "operation for the drilling of a new well, the reworking, deepening or plugging back of a well

[5]It is beyond the scope of this Memorandum Decision to undertake a discussion of oil and gas exploration and production technologies. However, we observe that the Legislature has recognized the advancement of technologies and practices for natural gas development that may involve stimulating and fracturing processes and that both use and produce water and waste water that may require impoundment or other strategies for disposal or recycling. *See* W. Va. Code § 22-6A-2(a) (2011) (Repl. Vol. 2014) (stating purpose of Horizontal Well Act).

or hole or other operations conducted in an effort to obtain or re-establish production of oil or gas."

Paragraph 14, on the other hand, does not grant the right to Webb Construction to inject any permittable or licensed fluid into a well that is proven unproductive of oil and gas and/or coalbed methane. Rather, paragraph 14 is quite specific. It provides only the right to inject salt water or brine. The right to inject salt water or brine continues beyond the primary or secondary lease terms allowing the Oil and Gas Lease to continue in force so long as Webb Construction continues making the annual injection payment of $3,624.00 for the right to inject, and so long as the injection of salt water and brine continues.

We find this language to be plain and unambiguous. Reading paragraph 14, as we must, in conjunction with the habendum clause, which explicitly provides for continuance of the primary lease term as long as "brine" is stored, supports the stated dual purpose of the Oil and Gas Lease regarding the right of exploration and production of oil and gas as well as the separate injection right. However, the record, including the permit documents, clearly establishes that fluids other than salt brine were injected into the 508/1A well. Moreover, the fluids were injected into a well that was not proven to be unproductive. We reject the argument that the best evidence of unproductivity is the fact that the 508/1A well had been plugged inasmuch as there is no documentary evidence of any effort by Webb Construction to rework the well, drill it to a different depth, or stimulate it to gain production. Because there were no drilling operations on the leased premises and there has not been salt water, brine, or salt brine injected into or stored in the 508/1A well, the Oil and Gas Lease terminated of its own accord at the conclusion of the secondary term of the lease. No party needed to take any action with respect to termination. Nor does such automatic termination constitute a forfeiture. That is the nature of habendum clauses. *See*, *McCullough Oil Inc*, 176 W. Va. at 644-47, 346 S.E.2d at 794-96 (discussing habendum clauses and holding that oil and gas leases with habendum clauses may automatically terminate and do not require notice of termination). Accordingly, we find that the Oil and Gas Lease terminated by its own terms and we, therefore, affirm the circuit court in that regard. We recognize that our reasoning is somewhat different than that of the circuit court, but our cases make plain that, in appropriate circumstances, we may affirm on different grounds than those relied upon by the circuit court. *See, e.g.*, *Hoover v. Moran*, 222 W. Va. 112, 119, 662 S.E.2d 711, 718 (2008); *Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W. Va. 498, 505, 625 S.E.2d 260, 267 (2005).

Having concluded that applying the plain and unambiguous language of the Oil and Gas Lease resulted in the automatic termination of the lease, we must now turn to the Webb Petitioner's estoppel argument. We recognize that Webb Construction paid, and North Hills Group accepted, annual injection payments for three years beyond the primary and secondary

terms of the lease. Webb Construction asserts that the circuit court erred in failing to address the issue of estoppel with respect to North Hills Group's acceptance of the injection payments from Webb Construction prior to North Hill Group's issuance of the termination letter. It contends that North Hills Group accepted payment for the secondary term of the Oil and Gas Lease and further accepted three annual injection payments with knowledge of injection well operations. Webb Construction relies heavily on *Dunbar Housing Authority v. Nesmith*, 184 W. Va. 288, 400 S.E.2d 296 (1990), wherein this Court held that West Virginia follows the general rule to the effect that a lessor waives his or her right to forfeit a lease for a breach of a covenant or condition when, subsequently, he or she accepts rental payments "with knowledge or full notice of such breach." *Id.* at 291, 400 S.E.2d at 299. While the circuit court's order does not explicitly address the issue of estoppel, the analysis and conclusions therein reached demonstrate that the circuit court implicitly rejected Webb Construction's estoppel argument. The evidence establishes that North Hills Group accepted the secondary term payment and three annual injection payments. However, the record is also abundantly clear that North Hills Group had no knowledge that anything other than salt water or brine was being injected into the 508/1A well until learning information at a Fayette County Commission meeting in November 2014, which prompted an inquiry into the nature of Webb Construction operations on the premises. Accordingly, we find that estoppel has no application here and we reject it as a basis for finding that the Oil and Gas Lease continued beyond the primary and secondary terms of the lease.

We now direct our attention to consideration of the Webb Petitioners' contentions that the circuit court erred by disregarding the testimony of WVDEP inspector Terry W. Urban ("Mr. Urban") when it found, among other things, that the injection operations were a "nuisance." This case is resolved based upon the plain language of the Oil and Gas Lease, and the evidence that substances other than salt water or brine were injected into the 508/1A well, which was not proven to be unproductive. Mr. Urban's testimony about the permit and the operations is not related to the dispositive plain language issues. Thus, there is no need for this Court to address whether the circuit court erred in disregarding Mr. Urban's testimony. We note that the substances injected were done so in consideration of what the WVDEP permit deemed allowable. The WVDEP permit and corresponding regulatory requirements are not at issue here. There is no claim and no evidence that Webb Construction injected substances other than what the permit allowed. What is before this Court involves only the application of plain language in an Oil and Gas Lease involving two parties.

This Court must also address the Webb Petitioners' assertions that the circuit court erred by relying on extrinsic evidence to construe the Oil and Gas Lease, particularly by considering the affidavit of Philip Douglas Mooney, the former President of North Hills Group, and by relying on the environmental testing report of Avner Vengosh, Ph.D, of Duke

University. We agree that it appears the circuit court relied on this evidence improperly. However, it is of no moment because the circuit court's reasoning does not affect this Court's analysis, which does not involve consideration of such evidence.

We now undertake review of the Webb Petitioners' assertions that the circuit court erred in finding that Mr. Webb exercises dominion and control over Webb Construction such that there is a unity of interest and ownership sufficient to pierce the corporate veil of Webb Construction. In contrast, North Hills Group contends that there was sufficient evidence to pierce the corporate veil of Webb Construction regarding all allegations. This Court has long held that "[t]he law presumes . . . that corporations are separate from their shareholders." Syl. pt. 3, in part, *Southern Elec. Supply Co. v. Raleigh Cty. Nat'l Bank*, 173 W. Va. 780, 320 S.E.2d 515 (1984). Furthermore, "the burden of proof is on a party soliciting a court to disregard a corporate structure." *Id.* at 787, 320 S.E.2d at 522. Only under exceptional circumstances may the corporate entity be disregarded so as to reach the individual liability of a corporate shareholder. "[T]he corporate form will never be disregarded lightly." *Southern States Coop., Inc. v. Dailey*, 167 W. Va. 920, 930, 280 S.E.2d 821, 827 (1981). We have observed that, the equitable remedy of piercing the corporate veil requires "particular attention to factual details." *Southern Elec. Supply Co.*, 173 W. Va. at 787, 320 S.E.2d at 523. In that regard, we have recognized an extensive number of factors for consideration in a totality of the circumstances test for deciding whether to pierce the corporate veil. These factors range, for example, from commingling of funds to diversion of funds to utter disregard of corporate formalities. *See Laya v. Erin Homes, Inc.*, 177 W. Va. 343, 347-48, 352 S.E.2d 93, 98-99 (1986) (enumerating nineteen factors for consideration in looking beyond corporate facades for potential piercing of corporate veil and setting out two-prong test consisting of unity of interest and ownership and fairness).

Our review of the record, including a close reading of the evidentiary hearing transcripts, compels the conclusion that the evidence does not support the circuit court's finding that Mr. Webb exercised dominion and control over Webb Construction with such unity of interest and ownership that the separate personalities of the two no longer exist and that an inequitable result would occur if the acts or omissions alleged were treated as those of Webb Construction alone. The circuit court's ruling appears to be perfunctory as no facts were referenced and there was no analysis pursuant to a fact-specific totality of the circumstances test. To this Court, North Hills Group merely points generally to testimony of Mr. Webb for their conclusory argument that there was sufficient evidence to pierce the corporate veil. However, the record is essentially void of evidence supporting the piercing of the corporate veil. Accordingly, we find that the circuit court committed clear error in piercing the corporate veil and determining that the Webb Petitioners have joint and several liability to North Hills Group.

Finally, we address the issue of the cease and desist injunction. The arguments of the parties on this issue are rather scant. The Webb Petitioners contend that the injunction deprives them of their contracted for and consented to rights given the dual purpose nature of the Oil and Gas Lease. They also argue that the injunction deprives Webb Construction of the considerable investment made in the leased premises to realize the benefit of their bargain. On the other hand, North Hills Group argues that the circuit court made no clearly erroneous findings and did not abuse its discretion when it granted the injunction prohibiting further Webb Construction operations on the leased premises.

This Court adopted a balancing of hardship test when considering injunctive relief in *Jefferson County Board of Education v. Jefferson County Education Association*, 183 W. Va. 15, 393 S.E.2d 653 (1990). The test requires consideration, in "flexible interplay," of four factors, including: (1) the likelihood of irreparable harm to the plaintiff without the injunction, (2) the likelihood of harm to the defendant with an injunction, (3) the plaintiff's likelihood of success on the merits, and (4) the public interest. *Id.* at 24, 393 S.E.2d at 662. This Court affirms the issuance of the cease and desist injunction, but does so with an analysis different from that employed by the circuit court.

Specifically, we consider whether injunctive relief based on the declaratory judgment determinations is necessary or proper. *See* W. Va. Code § 55-13-8 (1941) (Repl. Vol. 2016). In that regard, we do not rely on the findings of the circuit court regarding waste dump, nuisance, deprivation of quiet and useful enjoyment, the potential for migration creating liability concerns, or public hazard; therefore, we do not need to engage in balancing the *Jefferson* factors. Rather, we restrict our consideration of injunctive relief to the issues flowing from straightforward application of the language of the Oil and Gas Lease. In declaring the rights of the parties based on that language, we have herein concluded, in part, that the Oil and Gas Lease provided for the continuation of the lease only on the basis of continuing injection of salt water or brine and the making of the annual injection payment. However, fluids other than salt water or brine were injected into the 508/1A well. Thus, the lease terminated. Accordingly, because Webb Construction has no further rights under the Oil and Gas Lease, injunctive relief was proper and the circuit court committed no error in granting the same.

For the foregoing reasons, the June 7, 2016, order of the Circuit Court of Fayette County is affirmed insofar as it found the terms and language of the Oil and Gas Lease unambiguous and declared it terminated, and insofar as it granted cease and desist injunctive

relief. However, the order is reversed insofar as it pierced the corporate veil of Webb Construction.

Affirmed, in part, and Reversed, in part.

ISSUED: June 9, 2017

CONCURRED IN BY:
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum

CONCURRING, IN PART, AND DISSENTING, IN PART, AND WRITING SEPARATELY:
Chief Justice Allen H. Loughry II
Justice Elizabeth D. Walker

LOUGHRY, C.J., concurring, in part, and dissenting, in part, joined by WALKER, J.:

The majority's decision in this appeal is troubling on several levels. There can be little question that this is an unusually fact-intensive contract matter. There are competing viewpoints of the essential purpose of the lease and the actions that ensued after execution of the lease. In short, factual disputes abound and nothing contained in the record submitted assures me that the matter had been fully developed prior to the circuit court's ruling. Accordingly, I am left with the distinct impression that the circuit court's determination of the declaratory judgment aspect of this matter, thereby finding that the lease had terminated, was wildly premature.

The North Hills Group filed its complaint in this matter in January, 2016; within five months an order was entered granting declaratory relief, following a hearing undoubtedly designed primarily to address the request for injunctive relief. As should have been apparent to the circuit court, the factual matters underlying this lease were complex and warranted discovery by both parties. Upon an adequate record, the request for declaratory relief could have then been adjudicated. Further, while preliminary injunctions are, by their very nature, decided early in a case and, as a result, "preliminarily," the circuit court's order grants an injunction on what appears to be a permanent basis.

Compounding my discomfort with the proceedings below, the majority affirms the circuit court's order on a basis entirely different than those bases advocated and briefed by the parties, which strikes me as particularly improvident in this case. While this Court does

have the ability to decide cases on a basis that was neither raised nor argued by the parties, such discretion should be used sparingly. For obvious reasons, deciding a case on a basis not specifically raised by the parties leaves the issue without appropriate response or briefing by the losing party. It also begs the question that if the issue upon which the majority bases its resolution is so indisputably dispositive, why then did the parties not raise the issue below or before this Court? Moreover, if the issue were as easily decided as merely reading and applying the habendum clause in the manner in which the majority has done, it seems to me that the parties, although seeking different outcomes, would have argued as much. Therefore, I find the majority's reasoning inherently suspect, but without further response from the parties or a more developed record, I am conveniently constrained from launching a more well-rounded offensive to the majority's memorandum decision. As such, I am left simply to express my concerns with the undeveloped record, the premature disposition below, and the "left-field" rationale of the majority.

Accordingly, while I concur in the majority's reversal of the circuit court's ruling on piercing the corporate veil, I dissent to the majority's affirm of the circuit court's ruling as to the declaratory judgment and injunctive relief.