FILE COPY No. 19-0347

In the

Supreme Court of Appeals
Of West Virginia

ASCENT RESOURCES – MARCELLUS, LLC,

Petitioner,

v. No. 19-0347

ROY D. HAUGHT and BETTY HADLEY,

Respondents.

BRIEF OF PETITIONER ASCENT RESOURCES – MARCELLUS, LLC

On Appeal from Civil Action No. 16-C-25-c in the
Circuit Court of Tyler County, West Virginia

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1. The Circuit Court erred in denying Petitioner's motion for summary judgment and declining to declare that Petitioner has an implied right to pool and unitize an existing oil and gas lease that is silent on the subject. The issue is one of first impression and creates a split of authority between two circuit court judges in the Second Judicial Circuit.

2. The Circuit Court erred in finding that "[t]here is no evidence that the [Petitioner] cannot develop the minerals underlying the tract at issue in the absence of pooling and unitization" because the uncontroverted evidence in the record is to the contrary.

3. The Circuit Court erred by concluding that it should not determine the customary terms and conditions for pooling and unitization to govern the contractual relationship between the parties because existing case law provides otherwise.

4. The Circuit Court erred in its determination that it did not have (or would not) exercise its inherent equitable powers to establish common law, instead delegating that authority to the Legislature.

5. The Circuit Court erred in determining, contrary to the uncontroverted evidence, that the implied right to pool and unitize is not necessary for the development and production of the subject minerals and that an implied covenant would "materially alter the terms of the . . . Lease without fair consideration for such terms."

6. The Circuit Court erred in finding, with no evidentiary support, that an implied covenant of pooling and unitization would place an undue burden upon the oil and gas estate that was never contemplated by the original parties to the lease.

7. The Circuit Court erred in finding, without evidentiary support, that "[a]bsent the Plaintiff's assertion to the contrary, the record is devoid of any evidence that oil and gas are not being developed, in violation of the contractual terms, without the Court recognizing an implied right to pool and unitize."

8. The Circuit Court erred in concluding that it would "overturn more than a century of the state's common law" if it found an implied covenant to pool and unitize.

STATEMENT OF THE CASE

The Circuit Court erroneously denied Petitioner Ascent Resources – Marcellus, LLC's ("Ascent") Motion for Summary Judgment by failing to employ the uncontested facts to declare that Ascent has an implied right to pool an oil and gas lease with other mineral interests in order to develop the oil and gas in the Marcellus shale formation where the oil and gas lease is silent on the issue of pooling.

I. Factual Background.

Respondents collectively own a 50% interest in an oil and gas mineral estate in and under a 94-acre tract in McElroy District, Tyler County, West Virginia. Record Appendix ["Apx."] at 3-5. Respondents' predecessor in interest executed an oil and gas lease dated February 6, 1980, with D. & H. Oil Company ("Lease"), granting D. & H. Oil Company the right to drill wells on

the leased premises and to produce oil and gas. Apx. at 10-12.[1] Ascent owns the other 50% interest in the oil and gas and is also the successor in interest to the Lease. Apx. at 4. Thus, Ascent currently holds the right to drill wells and produce oil and gas. However, the Lease is silent as to whether Ascent has the right to pool or unitize[2] the Lease with other mineral interests as necessary to drill horizontal wells in the Marcellus shale formation. Apx. at 5.

Oil and gas cannot be produced economically from the Marcellus shale formation unless drilling units are formed large enough to accommodate a horizontal well bore at least 2,500 feet in length. Apx. at 59. Production of the oil and gas in the Marcellus shale formation will entail the extraction of oil and gas from long, relatively thin strands of fine-grained sedimentary shale. Apx. at 58-59; *see also* Itzchak E. Kornfeld, 116 W. VA. L. REV. 865, 866, 903, 906 (Spring 2014). Traditional vertical wells cannot reach enough of the shale formation to make the extraction of oil and gas economically viable. Apx. at 59. Horizontal drilling, in contrast, allows the shale formation to be hydraulically fractured along the entire length of a horizontal well bore. *Id.* The longer well bore facilitates production that is sufficient to make extraction of the oil and gas economically feasible. *Id.*

The 94-acre Lease tract is insufficient to support the drilling of a horizontal well bore of sufficient length to make production economically feasible. *Id.* The oil and gas tract must necessarily be combined – or pooled – with mineral interests in other tracts and developed as a

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[1] "[D]o grant, demise, lease and let [the Lease premises]for the purposes of mining and operating for oil and gas, and of building tanks, stations, power plants, water stations and structures thereon to take care of said products, and of laying pipe lines on, over and across the leased premises and other lands of Lessors, for the purposes of conveying oil, gas, steam or water therein from and to wells and pipe lines on the premises and on adjoining and adjacent farms, and rights of way for road ways over this and other lands of Lessors..."

[2] Technically, "pooling and unitization" are different. Pooling is the combination of small tracts of surface acreage to create a larger drilling unit for production of oil and gas, while unitization is the joint operation of tracts for production of oil and gas and usually relates to working interests. Both pooling and unitization allow for drilling and operating a well or wells to extract oil or gas from multiple tracts. *See*, Patrick H. Martin and Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law*, § 901 (LexisNexis Matthew Bender 2014); *see also* Martin and Kramer, *Williams & Meyers, Manual of Oil and Gas Law Terms*, pp. 779-781, 1109-10 (LexisNexis Matthew Bender 2006). For purposes of this appeal, there is no reason to distinguish the two concepts. To avoid being cumbersome, Ascent uses the term "pooling" to mean both pooling and unitization, individually and collectively.

single drilling unit to provide the length required for a horizontal well bore. *Id.* Thus, Ascent's ability to exercise its rights under the Lease and to develop the oil and gas depends on its right to pool the Lease with other oil and gas properties.

Ascent submitted the affidavit of Travis McBain, who holds a degree in Energy Management and has over 10 years of experience in the oil and gas industry, in which Mr. McBain attested that the following terms and conditions are customary in the oil and gas industry for pooling:

> 1. Lessee shall have the right to pool, unitize, or combine all or parts of the Leasehold with other lands, whether contiguous or not contiguous, leased or unleased, whether owned by Lessee or by others, at a time before or after drilling, to create drilling or production units.
>
> 2. Pooling or unitizing in one or more instances shall not exhaust Lessee's pooling and unitizing rights, and Lessee shall have the right to change the size, shape, and conditions of operation of any unit created and to make concomitant changes in payments.
>
> 3. Lessee shall allocate production from each well in a unit among each of the leases in the unit as a percentage of that leasehold's acreage in the unit compared to the total leasehold acreage in the unit. Lessee shall then pay the royalties specified in each lease based upon the sale price of the production allocated to that lease.
>
> 4. Drilling, operations in preparation for drilling, production, shut-in production from the unit, or payment of royalty on any part of the unit (including non-Leasehold land) shall have the same effect upon the terms of the Lease as if a well were located on, or the subject activity were attributable to, the Leasehold.
>
> 5. Lessee shall record among the land records of the county the declaration of pooling and any amendments thereto and attempt to furnish a copy to Lessor or their known successors and assigns, although failure to furnish a copy to any Lessor shall not operate to void or terminate any drilling unit that has been formed.

Apx. at 62-63.

Respondents did not present any affidavits or other evidence to contest the facts regarding the necessity of pooling or the evidence regarding the usual and customary terms of pooling.

II. Procedural Background.

To avoid risking a substantial investment in horizontal wells through a trespass or breach of contract action, Ascent filed a complaint for declaratory judgment on June 8, 2016, requesting a declaratory judgment order that Ascent has the implied right to pool the Lease with other mineral interests upon industry-custom terms and conditions because pooling is necessary for the development of the oil and gas in the Marcellus shale formation. Apx. at 3.

Respondents filed answers denying that Ascent was entitled to the relief sought. Apx. at 14, 21.

Ascent moved for summary judgment on August 18, 2016, and submitted two affidavits in support of its motion to show the necessity of pooling and the customary terms and conditions of pooling. Apx. at 29. Respondents filed a joint response opposing Ascent's motion for summary judgment. Apx. at 80. Respondents acknowledged that they did not offer any facts to create a genuine issue of material fact, noting that the "major concern is a question of law. . . ." Apx. at 84.

On March 4, 2019, the Circuit Court entered an order denying Ascent's motion for summary judgment, which it entered as a final order in accordance with Rule 54(b) of the West Virginia Rules of Civil Procedure. Apx. at 158.

The ruling creates a split of authority between the judges in the Second Judicial Circuit. Chief Judge David Hummel of the Second Judicial Circuit held that there is an implied right to

pool an oil and gas lease that is silent on the subject in *American Energy – Marcellus, LLC v. Mary Jean Templeton Poling, et al.*, Civil Action No. 15-c-34H, (Tyler County, W. Va., Apr. 15, 2016). Apx. at 65. Chief Judge Hummel noted that "[t]he implied right to pool or unitize is necessary for Plaintiff to exercise its rights and to fulfill its responsibilities under [the Lease] utilizing horizontal development . . . ." Apx. at 73. Accordingly, "[i]n the absence of pooling and unitization rights, the bargained-for leasehold benefits inuring to the lessor and lessee and their successors and assigns – production of oil and gas and payment of royalties – will be diminished and the purpose and intent of such Lease will be frustrated." *Id.* Chief Judge Hummel concluded under identical circumstances that pooling and unitization were "reasonably necessary" for the development of the minerals, and there was no harm to the oil and gas owners. *See Id.*

The Circuit Court in this case acknowledged that certain implied covenants already exist under West Virginia law and agreed that public policy promotes the development of oil and gas, but stated, without citation of authority, that it "[would] not overturn more than a century of the state's common law." Apx. at 163.

SUMMARY OF ARGUMENT

The only facts presented in this case are uncontroverted. To economically produce oil and gas from shale formations, drilling units must be created to accommodate horizontal wells. Because few oil and gas tracts are large enough to accommodate horizontal wells of sufficient length to make production economically feasible, several tracts must be "pooled" (combined) to form an adequately-sized drilling unit.

Some oil and gas leases – including the one at issue here – are simply silent about pooling, neither permitting nor prohibiting it. The question arises whether a lessee can pool such a lease with other oil and gas leases and mineral interests so it can exercise its right to drill for

and produce oil and gas.[3] Silence on the pooling issue creates an ambiguity that must be resolved by the courts. The law surrounding implied covenants and implied rights addresses circumstances precisely like this and emanates from the concept that whatever is necessary to the accomplishment of that which is expressly contracted to be done is part and parcel of the contract, though not specified. Implied covenants have been recognized in West Virginia since at least 1902 and as recently as June 2019 and are an integral part of our oil and gas law. The theoretical underpinnings of implied covenants and implied rights – cooperation, good faith and fair dealing, necessity, and public policy – all support an implied right to pool in order for a lessee to exercise the rights expressly granted in an oil and gas lease to drill wells and produce oil and gas.

In denying Ascent's motion for summary judgment, the Circuit Court made two fundamental errors. First, it determined that the Lease was "clear and unambiguous" even though it is silent on the issue of pooling. That error in reasoning was recently recognized by this Court in *Andrews v. Antero*, No. 17-0126, 2019 WL 2494598, at *7 (W. Va. June 10, 2019). Silence in the Lease creates an ambiguity that the court must resolve. Many of the Circuit Court's conclusions were based upon that fundamentally flawed premise. For example, the Circuit Court relied upon the faulty "plain and unambiguous" finding to conclude that it should not determine the customary terms and conditions for pooling because the Lease did not include those terms. And the Circuit Court found – contrary to the only facts submitted – that pooling is not necessary for the development of the oil and gas and determined that an implied right to pool would alter

[3] This case involves the rights of the mineral lessee in relation to the mineral lessor. This is not a case involving the correlative rights of a mineral owner in relation to the surface owner. Surface operating rights are not at issue. Even if there is an implied right to pool the Lease, Ascent recognizes that it needs to assure it has the necessary surface operating rights. *See EQT Prod. Co. v. Crowder,* No. 17-0968, 2019 WL 2414728, at *10 (W. Va. June 5, 2019).

the "plain and unambiguous terms" of the Lease. Apx. at 162-63. The conclusions built upon this faulty foundation must fail.

Second, the Circuit Court failed to consider in its analysis the undisputed fact that pooling the Lease is reasonably necessary for Ascent to develop the oil and gas in the Marcellus shale formation. The only evidence of record demonstrates the Lease must be pooled or unitized with mineral interests in other tracts and developed as a single unit to provide the necessary length required for a horizontal well bore. Apx. at 59. It was thus clear error for the Circuit Court to find that there is no evidence that Ascent cannot develop the minerals underlying the tract at issue without pooling. Apx. at 162. The failure to adopt the only facts of record also led the Circuit Court to erroneously determine pooling is not necessary because "the record is devoid of any evidence that Subject Minerals are not being developed ... without [an implied right to pool]," apparently (albeit unstated) because the parties have "operated without need for clarification for 39 years." Apx. at 161, 163.

Without any evidentiary support, the Circuit Court also erroneously determined that an "implied covenant would place a burden upon the Subject Mineral estate that was never contemplated by the original parties to the Lease and is not reflected in the terms of the agreement." Apx. at 163. Respondents did not present any evidence that a burden would be placed upon the oil and gas estate now owned by the Respondents. The Circuit Court was not at liberty to create one and erred in making such a finding without evidentiary support. Merely because vertical wells were drilled in shallower formations in the past cannot preclude the lessee from drilling and producing oil and gas from other productive formations or, indeed, complying with an implied covenant to develop.

The Circuit Court also posed alternative reasons for denying summary judgment in order to reach a result consistent with its expressed belief that a lessee who wants to pool should have to negotiate a pooling amendment to a lease and pay money for it. For example, the Circuit Court incorrectly determined that interpreting the Lease was not for the Court, but was instead a policy issue for the Legislature. The Court noted the Legislature had addressed forced pooling in proposed and enacted legislation. Apx. at 162. That conclusion ignores the fact here that the Lease already exists. "Forced pooling" addresses situations where there is no oil and gas lease or one signed by fewer than all the mineral owners. That is not the case here. Ascent owns or has under lease 100% of the mineral interests and does not need to "force pool" any third parties. The Circuit Court erred by deferring to the Legislature. The Circuit Court also felt it should not "change" the common law, even though this is a novel issue and the Declaratory Judgment Act provides the mechanism for a court to determine parties' rights under a contract, such as the silent Lease at issue here.

Based on the uncontroverted evidence of record and established law, the Circuit Court should have found that (1) the undisputed facts demonstrate pooling is reasonably necessary to develop the oil and gas in the Marcellus shale formation; (2) the Lease is silent on the issue of pooling; (3) it is the duty of the Circuit Court under the Declaratory Judgment Act to determine the rights and obligations of the parties to the Lease; (4) the principles of cooperation, good faith and fair dealing, and necessity, as well as the long-standing public policy of this State, all support an implied right to pool; and (5) Respondents have shown no substantial burden or harm that would result from pooling. The Circuit Court should have then followed established precedent to determine the terms and conditions upon which pooling would occur – again based

upon the uncontroverted evidence of record. Ultimately, the Circuit Court should have granted Ascent's motion for summary judgment.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, Ascent respectfully requests oral argument. This case squarely presents an issue of first impression that has created a split of authority between two circuit judges in the Second Judicial Circuit. Oral argument may aid this Court in reaching a decision.

ARGUMENT

I. Standard of Review.

This appeal arises from the Circuit Court of Tyler County's denial of Ascent's motion for summary judgment, which the Circuit Court denoted as constituting a final judgment pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure. Therefore, this action is now ripe for appellate review. W. Va. Code § 58-5-1 (providing that a "party to a civil action may appeal to the Supreme Court of Appeals from a final judgment of any circuit court. . . .").

"Generally, findings of fact are reviewed for clear error and conclusions of law are reviewed *de novo.* However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo.*" Syl. Pt. 1, in part, *State ex rel. Cooper v. Caperton,* 196 W. Va. 208, 470 S.E.2d 162 (1996).

"This Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court." *W. Virginia Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, 568, 746 S.E.2d 554, 556 (2013).

"If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

II. The Facts Of Record – And Only The Facts Of Record – Must Be Utilized In Ruling On The Issues.

In support of its motion for summary judgment, Ascent submitted the affidavit of Taylor Henderson to establish that the oil and gas in the Marcellus shale formation cannot be developed without pooling the Lease with other mineral interests in other tracts. Rather, the oil and gas must be developed by drilling horizontal well bores because traditional vertical wells cannot reach enough of the Marcellus shale formation to make the extraction of oil and gas economically viable. Apx. at 59. Horizontal wells in the Marcellus shale formation must be of sufficient horizontal length, and the surface overlying the Lease consists of only 94 acres, a space insufficient to support the drilling of a horizontal well. *Id.* The Lease must therefore be pooled with other mineral interests to create a drilling unit large enough to accommodate a horizontal well. *Id.*

Respondents did not offer any evidence to refute the affidavit of Mr. Henderson and admitted as much in their response to Ascent's motion for summary judgment. *See* Apx. at 84. "To successfully respond to a motion for summary judgment, [a non-moving party] [is] required to meet his or her burden of establishing the existence of a genuine question of material fact by providing the circuit court with a memorandum presenting any legal arguments against summary

judgment, and/or evidence in the form of affidavits, depositions or answers to interrogatories." *Bowers v. Wurzburg*, 207 W. Va. 28, 40, 528 S.E.2d 475, 487 (1999).

In its findings of fact, the Circuit Court failed to employ the uncontroverted facts and instead stated that "the implied right to pool and unitize is not necessary for the development and production of the subject minerals." Apx. at 162-63. The Circuit Court was obligated to base its findings of fact on the only actual evidence presented – specifically, Ascent cannot feasibly develop the minerals in the shale formation in the absence of pooling – and failure to do so constituted clear error. *Caperton,* 196 W. Va. at Syl. Pt. 1, 470 S.E.2d at Syl. Pt. 1; *Williams*, 194 W. Va. at Syl. Pt. 3, 459 S.E.2d at Syl. Pt. 3.

Further, the Circuit Court stated that "the record is devoid of any evidence that Subject Minerals are not being developed, in violation of the contractual terms, without the Court recognizing an implied right to pool and unitize." Apx. at 163. While it is not entirely clear what was meant by that statement, what is clear is that the oil and gas in the Marcellus shale formation are not being developed until the pooling rights under the silent lease are interpreted and clarified. That was the reason for filing the declaratory judgment action. *See* section VI.C., *infra.*

The parties have not agreed whether Ascent has the right to pool the Lease, and Ascent filed a declaratory judgment action to resolve the issue before attempting to drill. The undisputed facts that must be applied in analyzing whether there is an implied right to pool are that pooling is necessary to economically produce oil and gas from the Marcellus shale and that Respondents have shown no burden if the Lease is pooled.

The industry-custom terms and conditions of pooling presented through the affidavit of Travis McBain are also uncontroverted, but the Circuit Court declined to incorporate those

findings because of its erroneous conclusion that the Lease was "clear and unambiguous" and did not include any such terms. Apx. at 161. When an implied right to pool is established, the undisputed industry-custom terms and conditions of pooling must be accepted. *Bowers*, 207 W. Va. at 40, 528 S.E.2d at 487.

III. Silence On The Issue Of Pooling In The Lease Creates An Ambiguity That Must Be Resolved By The Court.

The Circuit Court fundamentally erred when it found that the Lease was "clear and unambiguous because the Lease did not expressly permit pooling and the parties had operated under the Lease for 39 years without need for clarification." Apx. at 160-61. To the contrary, in *Andrews v. Antero*, the Court recently stated:

> To the extent that neither deed at issue in this matter addresses whether new technology may be used to extract oil and gas, or describes specific burdens that may be placed upon the surface, the deeds are ambiguous. As a general principal, ambiguities in a deed are to be clarified by resort to the intention of the parties ascertained from the parties' situation at that time.

2019 WL 2494598, at *7 n.20 (internal quotes omitted). Just as the *Andrews* deeds were silent on the issue of using technologically-advanced drilling methods, the Lease here is silent on the issue of pooling. That creates an ambiguity the Circuit Court was required to resolve in the context of the appropriate test. Instead, the Circuit Court erred in concluding it could not "alter" the "unambiguous" contract or determine the industry-custom terms and conditions for pooling. Apx. at 161. The Circuit Court should have equated silence with ambiguity and then embarked upon a determination of whether there is an implied right to pool.

IV. There Is An Implied Right To Pool An Oil And Gas Lease With Other Mineral Interests To Develop The Oil And Gas In The Marcellus Shale Because Whatever Is Necessary To The Accomplishment Of That Which Is Expressly Contracted To Be Done Is Part And Parcel Of The Contract, Though Not Specified.

The determination of whether there is an implied right to pool can be analyzed under different tests. Regardless of which test is used, the equities are clearly balanced in favor of an implied right to pool.

A. Implied covenants and implied rights are an integral part of oil and gas law.

In recent years, with the advent of more effective drilling technology, the law of implied covenants and implied rights appurtenant to oil and gas leases has grown increasingly important. As explained by one authority:

> [I]mplied covenant law remains a vital force in the current law of oil and gas . . . . As the oil and gas laws mature, new problems emerge . . . . [W]hatever express provisions are put into leases, there will always be the unanticipated problem produced by unforeseen and unforeseeable developments – political, economic, legal, and technological. It is believed, therefore, that the law of implied covenants will continue to regulate the relationship of lessor and lessee in significant respects in this country.

Patrick H. Martin and Bruce M. Kramer, *Williams and Meyers, Oil and Gas Law*, § 801 (2017) [hereinafter "Treatise"] (citations omitted).

Implied covenants were first recognized in the late 1800s and "reached full cruising speed" in 1905 in the landmark decision of *Brewster v. Lanyon Zinc Co.*, 140 F. 801 (8th Cir. 1905). Treatise, § 802. In *Brewster*, the court held there was an implied duty to drill additional wells even though the lease was silent on the subject.. The court recognized that "[w]hatever is implied in a contract is as effectual as what is expressed. Implication is but another name for intention." *Brewster*, 140 F. at 809. The court explained that because the technology and methods used to extract oil and gas inevitably evolve over the life of a lease, certain terms and

conditions should be "rationally left to implication," and that further operations should be "reasonably calculated to effectuate the controlling intention of the parties as manifested in the lease, which was to make the extraction of oil and gas from the premises of mutual advantage and profit." [4] *Id.* at 811. The Court concluded that "[w]hatever is necessary to the accomplishment of that which is expressly contracted to be done is part and parcel of the contract, though not specified." *Id. Brewster* is cited as offering a rationale for the implication of covenants and for providing a standard of performance – the prudent operator standard. Treatise at § 802.[5]

West Virginia law is consistent and has often recognized implied rights and covenants appurtenant to oil and gas leases. *St. Luke's United Methodist Church v. CNG Development Co.*, 222 W. Va. 185, 663 S.E.2d 639 (2008) (an implied covenant to develop); *Wellman v. Energy Resources, Inc.*, 210 W. Va. 200, 557 S.E.2d 254 (2001) (an implied covenant to market);

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[4] The *Brewster* court stated:

> There could not have been an express stipulation as to the number of wells to be drilled, as to when the wells, other than the first, should be drilled or as to the rate at which the production would proceed, because these matters would depend in large measure upon future conditions, which could not be anticipated with certainty, such as the extent to which oil and gas, one or both, could be produced from the premises, as indicated by the first well and any others in the vicinity, the existence of a local market or demand therefore or the means of transporting them to a market, and the presence of wells on adjacent lands capable of diminishing or exhausting the supply in the natural reservoir. The subject was, therefore, rationally left to the implication, necessarily arising in the absence of express stipulation, that the further prosecution of the work should be along such lines as would be reasonably calculated to effectuate the controlling intention of the parties as manifested in the lease, which was to make the extraction of oil and gas from the premises of mutual advantage and profit. Even in respect of the first well, if oil or gas was found in paying quantity, there was no express engagement to operate it; but that it was intended to be operated was plainly implied in the engagement to pay royalties to be gauged according to the production of oil and the use of gas. ***Whatever is necessary to the accomplishment of that which is expressly contracted to be done is part and parcel of the contract, though not specified.***

Id. at 810-11 (emphasis added).

[5] *Brewster* has been cited with approval by this Court. *See St. Luke's United Methodist Church v. CNG Dev. Co.*, 222 W. Va. 185, 190–91, 663 S.E.2d 639, 644–45 (2008).

Jennings v. S. Carbon Co., 73 W. Va. 215, 80 S.E. 368 (1913) (an implied covenant to develop and to protect against drainage); *Ohio Fuel Oil Co. v. Greenleaf*, 84 W. Va. 67, 99 S.E. 274 (1919) (an implied covenant to protect against drainage); *Parish Fork Oil Co. v Bridgewater Gas Co.*, 51 W. Va. 583, 42 S.E. 655 (1902) (an implied covenant to protect against drainage).

The theoretical bases for implied covenants in these cases are important. First, "[t]he broad ground on which implied covenants are properly rested is believed to be the contract principle of cooperation." Treatise, § 802.1. "The principle of cooperation requires that parties to a contract cooperate in order to carry out the purposes of the agreement. It is based upon both the reasonable expectations of the parties when they enter into an agreement and ethical concepts of conduct." *Id.*

Another underlying basis for implied covenants in oil and gas leases is the concept of good faith and fair dealing. Treatise, § 801.2. West Virginia has long recognized the duty of good faith and fair dealing in contracts. *See, e.g., Evans v. United Bank*, 235 W. Va. 619, 628, 775 S.E.2d 500, 509 (2015) ("West Virginia law implies a covenant of good faith and fair dealing in every contract for purposes of evaluating a party's performance of that contract."). An oil and gas lease is a contract to which the duty of good faith and fair dealing applies. S*ee, e.g., McCullough Oil, Inc. v. Rezek*, 176 W. Va. 638, 642, 346 S.E.2d 788, 792 (1986).

Another analytical construct – necessity and substantial burden – has developed in the context of the implied rights of a lessee to operate in a particular way under an oil and gas lease. Implied rights have most often been considered in determining the right to use the surface for development of minerals.[6] Under long-standing West Virginia law, when a mineral estate is

[6] This case involves the rights of a lessee *vis-à-vis* a lessor under the terms of an oil and gas lease; no surface operating rights are at issue here. Regardless, because these cases involve implied rights as compared to implied obligations, the necessity and substantial burden test can be used to examine the implied rights under an oil and gas lease.

conveyed by deed or by lease, the grantee or lessee also acquires all the means to obtain the minerals. *Andrews*, 2019 WL 2494598 at *6; *EQT Prod. Co. v. Crowder,* No. 17-0968, 2019 WL 2414728, at *6 (W. Va. June 5, 2019); *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E.2d 90, 91 (1924); *Montgomery v. Economy Fuel Co.*, 61 W. Va. 620, 57 S.E. 137, 138 (1907) ("A lease granting minerals carries with it, *by necessary implication*, the right to enter upon the property and do all things necessary for the purpose of acquiring and enjoying the estate granted."). As this Court recently stated, a "mineral owner or lessee has an implied right to use the surface of a tract in any way reasonable and necessary to the development of minerals underlying the tract." *Crowder*, 2019 WL 2414728 at Syl. Pt. 5; *see also Andrews*, 2019 WL 2494598 at *6 (observing "where a deed severs the mineral and surface estates and plainly allows for the extraction of the mineral estate, certain uses of the surface by the mineral owner are necessarily implied."). Whether there is an implied right to perform a particular surface activity depends upon whether it is (a) reasonably necessary for the extraction of the minerals, and (b) can be exercised without any substantial burden to the surface owner. *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 16-18, 267 S.E.2d 721, 725-26 (1980) (considering surface operating rights); *see also Andrews*, 2019 WL 2494598 at *11 (applying the two-part test set forth in *Buffalo Mining*).

In this case, use of the surface is not at issue. The narrow question presented is whether a lessee has an implied right to pool a "silent" oil and gas lease with mineral interests in other tracts in order to drill horizontal wells that will cross the subsurface of multiple tracts.

B. Regardless of which test is employed – intent of the parties, cooperation, good faith and fair dealing, or necessity – an oil and gas lease silent on the issue should be construed to have an implied right to pool.

1. The intent of the parties to an oil and gas lease is to produce oil and gas and to receive royalties.

This Court has long recognized that the intent of the parties to an oil and gas lease is "to accomplish the main purpose of the owner of the land and of the lessee as operator of the oil and gas interest: securing production of oil or gas or both in paying quantities, quickly and for as long as production in paying quantities is obtainable." *McCullough Oil, Inc.*, 176 W. Va. at 642, 346 S.E.2d at 792. The Lease at issue here is no different; it grants the right to develop the oil and gas in all formations in the Lease premises in exchange for payment of royalties. Apx. at 11-12. At the most fundamental level, the purpose of an oil and gas lease is to work to the "mutual advantage and profit" of the parties thereto. *See Brewster*, 140 F. at 811. An oil and gas lease "yields nothing to the landowner when not worked" and consequently constitutes nothing more than "an incumbrance (sic) on his land." *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S.E. 978, 980 (1898). Accordingly, "[w]hen its terms will permit it, under the rules of law, an oil lease will be so construed as to promote development and prevent delay and unproductiveness." *Parish Fork Oil Co.*, 51 W. Va. at Syl. Pt. 3, 42 S.E. at Syl. Pt. 3.

Recognizing, as the Court did in *McCullough Oil*, that the intent of the parties to the Lease was to develop the oil and gas and applying the *Parish Fork* rule of construction leads to the conclusion that the ambiguity created by the Lease's silence should be resolved in favor of an implied right to pool. Only then can the intentions of the original parties to the Lease be realized: securing production of oil and gas in paying quantities, quickly and for as long as production in paying quantities is obtainable.

2. The implied right to pool is supported by the principle of cooperation.

As noted earlier, cooperation is a basic principle upon which implied covenants and implied rights are based. "The principle of cooperation requires that parties to a contract cooperate in order to carry out the purposes of the agreement. It is based upon both the

reasonable expectations of the parties when they enter into an agreement and ethical concepts of conduct." Treatise, at § 802.1. At its most fundamental level, an oil and gas lease gives the lessee the right to produce and sell oil and gas in exchange for payment of royalties. The principle of cooperation dictates that Respondents cannot refuse to cooperate by denying Ascent the rights necessary to the enjoyment of the entire oil and gas estate, including the shale formations, particularly when they can show no cognizable harm. The only consequence to the Respondents is that they will be paid royalties if oil and gas are found in paying quantities.

To borrow a phrase from due process law, lack of cooperation under these circumstances is contrary to traditional notions of fair play and justice. Ascent is denied the benefit of its investment and the purpose of the Lease is thwarted without an implied right to pool. This case is not about forcing Respondents to sign a lease; the Lease already exists and Ascent holds all contractual rights necessary to develop the oil and gas. Apx. at 90. In the absence of an implied right to pool, Respondents might try to work a termination of the Lease with respect to shale formations simply by refusing to cooperate and by refusing to sign an amendment to expressly authorize pooling.[7] Such an outcome is contrary to the recognition that "the further prosecution of the work should be along such lines as would be reasonably calculated to effectuate the controlling intention of the parties as manifested in the lease, which was to make the extraction of oil and gas from the premises of mutual advantage and profit." *Brewster*, 104 F. at 810.

[7] Such an outcome is not far-fetched given the "Keep it in the Ground" movement by those opposed to the use of fossil fuels. *See, e.g.*, Valerie Richardson, *Michael Bloomberg pledges $500 million to shut down coal plants, block natural gas*, THE WASHINGTON TIMES, June 9, 2019, https://www.washingtontimes.com/news/2019/jun/9/michael-bloomberg-beyond-carbon-campaign-aims-shut/; *see also* Jeff Brady, *'Keep It in The Ground' Activists Optimistic Despite Oil Boom*, NATIONAL PUBLIC RADIO, Mar. 16, 2018, https://www.npr.org/2018/03/16/589908135/keep-it-in-the-ground-activists-optimistic-despite-oil-boom.

Once oil and gas was found in paying quantities on the leasehold, the inchoate right to drill and produce oil and gas was vested in the lessee. That right continues "as long thereafter as oil or gas, or either of them is produced from the said lands by the said Lessee, its successors and assigns." Apx. at 55. If the Lease cannot be pooled with other mineral interests, the oil and gas in shale formations will not be developed, and no operator, owner or lessor[8] will be able to enjoy the benefits of the bargained-for lease. The purpose of the Lease is thwarted. The oil and gas in the Marcellus shale will not be developed and will thus be wasted.

In direct contradiction of this principle of cooperation, the Circuit Court ruled that Ascent should try to negotiate a pooling amendment with Respondents and pay them "due consideration." Apx. At 163. Respondents apparently opposed Ascent's implied right to pool for a simple reason: they want a financial windfall for a pooling amendment to the Lease. Apx. at 186. Respondents can leverage their ability to hold up production for more money by refusing to sign such an amendment. Such tactics, however, are contrary to the concept of cooperation. Ascent has no obligation to pay Respondents additional money to fulfill the material purpose of the Lease and enjoy the rights it already has. Respondents will receive the bargained-for consideration of royalties for their share of the proceeds from sale of the oil and gas. There is nothing to suggest that Respondents are entitled to additional "fair consideration" if Ascent pools the Lease. There is no contractual or statutory basis for the claim, and the Circuit Court did not cite any reason to justify additional compensation. Pooling places no additional burden on Respondents and does not change the bargain struck in the Lease to develop oil and gas in exchange for royalties. Demanding additional compensation or refusing to permit pooling are both inimical to the concepts of cooperation and the principle of good faith and fair dealing

[8] While admittedly not the situation here, it nonetheless bears consideration that in similar circumstances the interests of other co-tenant mineral owners who want the oil and gas developed could likewise be thwarted.

discussed below. Accordingly, the Circuit Court erred by finding that an implied right to pool would materially alter the terms of the Lease without fair consideration.

3. The implied right to pool is supported by the principle of good faith and fair dealing.

The concept of good faith and fair dealing underlying implied covenants in oil and gas leases also dictates recognition of an implied right to pool. West Virginia recognizes a duty of good faith and fair dealing in contracts, and an oil and gas lease is a contract. *See McCullough Oil, Inc.*, 176 W. Va. at Syl. Pt. 1, 346 S.E.2d at Syl. Pt. 1. Therefore, implied rights can be analyzed in the context of the duty of good faith and fair dealing.

The policy of West Virginia is and always has been that the extraction of minerals in accordance with established rules is not only acceptable but encouraged. *See* section IV.C., *infra.* Courts, on the other hand, must interpret and apply valid contracts, and our Court has already spoken in broad terms: "[w]hen its terms will permit it, under the rules of law, an oil lease will be so construed as to promote development and prevent delay and unproductiveness." *Parish Fork Oil Co.*, 51 W. Va. at Syl. Pt. 3, 42 S.E. at Syl. Pt. 3.

A common law right to pool an existing oil and gas lease is merely the "flip side" of the common law implied covenant to further develop recognized most recently in *St. Luke's United Methodist Church*, 222 W. Va. at 189, 663 S.E.2d at 643 (recognizing an implied obligation for an oil and gas lessee to develop the leased premises to protect against drainage by wells on adjacent property). Given an implied covenant to develop, if the only reasonable way to develop is to pool leases and drill horizontal wells, there must, *a fortiori*, be a corresponding implied right to pool the lease.

For example, there could be a situation where one co-tenant lessor asserts a claim for breach of an implied covenant to develop the shale formations against the lessee, but the lease is

silent as to pooling and other co-tenant lessors maintain the lessee has no right to pool. This would place a lessee in a highly untenable position of either losing its lease with respect to the undeveloped shale formations or risking a trespass action. This potential situation is not far-fetched. While it can be argued that the implied covenant to develop cannot be breached under those circumstances, the better result is that the original parties contemplated development, public policy encourages development, and there must be a common law right to pool that goes hand-in-glove with the common law implied covenant to develop. Good faith and fair dealing goes both ways – the implied obligation must be accompanied by the corresponding implied rights. Otherwise, there will be a gaping hole in the seamless fabric of the law.

4. The necessity and substantial burden test supports an implied right to pool.

Application of the *Buffalo Mining* necessity and substantial burden test leads to the conclusion that an implied right exists to pool the Lease with other mineral interests. Pooling is reasonably necessary and there is no undue burden on the Respondent lessors.

a) Pooling the Lease is "reasonably necessary."

The question of whether an implied right meets the *Buffalo Mining* "reasonably necessary" standard should be determined by the Court as a matter of law. *Justice v. Pennzoil Co.*, 598 F.2d 1339, 1341 (1979) (*citing Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950)) (The "issue of unreasonable use is one to be determined by the court.").

The implied right to pool is necessary for Ascent to enjoy its rights and fulfill its responsibilities under the Lease. Apx. at 58-59. The Respondents have not submitted any evidence contending otherwise. *See* section II, *supra*. Under the *Caperton* clear error standard, the Circuit Court erred by finding that pooling is not "reasonably necessary" to fully develop the oil and gas under the Lease. This case is conceptually no different than *Andrews*, where this

Court found it unnecessary to consider the first prong of the *Buffalo Mining* test because the property owners had not shown the existence of a material fact as to whether development activities were reasonably necessary. *Andrews*, 2019 WL 2494598 at *12.

b) Pooling imposes no unreasonable burden on the Respondents.

The second prong of the *Buffalo Mining* standard – the "unreasonable burden" test – is most often employed to determine the correlative rights of the separate estate owners – oil and gas *vis-a-vis* surface owners, coal owners *vis-a-vis* surface owners, and oil and gas owners *vis-à-vis* coal owners. To the extent the second prong of the test should be applied to the lessor-lessee relationship, pooling imposes no burden whatsoever on the Respondents. To the contrary, benefits are bestowed upon the Respondents because development of the oil and gas means that they will receive the resultant additional royalty payments.

The Respondents did not provide any evidence of an unreasonable burden, instead relying on argument of counsel that Respondents would be denied a windfall if they could not negotiate for and be paid additional money for a pooling amendment. Apx. at 186. Respondents were required to submit evidence, which they failed to do. *Andrews*, 2019 WL 2494598 at *6. Yet, the Circuit Court determined that pooling would place an undue burden on the oil and gas estate, although what constituted that burden was not stated. Apx. at 163. Pooling the Lease with other mineral interests entails nothing more than combining the leased premises with other mineral interests to form a unit large enough to allow horizontal drilling and assuring that the lessor is paid its share of the royalties. Each Respondent will be paid royalties at the rate specified in the Lease based upon his or her proportional ownership interest in the drilling unit. No owner will be put at a financial disadvantage by pooling the Lease; additional royalties will be paid if a successful well is drilled. Production of oil and gas is what the Lease contemplates.

It is inconceivable that accomplishing the purpose of the Lease could be construed as a burden on the oil and gas owner/lessor.

Consequently, the Circuit Court clearly erred in finding that pooling the Lease would place some unspecified undue burden on the oil and gas estate not contemplated by the original parties. Apx. at 163. That is an insufficient basis upon which to deny Ascent's motion for summary judgment and constitutes reversible error. *See Boggess v. City of Charleston*, 234 W. Va. 366, 371, 765 S.E.2d 255, 260 (2014) ("[s]ummary judgment is mandated when the record demonstrates that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law."); *Bowers*, 207 W. Va. at 40, 528 S.E.2d at 487 ("To successfully respond to a motion for summary judgment, a plaintiff was required to meet his or her burden of establishing the existence of a genuine question of material fact by providing the circuit court with a memorandum presenting any legal arguments against summary judgment, and/or evidence in the form of affidavits, depositions or answers to interrogatories."); *see also Ratliff v. State Farm Mut. Auto. Ins. Co.*, No. 2:13-CV-8, 2014 WL 906245, at *2 (N.D.W. Va. Mar. 7, 2014) ("The party opposing summary judgment must [] demonstrate that a triable issue of fact exists; he may not rest upon mere allegations or denials.").

The Circuit Court intimated that its finding of an unreasonable burden was based on horizontal drilling not being contemplated by the original parties to the Lease. Apx. at 163. Any question about whether new technology can be employed, even if it was not known or contemplated at the time of the lease, was recently laid to rest in *Andrews v. Antero*:

> Although these cases did involve technology that did not exist at the time the relevant severance deeds were executed, that fact, standing alone, was not dispositive. To the contrary, under West Virginia law, the use of technological advancements not expressly contemplated in a severance deed have nevertheless been implied.

2019 WL 2494598 at *7 n.21; *see also Buffalo Mining Co.*, 165 W. Va. at 15, 267 S.E.2d at 724 (placement of electric transmission lines permitted even though not contemplated by grantor and grantee). The common law pertaining to implied mineral development rights encourages the use of improved methods and technologies for mineral exploration, production, and transportation that were not (and in many instances, could not have been) contemplated at the time a particular deed or lease was executed.[9] Thus, the fact that horizontal drilling is a new technique not known at the time the Lease was executed cannot, standing alone, be found to constitute an unreasonable burden on the Respondents. For these reasons, the Circuit Court was incorrect in its determination that pooling would "place a burden upon the Subject Mineral estate that was never contemplated by the original parties to the Lease." Apx. at 163.

C. An implied right to pool is consistent with the public policy of West Virginia as expressed by the Legislature.

The West Virginia Legislature has consistently declared that the public policy of this State supports the development of minerals. The Legislature has stated that:

> It is hereby declared to be the public policy of this state and in the public interest to: Foster, encourage and promote exploration for and development, production, utilization and conservation of oil and gas resources; Prohibit waste of oil and gas resources and unnecessary surface loss of oil and gas and their constituents; Encourage the maximum recovery of oil and gas; and Safeguard, protect and enforce the correlative rights of operators and royalty owners in a pool of oil or gas to the end that each such operator

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[9] *See, e.g., Marvin v. Brewster Iron Mining Co.*, 55 N.Y. 538, 551 (1874) (owner of mineral rights has an implied right to "keep pace with the progress of invention and ingenuity, so far as is necessary to a profitable working of his property in competition with rivals."); *Culp v. Consol Pennsylvania Coal Co.*, 1989 WL 101553 (W.D. Pa. 1989) ("The right to work the mine involves the right . . . to use such means and processes in mining and removing [minerals] as may be necessary in light of modern improvements in the arts and sciences."); *see also Oberly v. H. C. Frick Coke Co.*, 262 Pa. 83 (1918). Similarly, the law related to servitudes such as easements and rights of way generally encourages the use of new technology. *See, e.g., Restatement (Third) Property: Servitudes* § 4.10 ("The manner, frequency and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefitted by the servitude.").

> and royalty owner may obtain his just and equitable share of production from such pool of oil or gas.

W. Va. Code § 22C-9-1. This sentiment is expressly echoed elsewhere by the Legislature. For example, in the Horizontal Well Act, it is declared that "[t]he advent and advancement of new and existing technologies and drilling practices have created the opportunity for the efficient development of natural gas contained in underground shales and other geologic formations" and that "[a]llowing the responsible development of our state's natural gas resources will enhance the economy of our state and the quality of life for our citizens while assuring the long term protection of the environment." W. Va. Code § 22-6A-2(a)(8). The Legislature also stated in the Horizontal Well Act that "the establishment of a new regulatory scheme to address new and advanced natural gas development technologies and drilling practices is in the public interest and should be done in a manner that protects the environment and our economy for current and future generations." W. Va. Code § 22-6A-2(b).

Similarly, in the recent Marcellus Gas and Manufacturing Development Act, the Legislature declared that "facilitating the development of business activity directly and indirectly related to development of the Marcellus shale serves the public interest of the citizens of this state by promoting economic development and improving economic opportunities for the citizens of this state." W. Va. Code § 5B-2H-2(b). In doing so, the Legislature found that "[i]t is in the interest of national security to encourage post-production uses of natural gas and its various components as a replacement for oil imported from other countries" and that "[w]ith development of the Marcellus shale comes the opportunity for economic development in related areas of the economy." W. Va. Code § 5B-2H-2(a).

Consistent with these expressions of public policy and legislative findings, an implied right to pool will encourage the exploration and development of natural gas resources and

facilitate development of the Marcellus shale. *See* Apx. at 59. In turn, an implied right to pool advances West Virginia's broader policy of protecting national security and encouraging post-production utilization of oil and gas resources.

An implied right to pool also safeguards the correlative rights of lessors and lessees by giving each of them the benefit of the original bargain – the right to develop oil and gas in return for royalties. This Court has recognized that horizontal drilling techniques enabled by pooling are typically less burdensome to the surface estate than traditional vertical wells, thus promoting conservation. *See Andrews v. Antero*, 2019 WL 2494598, at *10. An implied right to pool also helps to avoid waste of our precious natural resources by preventing a single interest holder from leveraging its position to deny a pooling amendment, which in turn "strands" properties and keeps them from being developed.

West Virginia's courts, like the Legislature, have long recognized the public benefits associated with oil and gas development. *See McGregor v. Camden*, 47 W. Va. 193, 34 S.E. 936, 937 (1899) ("The drilling of oil and gas wells is not only a legitimate business, but public policy upholds it, as being for the general welfare."). The common law is organic and needs to respond to this new opportunity to efficiently develop our State's natural resources consistent with established common law and State policy by recognizing that silent oil and gas leases carry with them the implied right to pool.

V. The Customary Terms And Conditions For Pooling And Unitization Should Govern The Contractual Relationship Between The Parties.

Courts have the equitable power to furnish missing contract terms in written agreements. For example, in *Jessee v. Aycoth*, 202 W. Va. 215, 503 S.E.2d 528 (1998), the Supreme Court of Appeals affirmed a trial court's addition of a term to a divorce settlement that required an ex-wife to sell her former marital residence and split the proceeds from the sale with her ex-

husband. The settlement agreement unambiguously stated how the profits were to be divided but did not set a date for the sale. *Id.* at 531-32. Aycoth argued that the absence of any term requiring Jessee to sell the residence by a particular date rendered the settlement agreement ambiguous. *Id.* The Court agreed. *Id.* at 532. Following an examination of parole evidence regarding the parties' intent, and because the divorced couple's only child had reached the age of majority, the circuit court furnished a term to the otherwise incomplete settlement agreement, holding as a matter of law that the former marital residence must be sold within a reasonable time. The Supreme Court of Appeals affirmed, noting that "[t]he decision of the circuit court did not alter the original agreement reached between [the parties]. Rather, after considering the evidence, the circuit court determined the exact term of the incomplete settlement agreement." *Id.*

Similarly, *In re Joseph G.*, 214 W. Va. 365, 589 S.E.2d 507 (W. Va. 2003), involved a dispute over a minor child's health care provision contract that failed to address whether the state or a private contractor would pay certain medical costs. The circuit court found the agreement incomplete and ambiguous as to which entity would pay those costs and added a term to that contract identifying the state – rather than the private contractor – as the party responsible for paying the minor's medical costs, based on what it determined to be the parties' intent. *Id.* at 512-13. The addition of that term was affirmed by the Supreme Court of Appeals, and stands, with *Aycoth*, as an example of the circuit court's power to furnish terms to written agreements in order to give effect to the parties' intent.

With respect to implied covenants, it is not disputed that West Virginia has recognized implied covenants relevant to oil and gas leases, such as an implied covenant to develop or market. *See* section IV.A., *supra*. This Court has relied upon industry custom when applying those covenants. *See, e.g., Wellman*, 210 W. Va. at 211, 557 S.E.2d at 265 (reciting the "long-

established expectation of lessors in this State, that they would receive one-eighth of the sale price received by the lessor" when applying the implied covenant to market); *see also St. Luke's United Methodist Church*, 222 W. Va. at 191, 663 S.E.2d at 645 (prudent operator standard). In reality, implied covenants and implied rights both furnish missing terms and conditions to a contract to implement the intent of the parties.

Here, Ascent submitted an affidavit attesting to the terms and conditions that are customary in the oil and gas industry. *See* p.4, *supra*; Apx. at 62-63. Respondents did not offer any competing evidence. Consequently, the Circuit Court erred by failing to recognize its equitable powers to supply missing terms and conditions and by refusing to establish such customary terms and conditions based on the sole evidence offered by Ascent. *See Bowers*, 207 W. Va. at 40, 528 S.E.2d at 487 (holding that "[t]o successfully respond to a motion for summary judgment, [the non-moving party] [is] required to meet his or her burden of establishing the existence of a genuine question of material fact by providing the circuit court with a memorandum presenting any legal arguments against summary judgment, and/or evidence in the form of affidavits, depositions or answers to interrogatories."); *see also Boggess*, 234 W. Va. at 371, 765 S.E.2d at 260 (holding that "[s]ummary judgment is mandated when the record demonstrates that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.").

VI. Circuit Courts Are Vested With The Authority And Have The Obligation To Interpret Contracts And To Declare And Apply Common Law.

The Circuit Court reached several conclusions that appear to be alternative reasons to avoid granting summary judgment. The Circuit Court asserted that it had no right to determine common law, intimated that there was no real controversy, invited the Legislature to act, and

declined to "overturn over a century of common law." None of these reasons withstands scrutiny.

A. Interpreting contracts and establishing the common law surrounding implied covenants and implied rights is a function for the courts.

The Circuit Court incorrectly asserted that it did not have the right to determine whether there is an implied right to pool under the common law. Apx. at 163.[10] This Court has long held there are implied covenants in oil and gas leases under West Virginia common law. *Monto v. Gillooly*, 107 W. Va. 151, 147 S.E. 542, 544 (1929) (holding that "[w]hatever is necessary to be done in order to accomplish the work specifically set forth in a contract, as agreed to be performed, is parcel of the contract though not specified."). As explained over 100 years ago, "[l]eases for oil and gas are subject to the implied covenant that the lessee will do all that is necessary to carry into effect the purposes and objects of the lease." *Jennings*, 73 W. Va. at 80, 80 S.E. at 369.

The common law pertaining to implied covenants is derivative of the State's common law as it pertains to contract interpretation. For example, "[w]hen reading and interpreting contract provisions, the court's purpose is to give full force and effect to the expressed *or implied intentions* of the contracting parties, if such can be discerned." *Ohio Valley Health Servs. & Educ. Corp. v. Riley*, 149 F. Supp. 3d 709, 716 (N.D.W. Va. 2015) (emphasis added); *see also Taylor v. Buffalo Collieries Co.*, 72 W. Va. 353, 79 S.E. 27, 27 (1913) (holding that a "court should regard the obvious intent and design of the parties, and the object to be attained by them, as well as the language of the instrument itself."). The use of implied covenants is nothing more than an extension of this common law principal of contract interpretation. "Implied covenants have been frequently referred to as contractual 'gap-fillers' utilized to implement the parties'

[10] The Circuit Court stated that "it would not overturn more than a century of the State's common law." The issue of whether there is an implied right to pool is a novel issue that has never been addressed by this Court.

intentions where not otherwise stated." *Leggett v. EQT Prod. Co.*, 239 W. Va. 264, 275, 800 S.E.2d 850, 861 (2017). Accordingly, the Circuit Court erred when it refused to rely on such "gap-fillers" as the implied covenant to pool to effectuate the established purpose and intent of the parties to the Lease.

B. A Circuit Court cannot deflect to the Legislature its responsibility to interpret contracts and rule on proper requests for a declaratory order.

The Circuit Court also stated it could not interpret the Lease and declare the common law because the Legislature had recently considered legislation on the issue of forced pooling and the West Virginia Code was silent on the issue presented in the complaint. Apx. at 162.

"If the Legislature intends to alter or supersede the common law, it must do so clearly and without equivocation." *State ex rel. Van Nguyen v. Berger*, 199 W. Va. 71, 75, 483 S.E.2d 71, 75 (1996). There is no legislative enactment clearly abrogating implied rights, which West Virginia recognizes under its common law, and there is also no clear legislative enactment prohibiting an implied right to pool. The mere fact that the Legislature has considered legislation on the topic of forced pooling[11] does not plainly manifest an attempt to abrogate the common law. *See* Syl. Pt. 4, *Seagraves v. Legg*, 147 W. Va. 331, 332, 127 S.E.2d 605, 605 (1962) ("the common law is not to be construed as altered or changed by statute, unless legislative intent to do so be plainly manifested."). Consequently, the Circuit Court erred in refusing to find an implied right to pool simply because the Legislature has in the past considered legislation on forced pooling and no statute addresses the issue raised by Ascent.

C. There is a justiciable controversy under the Declaratory Judgment Act.

The Circuit Court stated that the record is devoid of any facts to establish that the oil and gas are not being developed in the absence of pooling, thus suggesting there is no controversy

[11] *See* section IV.C., *supra* (forced pooling is not an issue here because Ascent holds 100% of the mineral interest rights necessary to develop the oil and gas estate in the property).

needing adjudication. Apx. at 161, 163. West Virginia's Declaratory Judgment Act provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." W. Va. Code § 55-13-1. The Declaratory Judgment Act specifically contemplates relief that is prospective in nature, not retrospective. "The purpose of a declaratory judgment proceeding . . . is to anticipate the actual accrual of causes for equitable relief or rights of action by anticipatory orders which adjudicate real controversies before violation or breach results in loss to one or the other of the persons involved." *Bd. of Ed. of Wyoming Cty. v. Bd. of Pub. Works*, 144 W. Va. 593, 599–600, 109 S.E.2d 552, 556 (1959) (emphasis added).

Put another way, the West Virginia Uniform Declaratory Judgment Act, "is designed to enable litigants to clarify legal rights and obligations before acting upon them." *Cox v. Amick,* 195 W. Va. 608, 618, 466 S.E.2d 459, 469 (1995). A "declaratory judgment action is a proper procedural means for adjudicating the legal rights of parties to a disputed contract." *Black v. St. Joseph's Hosp. of Buckhannon, Inc.*, 234 W. Va. 175, 180, 764 S.E.2d 335, 340 (2014). Whether oil and gas are currently being produced from other formations is inconsequential for the purpose of determining whether Ascent has the implied right to pool for future development of the Marcellus shale formation.

In this case, Ascent filed a complaint seeking a declaratory judgment that it has the implied right to pool an oil and gas lease. Respondents denied that there is such a right. Apx. at 86-88. "For purposes of a declaratory judgment action, a justiciable controversy exists when a legal right is claimed by one party and denied by another." Palmer, Louis J., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 57[4] at 1339 (5th ed. 2017). This case presents an actual, justiciable controversy. To the extent the Circuit Court refused to grant the

relief requested by Ascent because there was no actual controversy, the Circuit Court erred. West Virginia's Declaratory Judgment Act entitles Ascent to a declaration of its legal rights under the Lease.

CONCLUSION

Ascent respectfully requests that this Court reverse the Circuit Court's Order Denying Summary Judgment on Declaratory Judgment and remand with instructions to enter judgment in favor of Ascent and to make the following declarations:

- Pooling and unitization are reasonably necessary to develop the oil and gas in the Marcellus shale formation;
- An implied right to pool and unitize is supported by the intent of the original parties to the Lease, by the public policy of the State, and by the principles of cooperation, good faith and fair dealing, and necessity;
- Pooling and unitization places no unreasonable burden on the Respondents; and
- Ascent has the implied right to pool and unitize the Lease with other mineral interests upon the uncontroverted terms and conditions submitted by Ascent (*see* p. 4 *supra)* as a necessary adjunct to its right to drill and operate the premises for oil and gas.

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