No. 19-0347

In the

Supreme Court of Appeals Of West Virginia

ASCENT RESOURCES – MARCELLUS, LLC,

Petitioner,

v.

No. 19-0347

DONALD E. HUFFMAN and
TRIPLE L LAND AND MINERAL, LLC,

Respondents.

REPLY 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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INTRODUCTION

On April 3, 2019, Ascent Resources – Marcellus, LLC ("Ascent") filed a Notice of Appeal regarding an order denying a motion for summary judgment to construe a silent oil and gas lease as providing an implied right to pool and unitize[1] where the uncontroverted facts show that the oil and gas in shale formations cannot be developed in the absence of pooling. After Ascent timely filed its Initial Brief on July 3, 2019, and after several orders directing the Respondent to file a brief went unanswered, the current Respondents, Donald E. Huffman and Triple L Land and Mineral, LLC ("Respondents") advised the Court on June 5, 2020, that they had acquired "a partial interest" in the underlying mineral estate[2] and requested permission to file a brief. Ascent did not contest Respondents' motion, instead welcoming the opportunity to have the issue fully briefed and addressed by this Court to resolve the split of authority between two circuit judges.[3]

As shown below, Respondents raise arguments for the first time on appeal and speculate about facts not supported by the uncontroverted evidence of record, which shows that (1) the Lease is silent on the issue of pooling, and (2) the oil and gas in the shale formations in the leased premises cannot be economically produced if the Lease is not pooled with other leases or mineral interests sufficient to form a tract large enough to drill horizontal wells.[4] Respondents further rely again and again upon the faulty premise that silence must be construed in their favor.

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[1] As in Ascent's initial brief, for ease of use, pooling and unitization, while slightly different, are referred to herein collectively as "pooling."

[2] For purposes of this appeal, Ascent has not contested the Respondents' assertions that they now own a partial interest in the minerals but reserves all rights to do so if, in the future, it appears that Respondents' title is defective. There is no evidence in the record showing what interest, if any, Respondents acquired.

[3] See Pet. Br. at 5-6.

[4] At the outset, Respondents accuse Ascent of engaging in "pure sophistry." Resp. Br. at 8. Sophistry is the use of fallacious arguments, especially with the intention of deceiving. Synonyms are trickery, deviousness, deceit, deception, dishonesty, cheating, duplicity, guile, cunning, artfulness, wiliness, craft, craftiness, evasion, slyness, chicanery, intrigue, subterfuge, strategy, bluff, pretense, fraud, fraudulence, sharp practice, monkey business, funny business, hanky-panky, jiggery-pokery, every trick in the book. Counsel trusts that use of the term was a misuse and unintentional.

Respondents' only showing of a perceived "detriment" from pooling is that Respondents would be unable to extract additional money from Ascent to do that which Ascent is already obligated to do – develop the oil and gas in the leased premises.

In the final analysis, Respondents have not provided valid justification for the lower court's refusal to grant summary judgment. This Court is urged to recognize the principle that where an oil and gas lease is silent on the issue of pooling, neither permitting nor denying the right, there is an implied right to pool the lease with others to create a drilling unit where it is shown that pooling is necessary to develop the oil and gas and there is no harm to the lessee. [5]

ARGUMENT [6]

1. Respondents Have Not Justified the Circuit Court's Denial of Ascent's Motion for Summary Judgment.

A. Standard of Review.

The parties agree that the standard of review in this Court is *de novo*.

B. The Circuit Court Should Have Granted Ascent's Motion for Summary Judgment.

1. Respondents' Assertion That the Relief Sought Is Outside The Scope Of Permissible Relief Available In Construing An "Unambiguous" Contract Is Based Upon a Faulty Premise and Incorrect.

[5] "Pooling" is nothing more than combining enough land into a "drilling unit" to use modern technology to drill a well of sufficient length to economically produce gas from a formation and paying royalties to mineral owners on the basis of their proportionate shares of acreage in the unit.

[6] Respondents suggest in footnote 1 of their brief that Ascent failed to follow the requirements of Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure because the headings do not correspond to the assignments of error. This is incorrect. While not sequential, the following assignments of error clearly correspond substantively with the following headings, identified by section, in the Table of Contents: Assignment of Error #1 corresponds with Section III and IV; Assignment of Error #2 corresponds with Section II; Assignment of Error #3 corresponds with Section V; Assignment of Error #4 corresponds with Section VI; Assignment of Error #5 corresponds with Section IV(4)(a); Assignment of Error #6 corresponds with Section IV(4)(b); Assignment of Error #7 corresponds with Section II; and Assignment of Error #8 corresponds with Section VI.

Having convinced the lower court to adopt its position that the lease is unambiguous, Respondents cannot now appropriately claim that Ascent is barred from addressing the fallacy of the Court's order on appeal "because it did not raise the issue below." *See* Resp. Br. at 15-18. As shown below, silence can constitute an ambiguity. Ascent holds an oil and gas lease from 100% of the royalty owners that permits it to develop the oil and gas in the 94-acre Lease tract.[7] Apx. at 11-13. The Lease is silent on pooling. *See* Apx. at 11-12. The Lease does not expressly prohibit pooling. The Lease does not expressly provide for pooling. The Lease is simply silent. It was Respondents who claimed that the Lease was unambiguous. Apx. at 89-90. The lower court adopted Respondents' position and, in its Order, discussed whether the Lease was "unclear and ambiguous" and determined that the Lease was "plain and unambiguous" and "clear and unambiguous." Apx. at 161, ¶ ¶ 6, 8, 9.

Respondents gloss over the fact that the cases cited in Ascent's motion for summary judgment clearly stand for the proposition that courts have the inherent power to determine the rights and obligations of the parties when a contract is silent or ambiguous.[8] In every one of the cases cited, the contract was silent regarding the issue at stake, and in every one of those cases the Court furnished the missing terms – just as it did in the more recent case of *Andrews v. Antero Res.*

[7] Because the Lease covers 100% of the mineral interests, "forced pooling" or "statutory pooling" is not an issue in this case.

[8] *See, e.g., St. Luke's United Methodist Church v. CNG Development Co.*, 222 W. Va. 185, 663 S.E.2d 639 (2008) (court should impose a reasonable time during which additional developments may be undertaken under an implied covenant to develop); *Jessee v. Aycoth*, 202 W. Va. 215, 503 S.E.2d 528 (1998) (court added a provision to the agreement based on what it believed to be the parties' mutual intent); *In Re Joseph G*, 214 W.Va. 365, 589 S.E.2d 507 (2003) (court added provision to contract based on what it determined to be the parties' intent); *Sell v. Chaplin*, 168 W. Va. 404, 285 S.E.2d 133 (1981) (court allowed evidence to show the parties' intent regarding a material term missing in a loan agreement); *Coleman v. Sopher*, 201 W. Va. 588, 499 S.E.2d 592 (1997) (Court furnished missing term of contract); *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E. 90 (1924) (mineral owner's implied right to use surface); *Montgomery v. Economy Fuel Co.*, 61 W. Va. 620, 624, 57 S.E. 137, 139 (1907) (principle extended to mineral lessee's rights); *Porter v. Mack*, 65 W. Va. 636, 64 S.E. 853 (1909) (mineral owner had implied right to build tramway where "the right to mine and remove the same" was reserved); *Cole v. Ross Coal Co.*, 150 F. Supp. 808 (S.D.W.V. 1957) (following *Squires*; enumeration of specific mining rights does not exclude all others which would be implied); *Whiteman v. Chesapeake Appalachia, LLC*, 873 F.Supp.2d 767 (2012) (same).

Corp., where the two deeds at issue were silent about whether the use of new technology was permissible. 241 W. Va. 796, 803, 828 S.E.2d 858, 865 n. 20 (2019).

Respondents argue that silence in a contract cannot create an ambiguity and cite two cases from other jurisdictions where courts found silence did not create an ambiguity. First, there are plenty of other cases where courts have determined that silence does indeed create an ambiguity. *See, e.g., Olander v. State Farm Mut. Auto. Ins. Co.*, 317 F.3d 807, 810 (8th Cir. 2003) ([i]n many cases, a contract's silence on an issue creates an ambiguity"); *Dahl-Eimers v. Mut. of Omaha Life Ins. Co.*, 986 F.2d 1379, 1382 (11th Cir. 1993) ("[a]mbiguity in the contract terms arises from the contract's silence on definitions"); *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 546 (7th Cir. 2000) ("silence . . . makes the agreement genuinely ambiguous").

Second, Respondents twist Ascent's argument by stating that Ascent is arguing that "silence *on any topic* in a contract creates an ambiguity that may be reformed by a court in a declaratory judgment action . . . ." Resp. Br. at 16 (emphasis added). That is untrue. Ascent merely states that silence regarding a single issue -- pooling -- creates a latent ambiguity in an oil and gas lease where pooling is within the bundle of rights granted in the Lease and admittedly necessary to carry out the purpose of that lease – development of oil and gas.[9]

Whether silence creates an ambiguity is a matter of context. This point is succinctly stated in *Hongbo Han v. United Cont'l Holdings, Inc.*, 762 F.3d 598, 601 (7th Cir. 2014) (internal citations and alterations omitted) (emphasis added): "silence creates ambiguity only when the silence involves a matter naturally *within the scope of the contract as written*." Indeed, that is the purpose of implied covenants in general: an implied covenant "is a tool utilized *to resolve*

[9] A "latent ambiguity arises when the instrument upon its face appears to be clear and unambiguous, but there is some collateral matter which makes the meaning uncertain." *Kopf v. Lacey*, 208 W. Va. 302, 308, 540 S.E.2d 170, 176 (2000) (quoting *Collins v. Treat*, 108 W. Va. 443, 446, 152 S.E. 205, 206 (1930)).

contractual ambiguities. Implied covenants have been frequently referred to as contractual 'gap-fillers' utilized to implement the parties [sic] intentions where not otherwise stated." *Leggett v. EQT Prod. Co.*, 239 W. Va. 264, 275, 800 S.E.2d 850, 861 (2017) (emphasis added). This is all that Ascent asserts – where a lease is silent regarding a right or an obligation necessary to accomplish the stated purpose of a clearly-granted right in the lease, the Court must step in to fill the void. As *Leggett* recognizes, Courts furnish the "gap-fillers" to specify what can (implied rights) or must be (implied covenants) done to fulfill the purposes of the lease.

The semantics of "silence" versus "ambiguity" aside, "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." *Brewster v. Lanyon Zinc Co.*, 140 F. 801, 811 (8th Cir. 1905). Under long-standing precedent of this Court, Ascent has the clear and unmistakable right to do that which is reasonably necessary to develop the oil and gas in all the leased property, including the shale formations – not just the sandstone formations that may have already been drilled. Here, it is uncontroverted that pooling is necessary to create a drilling unit large enough to economically develop the oil and gas in the shale formation. Apx. at 59, ¶¶ 3-4.

2. *Respondents Cannot for the First Time on Appeal Argue That There is No Evidence That the Parties Intended Pooling and Unitization; In Any Event, on the Merits, Their Argument Does Not Employ the Correct Analysis.*

In section 1(B)(ii), Respondents raise arguments for the first time on appeal that Ascent should be faulted because there is no evidence regarding intent, and the Lease should be construed most strongly against Ascent. Respondents then go on, again for the first time on appeal, to create arguments against pooling based upon snippets from the Lease they believe may evince some indicia of intention. Resp. Br., pp. 18-21. The [Respondents'] Response to Plaintiff's Motion for Summary Judgment does not make the arguments raised here, Apx. 83, nor was the argument made during the hearing.

This Court will not consider non-jurisdictional arguments raised for the first time on appeal. *See Brodnik v. Stientjes*, No. 17-1107, 2020 WL 4355062, at *5 (W. Va. July 30, 2020) (holding that "this Court has long reasoned that one of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result in the imposition of a procedural bar to an appeal of that issue. It is the general rule of this Court that nonjurisdictional questions raised for the first time on appeal, will not be considered") (internal quotes and alterations omitted) (internal citations omitted). Therefore, Respondents have waived this argument.

Further, the intent of the parties to an oil and gas lease is known. This Court has recognized that an oil and gas lease is a contract designed to accomplish the main purpose of the landowner(s) and the lessee(s) or their assigns: securing production of oil and gas in paying quantities, quickly and for as long as production in paying quantities is obtainable. *McCullough Oil, Inc. v. Rezek*, 176 W. Va. 638, 346 S.E.2d 788, 792 (1986). Further, when its terms permit, an oil and gas lease should be construed to promote development and prevent delay and unproductiveness. *Howell v. Appalachian Energy, Inc.*, 205 W. Va. 508, 519 S.E.2d 423, 428 (1999).

Even if the Court does not reject consideration of Respondents' new argument, the argument is wrong because it employs an incorrect analysis. Respondents newly argue (strenuously) that the Lease should be construed against Ascent because "every reasonable inference suggests that it was the original Lessor, a gas company, ... who drafted the Lease, or chose to use that lease form in its business."[10] Resp. Br. at 20-21. But cases involving implied covenants and implied rights are not grounded on that principle. In each of the cases, *the underlying document was silent*, so the Court considered whether the activity under consideration was

[10] There is no evidence of record, and none is cited, to support the current proposition.

included within the overall bundle of obligations or rights held under a lease or a deed. In the implied covenant cases, the Court inquired whether the lessor had a *reasonable expectation* that the lessee would continue to develop the property for oil and gas, or to market the gas, or to protect against drainage.[11] In the implied rights cases, the Court looked at whether the activity was *reasonably necessary* to accomplish the over-arching development rights and whether it could be performed without undue burden on the lessor. [12]

The Lease here undeniably includes the right to "mine and operate" for oil and gas. *See* Apx. at 11. When the correct analysis is employed, the question becomes whether pooling the Lease with others to create a drilling unit large enough to economically produce oil and gas from a shale formation is a reasonable exercise of the right to "mine and operate" that does not unreasonably burden the lessor. The underlying legal analysis is not to identify who wrote the Lease and construe the Lease against them. Respondents have never contested the fact that pooling is reasonably necessary to produce gas from the Marcellus shale formation. Apx. at pp. 59, ¶¶3-4, 84. The only "burden" that they even attempted to demonstrate was that they would not receive a windfall for signing an unnecessary pooling amendment to the Lease. [13]

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[11] *St. Luke's United Methodist Church v. CNG Development Co.*, 222 W. Va. 185, 663 S.E.2d 639 (2008) (implied covenant to develop); *Wellman v. Energy Resources, Inc.*, 210 W. Va. 200, 557 S.E.2d 254 (2001) (implied covenant to market); *Jennings v. S. Carbon Co.*, 73 W. Va. 215, 80 S.E. 368 (1913) (implied covenant to develop and to protect against drainage); *Ohio Fuel Oil Co. v. Greenleaf*, 84 W. Va. 67, 99 S.E. 274 (1919) (implied covenant to protect against drainage); *Parish Fork Oil Co. v Bridgewater Gas Co.*, 51 W. Va. 583, 42 S.E. 655 (1902) (implied covenant to protect against drainage).

[12] *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 16-18, 267 S.E.2d 721, 725-26 (1980)(right to build electric line to mine); *see also Andrews*, 2019 WL 2494598 at *11 (right to use modern technology); *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950)(right to build road over surface estate if reasonably necessary for production and transportation of gas); *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."); *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.").

[13] It bears repeating that this case does not involve use of the surface estate – only the oil and gas estate.

In concept, the principle espoused by Respondents — that silence in a lease must be construed against the drafter — would deny lessees the right to use modern technology.[14] As shown above, that argument has been rejected repeatedly by the courts. *See* Pet. Br. at pp. 23-24.[15] It is impossible for every contract to mention every possible eventuality, and implied covenants and implied rights law has developed around that truism:

> [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).

C. *Respondents are Incorrect in Their Assessment That There is No Implied Right to Pool Because There is No Precedent.*

Respondents claim that "Ascent seeks to invert a body of law that protects a landowner ... and concoct, for the very first time in West Virginia, a new universal and retroactive rule that protects the interests of mineral lessees to the detriment of mineral owners in this state." Resp. Br. at 22. Respondents entirely miss the point. The seamless fabric of the law is woven from the

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[14] *See Andrews, supra* (finding deed executed prior to advent of fracking does not preclude the use of that technology if reasonably necessary to develop the Marcellus shale so long as new technology does not burden the estate beyond that originally contemplated by parties to the deed); *Buffalo Mining, supra* (lease provided right to mine; question was whether building an electric line was included within that "bundle of rights," which the Court affirmed).

[15] Respondents go on to argue that it was necessary for Ascent to adduce evidence regarding the intentions of the parties. Resp. Br. at 19. That is not true here. There is established precedent of this Court teaching that the intention of the parties in entering into an oil and gas lease is to secure production of oil and gas in paying quantities, quickly and for as long as production in paying quantities is obtainable. *McCullough Oil, supra.* The Lease clearly gives the lessee the right to drill for and to produce oil and gas. The undisputed facts are that pooling and horizontal drilling are necessary for the economic production of minerals from shale formations. As shown previously, Respondents are precluded from raising this issue for the first time on appeal. They had the opportunity to introduce evidence in the circuit court and found it unnecessary to do so. If they had evidence that the parties intended to prohibit pooling, that evidence could have been presented. It was not incumbent upon Ascent to prove a negative as Respondents now assert.

theoretical bases upon which it is founded. The theoretical bases shown in Ascent's initial brief – intent of the parties,[16] cooperation,[17] good faith and fair dealing,[18] and public policy[19] — all support the precept that there is an implied right to pool an oil and gas lease where it is necessary to exercise the clearly-granted right to drill for and produce oil and gas. Implied covenants and implied rights are merely two sides of the same coin: implied covenants address lessor rights even though the lease is **silent** on the subject. Thus arose the implied covenant to develop, the implied covenant to market, and the implied covenant to protect against drainage. *See* Pet. Br. at 15-16. The other side of that same coin – implied rights – addresses a lessee's rights to reasonably develop and produce oil and gas (or coal) even though the lease is **silent** on the issue -- the implied right (the "necessary implication") to do all things necessary for the purpose of acquiring and enjoying the estate granted. *See* Pet. Br. at pp. 16-17. There is also grafted onto the implied rights analysis the consideration of whether the proposed use constitutes an unreasonable burden upon the lessee, but here, the only "harm" that Respondents have shown is that they will not be able to demand additional money for signing an unnecessary contract amendment.

Respondents' effort to focus on the specific facts of each of the implied covenants and implied rights cases wholly misses the point.[20] Further, Respondents are simply wrong to suggest that the common law is stagnant and fixed in time and that this Court cannot address "the

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[16] The intention of the parties in entering into an oil and gas lease is to secure production of oil and gas in paying quantities, quickly and for as long as production in paying quantities is obtainable. *McCullough Oil, supra.*

[17] Treaties, at § 802.1.

[18] *McCullough Oil*, 176 W. Va. at Syl. Pt. 1, 346 S.E.2d at Syl. Pt. 1.

[19] W. Va. Code §§ 22C-9-1, 22-6A-2(a)(8); W. Va. Code § 5B-2H-2(a)-(b); *McGregor v. Camden*, 47 W. Va. 193, 34 S.E. 936, 937 (1899).

[20] For example, Respondents assert that "The [*Buffalo Mining*] test is, of course, inapplicable to the present facts because the test involves whether a mineral owner may strip mine and thereby impair or destroy a surface estate, which hardly bears upon whether or not a court may interpolate a pooling provision in a lease that grants no right to pool." Resp. Br. at 25. The legal principle is obviously not restricted to strip mining cases.

unanticipated problem produced by unforeseen and unforeseeable developments – political, economic, legal, and technological." Treatise, § 801.

This case involves application of existing precedent to a new set of facts – whether pooling is necessary to accomplish the oil and gas development rights granted in the Lease and whether it can be done without undue harm to the mineral owner/lessor. The theoretical underpinnings and the facts are all consonant with recognition of an implied right to pool because it is necessary, and the mineral owner is not harmed. In fact, the mineral owner, along with the other mineral owners in the drilling unit, will receive the benefit of additional royalties.

Finally, Respondents' reliance on *Stern v. Columbia Gas Transmission, LLC*, No. 5:15-CV-98, 2016 WL 7053702 (N.D. W. Va. Dec. 5, 2016), is misplaced. The *Stern* court held only that the lease language expressly gave the lessee the right to pool and dismissed plaintiffs' claims for breach of contract, breach of the implied covenant against drainage, and fraudulent extraction of gas. *See id.* There was no discussion whatsoever about an implied right to pool, and any such discussion would have been *dicta*. It is pure conjecture for Respondents to speculate about what the federal district court might have ruled had it considered the issue presented in this case.

2. The Undisputed Evidence is That the Oil and Gas in Shale Formations Cannot be Developed in the Absence of Pooling.

Respondents attempt to justify the lower court's order by obfuscating the facts and the law by arguing that there is "no evidence" that the oil and gas cannot be produced from the lease premises because they have been and are being produced. Basically, they argue that because the Lease is held by production from sandstone formations, it is unnecessary for Ascent to pool and

produce gas from shale formations. Resp. Br. at 26-28.[21] The lower court and Respondents have ignored the true facts and are making new law that is at odds with existing precedent of this Court.

"When 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. "[T]he 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 810-11. Once oil and gas were found in paying quantities on the leasehold, the inchoate right to drill and produce oil and gas was vested in the lessee. By the express provisions of the Lease, 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.

This Court effectively rejected the lower court ruling in *St. Luke's United Methodist Church v. CNG Dev. Co.*, 222 W. Va. 185, 663 S.E.2d 639 (2008), which held that there is an implied obligation for an oil and gas lessee to further develop the leased premises. There, St. Luke's owned a tract of land on which three marginally productive wells were drilled pursuant to an oil and gas lease. *Id.* at 641. St. Luke's was dissatisfied with the production, signed top leases with another producer, and filed suit to rescind the lease for breach of the implied obligation to further develop the property. *Id.* at 642. On appeal, this Court stated that:

> [A] lessor cannot require further development of the premises, after the lessee has acquired a vested interest in minerals by the completion of a paying well, except upon proof to the effect that

[21] Respondents' assertion is not supported by the record and is incorrect. There is no well on the leased premises. Instead, the Lease is being held in its secondary term because a shallower sandstone formation is included in a pooled unit for a waterflood operation that injects water into a formation to force out more oil in what is called "secondary recovery." This evidence is not in the record either but is included to demonstrate the danger of speculating about the facts.

> operators for oil and gas of ordinary prudence and experience in the same neighborhood under similar conditions have been proceeding successfully with the further development of their lands or leases, and the further fact that additional wells would likely inure to the mutual profit of both lessors and lessee.

Id. at 643.

The Court went on to discuss an implied covenant to develop all the land thus:

> Stated otherwise, this covenant requires that "when the existence of either of these valuable mineral substances [oil and gas] in paying quantities becomes apparent from operations on the premises leased or on adjoining lands, the lessee shall drill such number of wells as in the exercise of sound judgment he may deem reasonably necessary to secure either oil or gas or both, for the mutual advantage of the owner of the land and of himself as operator under the lease; also for the protection of the lands leased from drainage through wells on adjoining or contiguous lands." *Jennings v. Southern Carbon Co.*, 73 W. Va. 215, 219, 80 S.E. 368, 369 (1913).
> ...
> As further support for its position, Appellant argues that Dominion has violated the "prudent operator" standard first announced in *Brewster*. This oft-cited standard frames the issue in terms of objectively considering whether further development would mutually benefit the parties:
>
> > *The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious ... that both are bound by the standard of what is reasonable.*

Id. at 645 (emphasis added). After discussing the United States Supreme Court's seminal case on an implied covenant to develop, *Sauder v. Mid–Continent Petroleum Corp.*, 292 U.S. 272, 54 S.Ct. 671, 78 L.Ed. 1255 (1934), the Court cited its own precedent:

> In *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S.E. 978 (1898), we discussed the relative positions of the lessee and lessor following the abandonment of exploration after an unsuccessful test drill:
>
> > An oil lease yields nothing to the landowner when not worked, and is an incumbrance (sic) on his land, tying his hands against selling or leasing to others; but, when idle, it costs the lessee nothing, and is valuable, or may prove valuable, if he can hold it

> waiting developments in its vicinity.... Holding on to a lease after ceasing search is often for purposes of speculation, the thing which a prudent landowner guards against. Forfeiture for nondevelopment or delay is essential to private and public interests in relation to the use and alienation of property.

Id. at 646.

The Court concluded its review with the following observation:

> We later reaffirmed this principle in *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 42 S.E. 655 (1902) in **recognizing as universal the principle of law which discourages tying up and rendering unproductive the vast fields of mineral wealth, construes every contract and lease as to both lessor and lessee so as to best promote production, development and progress, and frowns upon every attempt to evade it as being in contravention of both good morals and public policy.** *Id.* at 595–96, 42 S.E. at 660.

Id. (emphasis added). Based upon these principles, the Court stated "we hold that a trial court may consider the equitable remedy of partial rescission in fashioning the relief to be awarded upon proof sufficient to establish a breach of the implied covenant of development in connection with an oil and gas lease dispute." *Id.* at 647.

Given an implied covenant to develop, if the only reasonable way to develop is to pool leases and drill horizontal wells, it follows there must be a corresponding implied right to pool the lease. An implied right to pool is consistent with the "universal principle of law which discourages tying up and rendering unproductive the vast fields of mineral wealth, construes every contract and lease as to both lessor and lessee so as to best promote production, development and progress, and frowns upon every attempt to evade it as being in contravention of both good morals and public policy." *St. Luke's, supra.* In *St. Luke's*, it was the lessee that was initially dilatory and later prevented by the top-lessee from continuing to drill. Here, it is the Respondents that are "tying up

and rendering unproductive" the shale formations in the leased premises.[22] Applying the "universal principle of law" and construing the Lease "so as best to promote production, development and progress" leads to the inexorable conclusion that there is an implied right to pool corresponding to the implied covenant to develop.[23]

Finally, the uncontroverted evidence is that the shale formations cannot be developed in the absence of pooling. Apx. at 59. While vertical wells drilled into shallower sandstone formations were obviously economically drilled and produced, horizontal wells are now necessary to develop shale formations. Apx. at 59. Nothing in the Lease limits Ascent's production rights to those sandstone formations nor does the Lease obviate Respondents' contractual obligation to permit development of the shale formations. Apx. at 55-56.

3. The Circuit Court had the Right and Obligation to Specify the Customary Terms and Conditions of Pooling and Unitization.

Taking no position on whether the terms and conditions governing pooling are customary (and thus admitting them), Respondents' argument is limited to a single point based upon the false premise that silence automatically means lessor wins. Respondents' position is belied by the *Stern* case, which they cite. After finding that the lease contained pooling rights because it permitted operations "alone or conjointly with other lands," the Court in *Stern* found no impediment to supplying the terms and conditions upon which pooling would be accomplished:

> Next, the Sterns argue that the subject leases cannot be read to provide for pooling because they do not provide for royalty payments unless there is production on the properties themselves. While the subject leases do not expressly provide for the apportionment of royalties amongst pooled leases, "[a] present pooling clause in an oil and gas lease produces the same royalty

[22] It is not to be forgotten that, if a pooling amendment is required, a lessor might refuse to sign a pooling amendment at any price. *See* Pet. Br. at 19, n. 7.

[23] Respondents fault Ascent "[b]ecause it fails to cite any pertinent authority in support of its theory of 'cooperation,'" Resp. Br. at 24. The Court's recognition in *St. Luke's* that Respondents' efforts to hold the shale formations for ransom contravenes both good morals and public policy is surely supportive of the learned treatises.

> apportionment effect as a community lease." Saint-Paul, supra § 56:1. Under West Virginia law, lessors in a community lease are entitled to royalties for oil or gas produced "in the proportion that the parcel of land held by each of them bears to the total area of the tract." *Lynch v. Davis*, 92 S.E. 427, 429 (W. Va. 1917). Thus, by operation of law, the Sterns would be entitled to the royalty stated in the subject leases in proportion with the acreage of their land included in the unit.

Stern v. Columbia Gas Transmission, LLC, No. 5:15CV98, 2016 WL 7053702, at *3 (N.D.W. Va. Dec. 5, 2016).

The same result obtains here. Ascent presented undisputed, admitted evidence that the terms it proposed were usual and customary in the industry. Apx. at 62-63. The terms are consonant with the *Stern* case. Respondents did not challenge them below and does not challenge them here.[24]

4. Circuit Courts Have the Right to Establish Common Law.

Respondents argue that the Court did not say it "could" not "modify" the common law, but that it "would" not. That is so. To that extent, an assignment of error may be superfluous except to point out that the lower court's reasoning for not doing so was flawed, as demonstrated in Ascent's briefs.

5. Respondents are Attempting to Limit Ascent's Development Obligation and Rights Under the Lease by Demanding More Money not Provided for in the Lease.

Respondents' next argument reveals its apparent true motivation: they want more money. Respondents argue that the Lease must be renegotiated – with adequate consideration paid – for Ascent to pool the Lease and further develop the oil and gas estate. Resp. Br. at 32. This argument is once again based upon the still-faulty premise that silence automatically must be construed in Respondents' favor because there was no "meeting of the minds." If they can be "the last man standing" between development or none, Respondents expect they can extract more money by

[24] See also the cases cited in footnote 8 of this brief.

requiring a lease amendment to include a pooling clause. Resp. Br. at 30-31. And it must not go unnoticed, because it is so very important, that Respondents could simply refuse to sign a pooling amendment at any price, thereby thwarting not only the purpose of the Lease but also penalizing other royalty owners in the Lease tract and the royalty owners of other tracts that would be included in the unit.

Stated differently, Respondents want to be paid more money for Ascent doing what it has an implied obligation to do – develop the premises for oil and gas. *Pooling in this case is not a contract amendment that requires new consideration.* Pooling must be included within the bundle of rights already granted in the Lease because it is admittedly necessary for the economic development of the shale formations and Respondents will suffer no harm thereby. Citing cases that say contract amendments require additional consideration is of no moment: Ascent already has the express right under the existing Lease to develop the lease premises for oil and gas and thus the implied right to do what is reasonably necessary to accomplish that purpose absent a showing of undue burden or harm to the Respondents. *Buffalo Mining, supra.* This Court should, as it has in the past, apply the correct test and continue to recognize the policy that "[w]hen its terms will permit it, 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. This universal principle discourages tying up and rendering unproductive the vast fields of mineral wealth, and so construes every contract and lease to the benefit of both lessor and lessee so as to best promote production, development and progress. *St. Luke's, supra.* The ruling sought here is balanced, applies to both lessor and lessee, and is applicable whether the lessor is demanding development (i.e., implied covenant to develop) or thwarting efforts to develop (the latter being the case here, requiring recognition of the concomitant implied right to pool).

6. Respondents' New Argument, That Horizontal Drilling with Pooling and Unitization Was Beyond the Contemplation of the Parties When the Lease Was Signed and Creates a Burden on the Estate, Thereby Necessitating a Contract Amendment, (a) Is Inappropriately Raised for the First Time on Appeal and (b) Has Been Soundly Rejected.

Continuing its string of arguments based upon the faulty premise that silence automatically means it wins, Respondents newly argue that horizontal drilling with pooling was beyond the contemplation of the parties when the Lease was signed and, as a consequence, a lease amendment is necessary because there is no "mutual assent." Resp. Br. at 31. This argument, raised for the first time on appeal, must be rejected.[25]

Next, somehow because a right-of-way would create a dominant estate and a servient estate, Respondents assert that an implied right to pool would create a burden upon Respondents' mineral estate. But an implied right to pool is part and parcel of the "bundle of rights" encompassed within the right to develop the oil and gas in the subject premises. As shown above, the law of servitudes supports implied rights. *See* n. 12, *supra*.

7. The Lower Court Erred in Finding That the Development of Minerals Under the Lease Has Not Been Prevented by Lack of Pooling.

As shown in section 2 above, the Circuit Court erred in finding that development of minerals had not been prevented by lack of pooling. That is what this case is all about. Ascent is being prevented from exercising its rights to fully develop the oil and gas estate in the leased premises. Apx. at 58-59. It is wrong on its face to assert (even if it's not factual – *see* n. 21, *supra*) that because oil and gas are being produced from existing vertical wells in sandstone formations where pooling is not an issue, Ascent is now precluded from further developing the oil and gas estate in shale formations where pooling is necessary. Apx. at 58-59.

[25] Respondents' textual argument does not correspond to the heading. To the extent Respondents are suggesting that Ascent cannot use new technology and procedures that were not known, that argument has been rejected by this Court. *See* Section 1(B)(2) above and Pet. Br. at 24-25, n. 9.

8. Respondents Erroneously Assert that an Implied Right to Pool would "Upend the State of the Law as it Present Exists" Because Old Law is Being Applied to New Facts.

Respondents' final attempt to justify the lower court's order is to claim that "an implied right to pool and unitize would have upended over a century of existing law" and "represent a major disruption to the law of property rights in this state." Resp. Br. at 33. To the contrary, over a century of common law is being applied to a new set of circumstances brought about by changes in technology – the advent of horizontal drilling in shale formations and the necessity of pooling to create adequately-sized drilling units. Old law is being applied to new facts and circumstances.

Respondents also split hairs to claim that "Ascent failed to identify any implied right that has been construed against a mineral estate in favor of a lessee." *Id.* What that means and why that should matter is not explained. It bears repeating that:

> [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.

Treatise, § 801 (citations omitted). Moreover, a universal principle of law discourages tying up and rendering unproductive the vast fields of mineral wealth, construes every contract and lease as to both lessor and lessee so as to best promote production, development and progress, and frowns upon every attempt to evade it as being in contravention of both good morals and public policy. *St. Luke's, supra.*

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 mineral estate; 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 as a necessary adjunct to its right to drill and operate the premises for oil and gas.

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2020, I caused the forgoing Reply Brief of Petitioner Ascent Resources – Marcellus, LLC to be served by U.S. First Class Mail on the following counsel:

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