

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 19-0347

**Ascent Resources – Marcellus, LLC,**  
**Petitioner,**

vs.)

**Donald E. Huffman and**  
**Triple L Land and Mineral, LLC,**  
**Respondents.**

(An appeal of a final  
judgment in Tyler County  
Civil Action No.: 16-C-25)

**RESPONDENT'S BRIEF**



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## **ASSIGNMENTS OF ERROR AS SET FORTH BY PETITIONER**

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 [sic] 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 that 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**

On February 6, 1980, the predecessors in interest of the respective parties to this appeal signed a lease agreement (“Lease”) concerning the oil and gas estate of a tract of land in Tyler County, West Virginia. (Appendix Record [“A.R.”], at 11). The term of the Lease was set at “ten years from this date and 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.” The Lease contemplated a delay rental fee of \$4.00 (four dollars) per year for each of the 94 acres encompassed by the lease, for a total rental payment of \$376.00 annually. (A.R., at 11). As a royalty, the Lease stated:

In Consideration of the Premises the said party of the second part, covenants and agrees: 1st – to deliver to the credit of the Lessors, their heirs or assigns, free of cost, in the pipe line to which Lessee may connect its wells, the equal one-eighth (1/8) part of all oil produced and

saved from the leased premises; and second to pay one-eighth (1/8) of the value at the well of the gas from each and every gas well drilled on said premises, the product from which is marketed and used off the premises, said gas to be measured at a meter set on the farm.

(A.R., at 11). Typewritten in a blank was the following provision: “It is agreed that Lessor shall help decide where wells shall be drilled on the property.” (A.R., at 11).

Thirty-six years later, the Petitioner, having acquired the interest of the original Lessee, brought the instant declaratory judgment action before the Circuit Court of Tyler County, seeking a declaration that the Petitioner “has the right to pool and unitize (combine) its oil and gas lease on the subject lands with other oil and gas leases and mineral interests as necessary to drill, operate and otherwise develop the oil and gas estate.” (A.R., at 3). The defendants in the civil action below, from whom the presently substituted Respondents later obtained a partial interest in the underlying mineral estate, filed answers, and shortly thereafter, the Petitioner filed a motion for summary judgment.

The Petitioner specifically sought a judgment from the Circuit Court declaring the implied right to pool and unitize oil and gas leases, as well as five specific paragraphs of terms it requested that the court impute into the lease:

- A. declaring that pooling and unitization are reasonably necessary to develop the Subject Minerals;
- B. declaring that pooling and unitization place no unreasonable burden on any owner of the Subject Minerals or lessor of the Subject Lease; and
- C. declaring that [Petitioner] has the implied right to pool and unitize the Subject Lease with other mineral leases or mineral interests as a necessary adjunct to its right to drill and operate the premises for oil and gas upon the following terms and conditions:
  - 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 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 Subject 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.

(A.R., at 30).

The motion for summary judgment was submitted with two affidavits, the first, from the Petitioner's employee, reservoir engineer Taylor Henderson, purporting that the "Subject Minerals" cannot be produced economically unless developed as a larger unit to permit horizontal drilling. (A.R., at 58-60). The second affidavit, by Petitioner's other employee, associate landman Travis McBain, parrots the five paragraphs of new pooling and unitization terms quoted above, stating that those paragraphs are "customary today in the oil and gas industry." (A.R., at 62-63).

Additionally, the Petitioner attached a copy of an order of the Tyler County Circuit Court, signed by Judge David Hummel, from a declaratory judgment action, in which the court found an implied right to pooling and unitization under West Virginia law, and applied the same to the

subject tract in that case, imputing the identical five paragraphs of terms sought in the instant litigation into the lease in question. (A.R., at 65-77). In that case, as recited by the court, the lessors agreed to withdraw their opposition to the Petitioner's summary judgment motion, in exchange for “a confidential sum of money[.]” (A.R., at 65).

The defendants responded, asserting that the evidentiary record was sufficient for the Court to dispose of the motion for summary judgment. (A.R., at 83-84, 89-90). The defendants asserted that there was no previously recognized implied right of pooling and unitization under West Virginia law, and that the legislature had repeatedly considered and failed to enact forced pooling legislation, including house Bill 4426 (2016 Regular Session). They also argued that the relief requested by the Petitioner exceeded the relief that would be available under the terms of the law that the Legislature had failed to enact. (A.R., at 84-86). The defendants further asserted that there was no authority in West Virginia to support an implied right to pooling and unitization, apart from the decision of Judge Hummel in a case in which opposition was withdrawn in exchange for the payment of funds, and suggested it would be inappropriate for the court to “substitut[e] its judgment for that of the legislative branch[.]” (A.R., at 86-88, 87).

Following oral argument (A.R., at 165-191), and the submission of a written reply by the Petitioner (A.R., at 146-156), the Circuit Court entered an order denying the Petitioners summary judgment. The court found, *inter alia*, that:

7. The Lease is silent as to whether there is an express right to pool or unitize the Lease with other leaseholds and mineral interests and to develop them jointly with other tracts of land.

8. The parties to this suit have not reached an agreement with respect to a new modification or ratification amending the Lease regarding pooling and unitization.

[...]

10. There is no evidence that the Plaintiff cannot develop the minerals

underlying the tract at issue in the absence of pooling and unitization.

(A.R., at 159-160). The court came to, *inter alia*, the following legal conclusions:

4. The Lease between the parties does not grant an express right to pool or unitize the respective oil and gas interests of each of the parties through the terms of the Lease.

5. The subject Lease was executed in 1980, and since this time, the parties have operated without incident or need for clarity in the 39 years under its operation absent the Plaintiff's motion for summary judgment on the declaratory action filed and argued in 2016.

6. Under these circumstances, there can be no argument that the terms of the Lease are unclear and ambiguous necessitating the Court's interpretation. Further, neither party in this civil action has put forth any argument that the Lease is unclear and ambiguous.

7. As such, the Court finds that the terms of the current Lease are clear and unambiguous, and should not be subject to the Court's interpretation. "It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." Syl. Pt. 3, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962)." Syl. Pt. 2, *Bennett v. Dove*, 166 W.Va. 722, 277 S.E.2d 617 (1981).

8. A valid written contract that expresses the parties' intent in plain and unambiguous language "is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. Pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 485, 128 S.E.2d 626, 629 (1962).

9. The Court concludes it should not seek out the "customary" terms and conditions for pooling and unitization clauses where the written instrument is clear and unambiguous in that it does not include any such terms therein. Syl. Pt. 4, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 485, 128 S.E.2d 626, 629 (1962).

10. As to Plaintiff's argument that the implied right to pool and unitize exists under West Virginia law, the Court concedes that implied covenants and implied rights are an integral part of oil and gas law, and that the West Virginia law recognizes certain implied covenants in oil and gas leases including an implied covenant to market[,], an implied covenant to develop[,], and an implied covenant to protect against drainage. [Citations omitted].

11. The Court also does not disagree with the proposition that West



Virginia law encourages the development of mineral interests; however to make such a broad determination that the implied right to pool and unitize exists under West Virginia common law is not for a circuit court to decide. The West Virginia legislature has addressed forced pooling and unitization in proposed and enacted legislation, but the West Virginia code is silent on forced pooling and unitization where there is a valid and existing contract that is silent on such. If the West Virginia Legislature wants to address this issue during its current session, it is more than welcome, but this Court will not.

12. Unlike the implied covenants and rights previously discussed, the implied right to pool and unitize is not necessary for the development and production of the subject minerals; [t]o find that the current Lease confers upon the Plaintiff an implied covenant of pooling and unitization would materially alter the terms of the clear and unambiguous language of the Lease without fair consideration for such terms.

13. The Court finds that to recognize an implied covenant of pooling and unitization 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.

14. The Court is not swayed by the Plaintiff's argument that pooling and unitization is necessary for the economically feasible production of the Subject Minerals. Absent the Plaintiff's assertions to the contrary, 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.

15. If horizontal wells are the only alternative to ensure the develop [sic] and production of the Subject Minerals without incurring outrageous expense, the parties need to return to the negotiating table to see if they can reach an amendment as to pooling for due consideration.

16. This Court does not wish to serve as an obstacle against West Virginia's public policy in favor of development of natural resources, but this Court will not overturn more than a century of the state's common law to avoid this fate.

(A.R., at 160-163).

Following the entry of this order, the Petitioner sought the instant appeal.

### **SUMMARY OF ARGUMENT**

The Petitioner's cause of action is predicated on two premises. The first premise is the assertion that pooling and unitization are necessary to develop the minerals that are the subject



of the instant Lease. The second premise is that there is an implied right in West Virginia for mineral lessees to pool and unitize various interests in order to facilitate horizontal drilling. The Petitioners see no impediment in the fact the the implied right to pooling and unitization has never heretofore been expressed as the law of West Virginia by this Court or by the Legislature. But irrespective of whether such an implied right exists, the Petitioner's claim regarding the instant Lease must fail, because the underlying factual premise – that the mineral estate at issue in this case cannot be developed without pooling and unitization, is an expression of pure sophistry by the Petitioner.

It is utterly self-evident that the mineral estate can be developed, has been developed, and continues to produce, all without resort to pooling, unitization, and horizontal drilling. If the oil and gas could not be developed, the then lease would have terminated thirty years ago based on its own terms. In fact, the Petitioner stated in its Complaint that “[t]he subject lease is a valid and subsisting oil and gas lease that is in full force and effect by virtue of an existing well or wells and operation of the premises for the production of oil and gas.” (A.R., at 5). The Circuit Court correctly determined 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.” (A.R., at 163). The Petitioner clearly wants the lease analyzed as one whose purpose would be frustrated in the absence of pooling and unitization, but its effort to massage the facts failed in the court below and should fail before this Court as well.

The Petitioner avers that the Circuit Court was constrained to consider nothing except its own employee's self-serving affidavit in determining whether or not pooling and unitization was

necessary to develop the mineral estate. The correct standard, however, written out directly in Rule 56 of the Rules of Civil Procedure, makes it clear that the Court may consider the pleadings in addition to the affidavits. The Petitioner admitted in its own Complaint, as quoted in the preceding paragraph of this Brief, that the lease was already producing. It defies logic for the Petitioner to insist that the Circuit Court pretend that a now 40-year-old lease has failed to produce any oil or gas, contrary to the Petitioner's own representations. If no oil or gas had ever been produced, the lease would have terminated decades ago by its own express language.

The Circuit Court was also correct in determining that it could not impute five paragraphs worth of highly specific rights and obligations to the parties that were clearly never contemplated, nor bargained for, at the time the lease was signed. It is clear from the typewritten, bargained-for provision in the Lease that the original Lessor, Mazie Cunningham, anticipated providing guidance about where on her property the Lessee should sink a well or wells. It is not at all clear, and strains credulity, that she anticipated that her rights to receive compensation for gas produced from her land would be commingled with those of dozens of other landowners.

The Petitioner acknowledges that under the existing express language of the Lease, in the absence of an implied right to pool, the Petitioner could be subject to liability for trespass by using the subject tract to produce from a horizontal well. (Petitioner's Brief, at 22). Yet, the Petitioner seeks to be given the right to do that which it would not otherwise be permitted to do for no additional consideration. This request goes far beyond the legitimate powers of the Circuit Court, and it was wholly proper to deny the requested relief. Furthermore, it was entirely proper for the Circuit Court to find that it would be a burden upon the mineral estate to

unilaterally grant new, un-bargained-for, unanticipated rights to the Petitioner without compensation to the lessors.

The Petitioner's resort to appellate relief must also fail because its argument before this Court relies on an argument which it omitted in the Court below. While the Petitioner asserted baldly in its Complaint that "courts have the inherent equitable power to determine the rights and obligations of the parties when a contract is ambiguous or silent on an issue," (A.R., at 6), the Petitioner offered no argument below about what aspect of the language of the Lease was ambiguous. The word "ambiguous" appears to be used only once in the memorandum supporting summary judgment: "... whether the Court determines that relief is warranted because there in an implied right to pool or because the Subject Lease is ambiguous..." (A.R., at 50). No assertion was ever made that the Lease was, in fact, ambiguous, and if so, why. The Circuit Court relied on *Cotiga, supra*, to find that it had no power to interpret an unambiguous lease. For the first time on appeal, the Petitioner argues that silence on a subject creates an ambiguity. (Petitioner's Brief, at 7, 13). The Petitioner should be foreclosed from advancing that argument now, when it waived that argument before the lower Court. Furthermore, the notion that silence can simply be equated with ambiguity in a contract is belied by the authority.

The Petitioner accuses the Respondents of seeking a "windfall" by renegotiating the lease to permit pooling and unitization in exchange for compensation. (Petitioner's Brief, at 20). Yet the true windfall at issue in this case is that which will be enjoyed by the Petitioner, and other similarly situated leaseholders, if this Court establishes new law having the same effect as rubber-stamping five new paragraphs into every decades-old or century-old lease across the state. What the Petitioner wants is a portfolio of modern leases, sufficient to support a large-

scale horizontal drilling operation in deep shale formations, for 1980's shallow gas prices. That would be a truly magnificent windfall for the Petitioner and its shareholders. Not so for the mineral estate owners of West Virginia. This Court should affirm the Circuit Court's denial of summary judgment.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This Court has already set this matter for Oral Argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. The Petitioner asserts that this matter is appropriate for disposition as a memorandum opinion, as there are no substantial questions of law, nor prejudicial error.

### **ARGUMENT<sup>1</sup>**

#### **1. The Circuit Court appropriately disposed of the Petitioner's motion for summary judgment.**

##### **A. Standard of Review**

The standard of review for a challenge to a lower court's granting of a motion for summary judgment is *de novo*. “A circuit court's entry of summary judgment is reviewed *de novo*.” Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Furthermore, a motion for summary judgment is to be granted only when “[...]the pleadings, depositions,

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<sup>1</sup> The Petitioner's own argument sections do not actually correspond to the enumerated assignments of error, which are at times repetitive and unwieldy. Furthermore, certain assignments of error appear to have no corresponding argument sections whatsoever in the Petitioner's Brief. Specifically, in the Petitioner's Brief, it appears that Argument Sections II, III, and IV all correspond to Assignment of Error #1; Argument Section V appears to correspond to Assignment of Error #3; and Argument Section VI appears to correspond to Assignment of Error #4. No argument section specifically addresses the remaining assignments of error, although they are sporadically addressed throughout the previously-mentioned sections. This manner of briefing by the Petitioner is in violation of Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure, and could subject the Petitioner to the sanctions set forth in Rule 10(j), in this Court's discretion.

Each numbered argument section of this Brief corresponds to the assignment of error bearing the same number in the Petitioner's recitation of its assignment of error, in order to comply with Rule 10(d) of the West Virginia Rules of Appellate Procedure. Undoubtedly, the bulk of the Petitioner's contentions are contained within its Assignment of Error #1. It is the Respondent's intent to respond to every argument advanced in the Petitioner's Brief.

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c) of the West Virginia Rules of Civil Procedure.

Syllabus Point 5 of *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995) states that:

Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

*Id.* Further, this Court has held, in *Hanlon v. Chambers*, 195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995), that:

The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment; in assessing the record to determine whether there is a genuine issue as to any material facts, the circuit court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought. The inferences to be drawn from the underlying affidavits, exhibits, answers to interrogatories, and depositions must be viewed in the light most favorable to the party opposing the motion.

*Id.*

In short, the burden is upon the moving party to demonstrate that there is no fact in question that could sway the outcome of a trial, and that burden must be met in the face of the trial court resolving questions of fact, as contained in the motion, response, and appendices, in favor of the non-moving party. A non-moving party is not required to be responsive to issues that are not raised in a motion for summary judgment; therefore, while the non-moving party bears a burden to demonstrate sufficient evidence to support the existence of a factual question upon which a verdict could be reached at trial, it is only required to do so on those issues raised



by the moving party. *See, Costello v. Grundon*, 651 F.3d 614 (7th Cir., 2011).

In determining whether to grant a motion for summary judgment, this Court has held that a trial court should consider the entire record.

2. "On a motion for summary judgment all papers of record and all matters submitted by both parties should be considered by the court." Syl.Pt. 2, *Aetna Casualty & Surety Co. v. Fed. Ins. Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

*Ramey v. Ramey*, 395 S.E.2d 230, 183 W.Va. 230 (1990).

Rule 56(b) of the West Virginia Rules of Civil Procedure reads as follows: "For defending party. — A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."

The applicable standard of review for an appeal of a declaratory judgment action is set forth as follows:

We have stated previously that: "A circuit court's entry of a declaratory judgment is reviewed de novo." Syl. Pt. 3, *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995). As the *Cox* Court explained, "because the purpose of a declaratory judgment action is to resolve legal questions, a circuit court's ultimate resolution in a declaratory judgment action is reviewed de novo." *Id.* 195 W.Va. at 612, 466 S.E.2d at 463. Of course, the circuit court's ultimate resolution in the instant case was to dismiss the action.

In a more recent case citing *Cox*, *supra*, we also noted the standard we apply to the factual findings of a lower court in such actions:

This Court has said that the standard of review for declaratory judgment is de novo. We have also said that, in those cases, "any determinations of fact made by the circuit court in reaching its ultimate resolution are reviewed pursuant to a clearly erroneous standard."

*Mountain Lodge Ass'n v. Crum & Forster Indem. Co.*, 210 W.Va. 536, 545, 558 S.E.2d 336, 345 (2001) (quoting *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995)) (internal citations omitted).



*Willard v. Whited*, 566 S.E.2d 881, 211 W.Va. 522 (2002). Thus the Petitioner asserts that the Circuit Court's legal conclusions should be subject to *de novo* review, and its underlying factual findings should be reviewed for clear error.

**B. The Petitioner is not entitled to summary judgment.**

**i. The relief sought by the Petitioner is outside the scope of permissible relief available in construing an unambiguous contract.**

The Circuit Court's reasoning in denying summary judgment to the Petitioner was sound, in all respects. First, the scope of appropriate judicial intervention in a contract in a declaratory judgment action forbids the outcome sought by the Petitioner.

1. "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962), Syllabus Point 1.

2. "It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962), Syllabus Point 3.

Syl. Pts. 1 and 2, *Bennett v. Dove*, 166 W.Va. 722, 277 S.E.2d 617 (1981). There is no ambiguity in the Lease concerning the nature or scope of pooling and unitization to take place under the Lease. There is simply no agreement to pool and unitize at all. "An oil and gas lease which is clear in its provisions and free from ambiguity, either latent or patent, should be considered on the basis of its express provisions and is not subject to a practical construction by the parties." Syl. Pt. 3, *Little Coal Land Co. v. Owens-Illinois Glass Co.*, 135 W.Va. 277, 63 S.E.2d 528 (1951). "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be

determined by the court." Syl. pt. 2, *Supervalu Operations v. Center Design*, 206 W.Va. 311, 524 S.E.2d 666 (1999).

As noted by the Circuit Court, there was no effort by the Petitioner to describe how, or why, the Lease was ambiguous. The Petitioner asserts, for the first time on appeal, that silence is equivalent to ambiguity. (Petitioner's Brief, at 7, 13). This is despite the fact that the Petitioner presented "silence" and "ambiguity" in the disjunctive in its Complaint: "19. Further, courts have the inherent equitable power to determine the rights and obligations of the parties when a contract is ambiguous ~~or~~ silent on an issue." (A.R., at 6) (Footnote omitted, emphasis added). The Petitioner's memorandum in support of summary judgment suggested no reason why the Lease was ambiguous, with the only mention of the word "ambiguous" in the following clause: "... whether the Court determines that relief is warranted because there in an implied right to pool or because the Subject Lease is ambiguous..." (A.R., at 50).

No effort was made to demonstrate that the Lease was ambiguous in a manner that would permit a modification by means of declaratory judgment. The Petitioner failed to make a sufficient case below. It should not be permitted to present this theory for the first time now on appeal:

Our general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered.' *Shaffer v. Acme Limestone Co., Inc.*, 206 W.Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999)."

*Noble v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009).

This Court has "long held that theories raised for the first time on appeal are not considered." *Clint Hurt & Assoc. v. Rare Earth Energy, Inc.*, 198 W.Va. 320, 329, 480 S.E.2d 529, 538 (1996). This Court will not consider nonjurisdictional questions that have not been considered by the trial court. *Id.* See also *Crain v. Lightner*, 178 W.Va. 765, 771, 364 S.E.2d 778, 784 (1987). "The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not

have been developed in such a way so that a disposition can be made on appeal." *Clint Hurt & Assoc. v. Rare Earth Energy, Inc.*, 198 W.Va. at 329, 480 S.E.2d at 538. "[T]here is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom." *Id.*

*Zaleski v. West Virginia Mut. Ins. Co.*, 687 S.E.2d 123, 224 W.Va. 544 (2009). (Footnotes and page numbers omitted). Silence as equivalent to ambiguity is a "theor[y] raised for the first time on appeal[.]" per *Clint Hurt & Assoc.*, *supra*.

Furthermore, on the merits, the underlying basis for this legal theory is inapplicable to the facts of this case. The Petitioner relies on footnote 20 of *Andrews v. Antero Res. Corp.*, 242 W.Va. 39, 828 S.E.2d 858 (2019), which states:

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 principle, ambiguities in a deed are to be clarified by resort to the intention of the parties ascertained from the deed itself, the circumstances surrounding its execution, as well as the subject matter and the parties' situation at that time." *Phillips v. Fox*, 193 W. Va. 657, 662, 458 S.E.2d 327, 332 (1995) (citing 23 Am. Jur. 2d Deeds § 221 (1983)). See also *Kell v. Appalachian Power Co.*, 170 W. Va. 14, 19, 289 S.E.2d 450, 456 (1982) ("In any construction of the language of a deed the intent of the parties is controlling." (footnote omitted)).

*Andrews v. Antero Res. Corp.*, 242 W.Va. 39, 828 S.E.2d 858 (2019), at footnote 20.

This footnote, of course, is no substitute for an actual legal principle that silence on any topic in a contract creates an ambiguity that may be reformed by a court in a declaratory judgment action, or, as the Petitioner proposes: "Silence in the Lease creates an ambiguity that the court must resolve." (Petitioner's Brief, at 7). This Court's finding in *Andrews* was wholly fact dependent, and does not create the sort of rule that the Petitioner proffers. This Court has long found a distinction between silence and ambiguity, conveniently ignored by the Petitioner hoping to synthesize a rule out of a footnote. For example, pertaining to both statutes and real

estate instruments:

Contrary to the Tax Commissioner's assertions, however, legislative silence does not constitute statutory ambiguity. *E.g.*, *Sniffin v. Cline*, 193 W.Va. 370, 374, 456 S.E.2d 451, 455 (1995) (distinguishing between silence and ambiguity of statute interpreted by agency (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984))); *Consolidation Coal Co. v. Krupica*, 163 W.Va. 74, 80, 254 S.E.2d 813, 816–17 (1979) (noting distinction between statute that is silent as opposed to statute that is ambiguous (citations omitted)). See also *DeLong v. Farmers Bldg. & Loan Ass'n*, 148 W.Va. 625, 634, 137 S.E.2d 11, 17 (1964) (differentiating between silence and ambiguity in instrument creating joint estate) ... Thus, we reiterate, silence does not, in and of itself, render a statute ambiguous.

*Griffith v. Frontier West Virginia, Inc.*, 228 W.Va. 277, 719 S.E.2d 747, 755 (2011).

The Tenth Circuit considered whether silence in a contract constitutes an ambiguity, and observed that:

Plaintiffs' attempts to manufacture ambiguity are unavailing. They argue that the AMI Agreement "would be unambiguous ... if it said '[Hess] does not have to acquire leases.' It does not." *Aplt. Br.* at 30 (emphasis in original). Plaintiffs' strawman does not impress, for there are lots of requirements one could imagine imposing on Hess that the AMI Agreement does not explicitly disclaim. For instance, the AMI Agreement is silent as to whether Hess's payments must be made in rubles (or any other particular currency). But that silence is not an ambiguity. Nor would it support a plausible claim that Hess breached the contract by sending payment in U.S. dollars. These sorts of imagined breaches, detached from any contractual duty, are appropriately dismissed at the pleadings stage.

*Spring Creek Exploration & Prod. Co. v. Hess Bakken Inv., II, LLC*, 887 F.3d 1003 (10th Cir.

2018). The Petitioner's assertion that the Lease is ambiguous on the matter of pooling is equally vacuous.

The Eleventh Circuit similarly analyzed a plea agreement, which, like the Lease in the instant case, undoubtedly turns on contract principles:

The relevant promise that the government made to Melton and Flores in the plea agreements was simply to "move for a downward departure in

accordance with Section 5K1.1 of the United States Sentencing Guidelines or Rule 35 of the Federal Rules of Criminal Procedure" if the government determined that they had provided substantial assistance to the government. That is all the agreements say about a substantial assistance motion. They say nothing about the government filing a motion under § 3553(e) to allow the district court to depart below the statutory mandatory minimum that applied to the convictions. Nothing at all. Silence is not ambiguity. The plea agreement unambiguously shows that no promise was made about filing a § 3553(e) motion either in the initial sentence proceeding or in some future proceeding under § 3582(c) (2) based on a post-amendment change in the guidelines.

*United States v. Melton*, 861 F.3d 1320 (11th Cir. 2017). The lease is not ambiguous. This fact alone is sufficient to defeat the Petitioner's efforts to have this Court construe it. Therefore, it would be appropriate to affirm the judgment below.

**ii. Even if the Lease was ambiguous, no evidence supports the contention that the parties intended pooling and unitization to take place.**

This Court has very recently stated the following concerning ambiguous deeds:

"[T]he polar star that should guide us in the construction of deeds as of all other contracts is, what was the intention of the party or parties making the instrument, and when this is determined, to give effect thereto, unless to do so would violate some rule of property." *Totten v. Pocahontas Coal & Coke Co.*, 67 W.Va. 639, 642, 68 S.E. 373, 374 (1910). The determination of whether a deed, contract, or other writing is ambiguous and does not clearly express the intention of the parties is a question of law to be determined by the court. See *Gastar Expl. Inc. v. Rine*, 239 W.Va. 792, 799, 806 S.E.2d 448, 455 (2017) ("Whether a deed is ambiguous is a question of law to be determined by the court."); Syllabus Point 1, in part, *Berkeley Cty. Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W.Va. 252, 162 S.E.2d 189 (1968) ("The question as to whether a contract is ambiguous is a question of law to be determined by the court.").

[...]

Whether a writing is ambiguous is a question of law. But if a circuit court finds that a deed, contract, or other writing is ambiguous and does not clearly express the intention of the parties, then the proper interpretation of that ambiguous document, when the facts are in dispute, presents a question of fact for the factfinder to resolve after considering all relevant extrinsic evidence. See *Payne v. Weston*, 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1995) ("It is only when the document has



been found to be ambiguous that the determination of intent through extrinsic evidence become[s] a question of fact."); *Coleman v. Sopher*, 201 W.Va. 588, 599 n.15, 499 S.E.2d 592, 603 n.15 (1997) ("Determination of the intent of parties to a contract typically creates a question of fact to be determined by a jury.").

*Harrell v. Cain*, 242 W.Va. 194, 832 S.E.2d 120 (2019). As previously described, the Petitioner failed to adduce any evidence, or even a bare assertion, that the Lease was ambiguous in the lower court. Undoubtedly, the burden was upon the Petitioner to do so in order to establish entitlement to summary judgment. However, even if the Lease was found to be ambiguous on the issue of pooling and unitization, the Lease itself makes clear that the parties did not intend to gain or give up rights, respectively, concerning pooling and unitization.

This Court has also stated that

As a general principle, ambiguities in a deed are to be clarified by resort to the intention of the parties ascertained from the deed itself, the circumstances surrounding its execution, as well as the subject matter and the parties' situation at that time. 23 Am.Jur.2d Deeds § 221 (1983).

*Phillips v. Fox*, 458 S.E.2d 327, 332, 193 W.Va. 657, 662 (1995).

The intention of the parties can largely be ascertained from the Lease itself, per *Phillips*. The Lease specifically contemplates that the Lessor will be paid a royalty on "the value at the well of the gas from each and every *gas well drilled on said premises*." (A.R., at 11). The Lease clearly does not contemplate payment for gas wells drilled on another parcel; nor does it contemplate sharing the proceeds of the production of a theoretical horizontal well pad drilled on the property with the owners of other neighboring mineral estates. The Lease includes a provision which anticipates the free household use by Lessor of up to two hundred thousand cubic feet of gas per year, but only from wells producing gas on the property, or from pipelines leading from such wells. (A.R., at 11). There is no right contemplated to free gas from a



horizontal well producing a large unit of which the subject parcel is a small portion.

The annual \$4.00/acre rental is only due “until, but not after, a well yielding royalty to the Lessors is *drilled on the leased premises*[.]” (A.R., at 11). There is no contemplation of a well being drilled on a distant well pad through which production, sufficient to end the rental payments, might begin. Most glaringly, one of the parties to this lease interlineated by typewriter that “It is agreed Lessor shall help decide where well or wells shall be drilled on this property.” (A.R., at 11). One can almost envision Mazie Cunningham walking her 94 acres with representatives from the D. & H. Oil Company in the spring of 1980 to determine where to site the wells. It is a spectacular leap to suggest any party to this Lease contemplated pooling and unitization at the time it was signed.

“Pooling” in the context of oil and gas was first mentioned in this Court's case law in 1974, in a discussion about a section of the West Virginia Code on the same topic: “Code, 1931, 22-4A-7, as amended, entitled 'Drilling units and the pooling of interests in drilling units in connection with deep oil and gas wells', sets out the requirements for pooling and drilling in a pooled unit.” *Traverse Corp. v. Latimer*, 205 S.E.2d 133, 136, 157 W.Va. 855, 858 (1974). Certainly, a sophisticated party, such as the original Lessee in this case, would have been aware of pooling, and its utility for the drilling of “deep oil and gas wells.” Yet no provision was written into the lease. The Petitioner seeks to excuse this omission, for its own benefit, 40 years hence. Yet this Court has held that “doubtful provisions of a written instrument should be construed most strongly against the party preparing it. *See, Henson v. Lamb*, 120 W.Va. 552, 199 S.E. 459 (1938); *Charlton v. Chevrolet Motor Co.*, 115 W.Va. 25, 174 S.E. 570 (1934); *Peerless Carbon Black Co. v. Gillespie*, 87 W.Va. 441, 105 S.E. 517 (1920).” *Moore v. Johnson Service*

Co., 219 S.E.2d 315, 321, 158 W.Va. 808, 817 (1975). Every reasonable inference suggests that it was the original Lessor, a gas company, and not Mazie Cunningham, who drafted the Lease, or chose to use that lease form in its business.

This Court has previously examined the question of how to construe an ambiguous oil and gas lease term, and has determined to construe leases in favor of lessors, even in situations in which they are represented by counsel:

Having found the language at issue ambiguous, the lessors urge that the language should be construed against CNR consistent with "[t]he general rule as to oil and gas leases . . . that such contracts will generally be liberally construed in favor of the lessor, and strictly as against the lessee." Syllabus Point 1, *Martin v. Consolidated Coal & Oil Corp.*, 101 W.Va. 721, 133 S.E. 626 (1926). CNR posits, to the contrary, that the lease language at issue should not be construed against it. According to CNR, many of the lessors are business entities which are as sophisticated in commercial matters as CNR. Further, says CNR, many of the lessors consulted with attorneys experienced in oil and gas law and even amended the leases prior to signing them.

We choose to adhere to our traditional rule and construe the language against the lessee. Significantly, CNR drafted the "the wellhead"-type language in dispute. Under our law, "[u]ncertainties in an intricate and involved contract should be resolved against the party who prepared it." Syllabus Point 1, *Charlton v. Chevrolet Motor Co.*, 115 W.Va. 25, 174 S.E. 570 (1934). Simply put, if the drafter of the leases below originally intended the lessors to bear a portion of the transportation and processing costs of oil and gas, he or she could have written into the leases specific language which clearly informed the lessors exactly how their royalties were to be calculated and what deductions were to be taken from the royalty amounts for post-production expenses.

*Estate of Tawney v. Columbia Nat. Res.*, 633 S.E.2d 22, 29-30, 219 W.Va. 266 (2006). Likewise, if the drafters of the Lease in the instant matter intended for it to create a right to pool and unitize, the drafters would have put in that language. They did not. There is simply no basis to impute pooling and unitization terms into the Lease, and the Petitioner has failed to carry its burden in that regard.

**C. There is no implied right to pool and unitize inherent in an oil and gas lease in West Virginia.**

The Petitioner describes the existing law of implied rights and covenants in West Virginia, citing the following cases and principles:

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); *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).

(Petitioner's Brief at 15-16). Each of these cases describes an implied covenant which inures to protect the lessor, and which creates an obligation upon the lessee. The Petitioner, by its own admission (Petitioner's Brief, at 16, footnote 6), goes on to list a number of cases creating implied rights. Each and every one of these cases involves the rights of the mineral owner over the servient surface estate. In this manner, the Petitioner seeks to invert a body of law that protects the owner of the mineral estate in every single instance (either from a lessee, or from a surface owner), and concoct, for the first time in West Virginia, a new universal and retroactive rule that protects the interest of mineral lessees to the detriment of mineral owners in this state. It is a bold gambit, and one that will be very profitable to oil and gas operators in this state if successful.

The Petitioner suggests four "tests" under which its self-serving "implied right" should materialize: "intent of the parties," "cooperation," "good faith and fair dealing," and "necessity." (Petitioner's Brief, at 17). Each one of these legal principles is presented wholly out of the

context in which it was established.

The “test” under “intent of the parties” is no test at all, but merely a recitation of the following:

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

Syl. Pt. 1, *McCullough Oil, Inc. v. Rezek*, 346 S.E.2d 788, 790, 176 W.Va. 638, 640 (1986).

*McCullough Oil*, however, is a case that cuts against the Petitioner's interests, in that it is an example of this Court protecting mineral owners by holding that a lessee's interest terminates automatically, and without the requirement of notice by the lessor, upon the expiration of a primary term or the end of production, depending, of course, on the express language of the lease. *Id.*, at 346 S.E.2d at 794-797. By no means did it create a principle of law whereby a lessee could unilaterally expand its rights beyond what is written in the lease, without the assent of, nor consideration to, the lessor, in order to accomplish more production. *Parish Fork Oil Co v. Bridgewater Gas Co*, 59 L.R.A. 566, 42 S.E. 655, 61 W.Va. 583 (1902), similarly cited by the Petitioner, also stands for the proposition that the lessor, not the lessee, is protected in the event of a failure of the lessee to produce oil. It does not give unlimited license to a lessee to invade the existing rights of a lessor to do so. Furthermore, as discussed at length in Section 1(B)(ii) of this Brief, there is simply no reason to believe that either party to the lease intended for it to become subject to pooling and unitization.

In its section on “cooperation” (Petitioner's Brief at 18-21), the Petitioner fails to cite a single case for the proposition that such a principle, as described by the Petitioner, has even been recognized under West Virginia law. It is, however, mentioned in footnote 2 of *Smith v. Buege*,

387 S.E.2d 109, 182 W.Va. 204 (1989):

2 For a discussion of the common-law duty of good-faith performance and cooperation implicit in a contract see Restatement (Second) of Contracts § 205 (1979); 3 A. Corbin, Corbin on Contracts § 570 (1960); 11 S. Williston, A Treatise on the Law of Contracts § 1295 (W. Jaeger 3d ed. 1968); 5 S. Williston, A Treatise on the Law of Contracts § 670, at 159 (W. Jaeger 3d ed. 1961); Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv.L.Rev. 369 (1980). See also syl. pt. 2, *Manning v. Bleifus*, 166 W.Va. 131, 272 S.E.2d 821 (1980) (a "subject to the approval of financing" clause in a real-estate sales contract requires a purchaser to make reasonable, good-faith efforts to obtain financing); syl. pt. 1, *Duncan Box & Lumber Co. v. Sargent*, 126 W.Va. 1, 27 S.E.2d 68 (1943) (an agreement to pay a preexisting debt when the promisor shall be "able to effect a sale of" certain real estate which he owns requires payment to be made upon the accrual of a reasonable time for accomplishing such sale).

*Smith v. Buege*, 387 S.E.2d 109, 182 W.Va. 204 (1989), at footnote 2. Neither of the West Virginia cases cited in that footnote stand for the prospect that an individual must unilaterally cede rights retained under a contract for no compensation. They merely require good faith from parties in fulfilling terms of a contract. Failure to capitulate in a contract dispute is not a failure to "cooperate." The Petitioner lists numerous ways in which the Respondents might leverage their rights under the Lease to obtain a financial advantage from, or otherwise thwart the Petitioner. (Petitioner's Brief, at 19). The Petitioner faults the Circuit Court for suggesting that it ought to pay for the rights it does not presently have. (Petitioner's Brief, at 20). It complains that it is "denied the benefit of its investment" and invokes "traditional notions of fair play and justice." (Petitioner's Brief, at 19). The Petitioner is right to be concerned about "fair play and justice," but not for the reasons it thinks. Because it fails to cite any pertinent authority in support of its theory of "cooperation," this Court should decline to credit the Petitioner's assertions in this regard.

Similarly, while the Petitioner proffers the phrase "good faith and fair dealing," it does



not actually attempt to demonstrate what that principle entails through citation to relevant authority. It is understandable why the Petitioner would fail to do so, because the definition of “good faith and fair dealing” under this Court's case law does not require the result the Petitioner seeks. This Court has recognized that:

Further, "where the express intention of contracting parties is clear, a contrary intent will not be created by implication. The implied covenant of good faith and fair dealing cannot give contracting parties rights which are inconsistent with those set out in the contract." *Bonanza Int'l, Inc. v. Restaurant Management Consultants, Inc.*, 625 F.Supp. 1431, 1448 (E.D.La.1986). The Supreme Court of Oregon recognized in *Wheeler*, "the principle that every contract contains an implied condition of good faith and fair dealing in its performance ... does not require that a lease or contractual relationship which is, by its terms, limited to a specific period be converted into a permanent relationship terminable only at the option of the lessee." 276 Or. at 754, 556 P.2d at 670.

*Barn-Chestnut, Inc. v. CFM Development Corp.*, 457 S.E.2d 502, 509, 193 W.Va. 565, 572 (1995). The Petitioner does not have the right to pool and unitize the Lease. The principle of good faith and fair dealing cannot give it that right to which it is not entitled under the Lease.

Finally, the Petitioner relies on the two-part test from *Buffalo Min. Co. v. Martin*, 165 W.Va. 10, 267 S.E.2d 721 (1980). This 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 on the whether or not a court may interpolate a pooling provision in a lease that grants no right to pool.

The Petitioner advances numerous public policy arguments. Fond of citing to *Andrews v. Antero, supra*, the Petitioner nevertheless ignores this Court's admonition in footnote 31:

31 Insofar as we resolve this matter based upon existing principles of law, we decline Property Owners' invitation to rule in their favor based upon public policy grounds. Such an argument is more properly addressed to our State Legislature. See Syl. pt. 2, in part, *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 679 S.E.2d 323 (2009) ("It is the duty of the Legislature to consider facts, establish policy, and embody that

policy in legislation . It is the duty of this Court to enforce legislation unless it runs afoul of the State or Federal *Constitutions* ." (emphasis added)).

*Andrews v. Antero Res. Corp.*, 242 W.Va. 39, 828 S.E.2d 858 (2019), at footnote 31. Public policy notwithstanding, were the Legislature to pass a statute creating an implied right of pooling and unitization, it's entirely possible that this Court would be constrained to invalidate it on constitutional grounds, given the obvious implications on constitutionally-protected property interests.

The Northern District has had occasion to examine a question very similar to that at issue in this appeal in *Stern v. Columbia Gas Transmission LLC*, No. 5:15-CV-98, 2016 WL 7053702 (N.D. W. Va. Dec. 5, 2016). In *Stern*, the District Court examined whether the applicable lease language permitted pooling, and found that it did, not on the basis of an implied right, but on the basis of the unambiguous language of the lease. *Id.*, at 5-6. The lease in *Stern* had the language "alone and conjointly with other lands" – language that is absent from the Lease herein. *Id.* It is clear from the language in *Stern* that in the absence of such language, the pooling provision would have failed.

The Petitioner has wholly failed to demonstrate that it is entitled to summary judgment. It has wholly failed to show that there is an implied right to pooling and unitization regarding oil and gas leases in West Virginia. This Court should decline to grant the Petitioner the relief it seeks, which is little more than the unilateral reassignment of property rights for no compensation.

**2. The Circuit Court's finding that there was no evidence that the minerals underlying the tract could not be developed in the absence of pooling and unitization is clearly supported by the record, and obviously correct.**

Perhaps the most confounding aspect of the Petitioner's claim is its insistence, in defiance

of all reason, that the leased mineral estate cannot be developed in the absence of pooling and unitization. Irrespective of whether certain geological strata can or cannot be produced without the pooling necessary to facilitate horizontal drilling, it is simply an inaccuracy to say that the mineral estate encompassed by the lease cannot be produced without it. Through the Petitioner's own assertions in its Complaint, the Petitioner has already admitted that the lease is producing, and has been held beyond its ten year primary term by said production: "[t]he subject lease is a valid and subsisting oil and gas lease that is in full force and effect by virtue of an existing well or wells and operation of the premises for the production of oil and gas." (A.R., at 5). If the wells previously bored were not producing, there would be no lease at this late date, for the lease states: "It is agreed that this lease shall remain in force for the term of ten years from this date and 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." (A.R., at 11).

This reality is fully consonant with the corresponding factual findings and conclusions of the Circuit Court: "There is no evidence that the Plaintiff cannot develop the minerals underlying the tract at issue in the absence of pooling and unitization." (A.R., at 160). "The Court is not swayed by the Plaintiff's argument that pooling and unitization is necessary for the economically feasible production of the Subject Minerals. Absent the Plaintiff's assertions to the contrary, 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." (A.R., at 163).

As the Petitioner concedes in its Complaint, the lease is producing, and is validly held by the Petitioner in its secondary term. There is no evidence to support the notion that the purpose

of the lease has been frustrated, because it has been in effect unabated for forty years. No pooling or unitization has been necessary to accomplish that state of affairs.

**3. The Circuit Court correctly refrained from imputing allegedly “customary terms and conditions for pooling and unitization” into the Lease.**

While circuit courts, in appropriate circumstances, have a limited ability to impute terms into contacts that are ambiguous or otherwise in need of reform, the Petitioner has failed to show that it is entitled to have the Lease modified at all, let alone by interpolating five highly specific paragraphs of terms. (A.R., at 30). As previously discussed in Section 1(B)(i) of this Brief, and as held by the Circuit Court, "It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962). (A.R., at 161).

The Respondents take no position on whether or not the five paragraphs actually constitute the customary terms used in pooling and unitization agreements. Whether or not that is the case is irrelevant. The Petitioner was not entitled to summary judgment irrespective of what language it sought to include in the Lease. Rule 56(c) requires that "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact *and that the moving party is entitled to a judgment as a matter of law.*" The Petitioner failed to show that it was entitled to judgment as a matter of law. It failed to demonstrate the existence of any circumstance that would permit the judicial modification of the Lease in the first place. Thus, its preferred remedy is irrelevant. As the Circuit Court correctly held:

9. The Court concludes that it should not seek out the “customary” terms and conditions for pooling and unitization clauses where the written instrument is clear and unambiguous in that it does not include any such terms therein. Syl. Pt. 4, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 485. 128 S.E.2d 626, 629 (1962).

(A.R., at 161). The Petitioner is entitled to no relief in this regard.

**4. The Circuit Court exercised proper restraint in declining to accept the Petitioner's invitation to establish or modify the common law of West Virginia under the circumstances of this case.**

The Petitioner fails to actually identify any authority to support the notion that circuit courts may modify the common law, as opposed to this Court, which clearly can (*see, e.g., State v. Hutton*, 235 W.Va. 724, 776 S.E.2d 621 (2015)). Nevertheless, this assignment of error is misconceived. The Circuit Court did not disclaim its power to construe or interpret the law. Instead, it simply refused to grant relief to the Petitioner on its meritless Petition.

In its 10<sup>th</sup> conclusion of law, the Circuit Court acknowledged a number of implied covenants of judicial origin. It simply declined, in the absence of entitlement to relief, to recognize the implied right to pool and unitize sought by the Petitioner. The Circuit Court stated “If the West Virginia Legislature wants to address this issue during its current session, it is more than welcome, but this Court will not.” (A.R., at 162). Notably, the Court did not say that it “cannot,” but that it “will not.” The Circuit Court explained its rationale for denying the Petitioner relief in detail. A court is not required to take action simply because it can. The Court correctly found that there was no implied right to pool and unitize, and it would have been error for it to find otherwise as a general principle, or as applied to the Lease in this case.



**5. The record below proves beyond doubt that minerals subject to the Lease have been and are continuing to be produced without any pooling or unitization, and to permit the Petitioner to pool and unitize would unilaterally expand the scope of the Petitioner's rights under the language of the Lease without any corresponding consideration.**

It is true, as the Petitioner posits, that attempting to produce a horizontal well under a leasehold without a right to pool and unitize, could subject the Petitioner to potential liability for trespass. (Petitioner's Brief, at 22). This is because to do so would be to use the Respondents' estate in a way that the Petitioner has no right to do under the plain language of the Lease. Yet the Petitioner seeks an effective modification of the Lease to permit it to do the very thing that it will not now do, due to its fear of incurring tort or contract liability. Further, the Petitioner seeks to expand its rights without consideration. This Court has long held that:

3. "The fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement." Syllabus Point 5, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253 (1926).

4. "A promise or contract where there is no valuable consideration, and where there is no benefit moving to the promisor or damage or injury to the promisee, is void." Syllabus Point 2, *Sturm v. Parish*, 1 W.Va. 125 (1865).

Syl. Pts. 2 and 3, *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 230 W.Va. 281 (2012).

A modification of a contract requires new consideration; the original consideration is not adequate:

However, we also have held that "not only must such modification or alterations be by mutual agreement but must be based upon a valid consideration, and the original consideration ... cannot be used as consideration for any agreement of modification or alteration in connection therewith." *Steinbrecher v. Jones*, 151 W.Va. 462, 470, 153 S.E.2d 295, 301 (1967). Likewise, "[i]n the absence of a mutual agreement, based on a valid consideration, establishing modification of a written contract, there can be no subsequent modification of such a contract without consideration, and the mere promise of one of the

parties to perform what he is already bound to do under the terms of the contract is not a sufficient consideration." Syl. Pt. 5, *Bischoff v. Francesa*, 133 W.Va. 474, 56 S.E.2d 865 (1949).

*Citizens Telecomms. Co. of W. Va. v. Sheridan*, 799 S.E.2d 144, 152 (W. Va. 2017).

To interpolate a five paragraph provision concerning pooling and unitization (A.R., at 30) into the Lease is clearly a material alteration to it, in the absence of the operation of some legal fiction. In *Citizens Telecomms.*, the issue was the insertion of an arbitration provision in a contract between a telecommunication company and its customers. In that case, this Court held that the telecommunication company's parallel obligation to arbitrate constituted consideration under this legal principle. *Id.*, at 152. Here, the Petitioner proposes that it will simply do what it is already obligated to do: pay the royalty that its predecessor in interest agreed to pay in 1980. Such illusory consideration for a contract modification fails the test under *Steinbrecher* and *Bischoff*, *supra*.

**6. The development of oil and gas by means of horizontal drilling, and facilitated by a pooling and unitization process, rather than by drilling wells on the subject tract, is clearly beyond the scope of what was contemplated and intended by the parties on February 6, 1980 when the lease was executed, and to permit it without a renegotiation of the Lease would constitute a burden upon the mineral estate.**

The Court has held that mutual assent is required for any contract:

Concerning mutual assent to contract, we have held:

It is elementary that mutuality of assent is an essential element of all contracts. *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.*, 158 W.Va. 935, 216 S.E.2d 234 (1975). In order for this mutuality to exist, it is necessary that there be a proposal or offer on the part of one party and an acceptance on the part of the other. Both the offer and acceptance may be by word, act or conduct that evince the intention of the parties to contract. That their minds have met may be shown by direct evidence of an actual agreement or by indirect evidence through facts from which an agreement may be implied. See *Lacey v. Cardwell*, 216 Va. 212, 217 S.E.2d 835 (1975); *Charbonnages de France v. Smith*, 597 F.2d 406, 415-416 (4th Cir. 1979).

*Bailey v. Sewell Coal Co.*, 190 W.Va. 138, 140-41, 437 S.E.2d 448, 450-51 (1993).

*Citizens Telecomms. Co. of W. Va. v. Sheridan*, 799 S.E.2d at 150-151 (page number omitted).

The Petitioner offers only the most conclusory evidence of the intention of the parties to agree to the absent pooling and unitization provision. As discussed at length in Section 1(B)(ii) of this Brief, there are numerous indicia present in the text of the Lease itself that weigh against a finding that the parties intended pooling to take place in the context of this agreement.

As it presently stands, the Petitioner has no right to pool and unitize the Lease. If the Circuit Court had granted Summary Judgment, the Petitioner would have precisely that right. The right to pool and unitize could be thought of as a right-of-way that permits a certain form of mineral exploration affecting the mineral estate to take place. A right-of-way, which does not presently exist, will come into existence if the Petitioner obtains the relief it seeks.

The land benefitting from an easement is called the dominant estate; the land burdened by an easement is called the servient estate.

It is essential to the existence of an easement, which is appurtenant to land, that there be two distinct estates or tenements, the dominant to which the right belongs, and the servient upon which the obligation rests. ... The term easement and the term servitude are often used indiscriminately; the one is usually applied to the right enjoyed, the other to the burden imposed. A right of way over the land of another is an easement in the dominant estate and a servitude upon the servient estate. *Cottrell v. Nurnberger*, 131 W.Va. 391, 397, 47 S.E.2d 454, 457 (1948). (Citations omitted).

*Newman v. Michel*, 688 S.E.2d 610, 615-616, 224 W.Va. 735 (2009) (page number omitted).

The Circuit Court did not err in determining that an implied right to pool would create a burden upon the Respondent's estate.

**7. As previously established in this Response, and as is wholly clear from the record, the Circuit Court was correct in finding that the development of minerals under the Lease has not been prevented by the lack of a pooling and unitization provision in the lease, whether express or implied.**

As previously discussed in argument section 2 of this Brief, the record is unequivocal that the mineral estate has been developed, and continues to produce oil and/or gas, all in the absence of a pooling and unitization provision. The Petitioner has failed to assert authority or citation to the record to differentiate or otherwise support its Seventh Assignment of Error, and accordingly, this Court should decline to review it. Rule 10(c)(7), West Virginia Rules of Appellate Procedure.

**8. The Circuit Court was correct in observing that to adopt an implied right to pooling and unitization would upend the state of the law as it presently exists.**

As discussed in Section 1(C) above, for the Circuit Court to have found an implied right to pool and unitize would have upended over a century of existing law, precisely as the Circuit Court intimated. (A.R., at 163). The Petitioner failed to identify any implied right that has been construed against a mineral estate owner in favor of a lessee. It would represent a major disruption to the law of property rights in this state. It was a wholly appropriate exercise of judicial restraint for the Circuit Court to refrain from consummating the Petitioner's gambit.

The Respondent does not disagree with the Petitioner that a circuit court both has the power to enter declaratory judgment on contractual relationships, nor does the Respondent disagree that a justiciable controversy exists. (Petitioner's Brief, at 30-33). There was simply no basis for the Circuit Court to grant summary judgment. No evidence proffered by the Petitioner with its summary judgment motion suggests that the original parties to the Lease intended to effectuate a pooling agreement. The Petitioner's insistence on the existence of an implied right

to pooling and unitization is devoid of applicable authority. The Circuit Court did not abdicate its judicial responsibilities – it simply made the right decision on a meritless request for relief.

### **CONCLUSION**

The law does not permit what the Petitioner seeks: a windfall of vast proportion whereby it, and other similarly situated leaseholders, may obtain rights they do not currently possess, wholesale, and free of charge, from the mineral owners of West Virginia. WHEREFORE, the Respondents respectfully request that this Court grant the following relief:

1. That this Court affirm the lower court's disposition of the Petitioner's motion for summary judgment;
2. That this Court decline to find that there is an implied right to pooling and unitization in oil and gas leases;
3. Alternatively, that if this Court finds that there is an implied right to pooling and unitization, that this Court find that the implied right is not applicable to the Lease under the facts of this case; or
4. That this Court grant any other relief the Court deems just and proper.

Respectfully submitted,



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