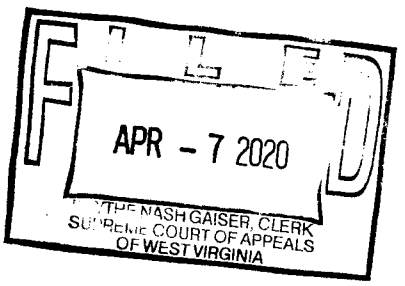
IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-1076



THOMAS W. SMITH,
THOMAS W. SMITH, Administrator
of the Estate of Elizabeth Anne Smith,
RACHEL DICKHUT,
NANCY SMITH McGREGOR,
MARY SMITH NELSON, and
ELIZABETH SMITH ARTHUR,

Plaintiffs and Counterclaim Defendants/Petitioners,

v.

CHESTNUT RIDGE STORAGE LLC,

Defendant and Counterclaim Plaintiff/Respondent.

On Appeal from the Circuit Court of Monongalia County
Civil Action No. 11-C-457

BRIEF OF PETITIONERS

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2. The circuit court erred in denying petitioners' motion for summary judgment because petitioners have immunity under the *Noerr-Pennington* doctrine and federal law.

3. The circuit court erred in finding that the lessee "is the sole judge as to when/whether strata are depleted and gas can be stored."

II. STATEMENT OF THE CASE

This case involves an Oil and Gas Lease and a Gas Storage Addendum. Appendix ("App.") 0413, 0419. The lessors are Thomas W. Smith, Thomas W. Smith, Administrator of the Estate of Elizabeth Anne Smith, Rachel Dickhut, Nancy Smith McGregor, Mary Smith Nelson, and Elizabeth Smith Arthur ("Smiths"), and the lessee is Chestnut Ridge Storage LLC ("Chestnut Ridge"). The Smiths are the plaintiffs and counterclaim defendants in the circuit court, and Chestnut Ridge is the defendant and counterclaim plaintiff. The primary question on appeal is whether the counterclaim against the Smiths is barred by the litigation privilege and the *Noerr-Pennington* doctrine. None of the material facts on this question are in dispute.

A. THE LEASE AND GAS STORAGE ADDENDUM

The Smiths are descendants of Brackett A. Smith who acquired several thousand acres of oil and gas properties in Fayette County, Pennsylvania, and

Monongalia and Preston Counties, West Virginia. Brackett A. Smith died in 1960, leaving his property to his two sons, Claude B. Smith and Lee Max Smith. The share of the property inherited by Claude B. Smith ultimately passed to his children Thomas W. Smith, Elizabeth Anne Smith, and Rachel Smith Dickhut, plaintiffs in this case. The share of the property inherited by Lee Max Smith passed to his children Nancy Smith McGregor, Elizabeth Smith Arthur, and Mary Smith Nelson, also plaintiffs in this case. After the case was filed, Elizabeth Anne Smith died, and Thomas W. Smith, Administrator, was substituted in her place.

On April 21, 1987, the Smith family leased a tract of 4,572 acres to Fox Oil & Gas, Inc. for the production of oil and gas. App. 0413. Fox drilled seven wells on the property. The Lease was later acquired by Oil & Gas Management, Inc. ("OGM").

On January 26, 1993, the Smiths signed a Gas Storage Addendum allowing the lessee to employ depleted strata for storage. App. 0419. In soliciting the Addendum, the lessee told the lessors:

> The addendum grants Fox the right to store gas in a depleted reservoir (empty container) for which rent is paid. In the event the Fox lease is only held by the storage provision (refer to Page 2, Paragraph 3 of the Addendum) and there are no other operations for the drilling or production of gas on the Leased Premises, the Smith heirs would then have the opportunity to lease the sands 100 feet above and 100 feet below the storage interval to a third party and enjoy revenues generated by that Lease in addition to the storage rental under the Fox Lease. I believe this provision is fair and equitable, and will not diminish the value of the oil and gas if and when the Leased Premises is utilized for storage.

App. 0426.

B. THE STORAGE PROJECT AND FERC PROCEEDING

In July 2007, OGM assigned approximately 2300 acres of the Smith property to Chestnut Ridge for a storage project. App. 0905. The storage area was defined to include a vertical area from 500 feet above the Onondaga Limestone to 500 feet below the Oriskany Sand. App. 908. The horizontal limits of the storage zone included a 2000 foot buffer zone around the storage area. *Id.* All the producing wells are within the area assigned to Chestnut Ridge for storage. App. 0907, 0937. The storage zone also includes the Marcellus Shale on the 2300 acres. App. 0428, 0430.

In December 2007, Chestnut Ridge applied to FERC for a certificate of public convenience and necessity to construct and operate the storage field. App. 0469. The Smiths filed a motion to intervene and protest on the ground that the areas proposed for storage on their property were not depleted and that the Gas Storage Addendum only allows the lessee to employ depleted strata for storage. App. 0432.

In response, Chestnut Ridge told FERC that it did not object to the Smiths' participation in the proceeding. App. 0438. Nor did Chestnut Ridge contest the Smiths' position that Chestnut Ridge did not have the right to store gas because the property was not depleted. Rather, Chestnut Ridge said it would negotiate with the Smiths on appropriate compensation due on account of the project.

> Chestnut Ridge acknowledges its duty to negotiate with the Smiths compensation for the value of the gas subject to their interests remaining in place, and Chestnut Ridge fully intends to offer the Smiths a payment . . . .

App. 0443.

Chestnut Ridge also told FERC that if the parties could not agree on compensation, the Smiths had the right to seek relief in an appropriate court.

> [I]f Chestnut Ridge and the Smiths cannot reach agreement as to the value of whatever gas subject to the Lease and Addendum is economically recoverable, the Smiths will have the right, at the appropriate time, to seek compensation from a court of competent jurisdiction for any loss of potential royalties based on their claim that the storage project will effectively shut in gas which, if produced, would yield them royalties.

App. 0460.

In the FERC proceeding, Chestnut Ridge admitted that the proposed storage field was not depleted and that the Smiths had a claim for damages, but it told FERC that the claim would have to be determined by an appropriate court, not by the agency. App. 0440, 0476.

On August 31, 2009, FERC issued a certificate granting Chestnut Ridge the right to construct the storage facility and requiring the facility to be completed within two years. App. 0469. By letter dated September 29, 2009, Chestnut Ridge unconditionally accepted the certificate and committed to comply with all its conditions. App. 0523. The certificate required Chestnut Ridge to cease all production from existing wells once storage began. App. 0498.

In issuing the certificate, FERC found there was no dispute (1) that the property that Chestnut Ridge proposed to use was not depleted and (2) that converting the property to storage would violate the Gas Storage Addendum:

> The parties agree that the production field is not yet depleted, and Chestnut Ridge does not dispute the Smiths' contention

> that converting a currently producing field into a storage reservoir would be inconsistent with the provisions of the parties' gas storage addendum.

App. 0476. The Commission held, however, that the compensation due the Smiths would have to be determined by a court. *Id.* Although Chestnut Ridge told FERC that it would negotiate with the Smiths on compensation for the undeveloped gas, it never did so. App. 0355.

In August 2011, Chestnut Ridge sought an extension of three years to construct the storage field. App. 2283. The Smiths opposed the extension. FERC ultimately denied the request for an extension. App. 0526, 0533. The agency found that Chestnut Ridge had not taken the necessary steps to construct the storage field and that the project was not viable.

> Chestnut Ridge has reached the conclusion, which we have no reason to dispute, that its project is not financially viable under current conditions.
>
> * * *
>
> Chestnut Ridge's deadline for completing the project came and went, and it is still unable to secure financing or present any evidence of market demand for its storage services at the rates it says it would need to make its project viable.

App. 0537, 0544. Chestnut Ridge did not appeal this ruling.

C. THIS CASE

The Smiths filed this action on July 15, 2011, seeking a declaratory judgment and damages against Chestnut Ridge for breach of the Lease and Gas Storage Addendum. App. 0347. At that time, the Smiths were informed that Chestnut Ridge was proceeding to establish a storage field on their property. In their complaint, the Smiths

alleged that the strata being employed for storage were not depleted and that Chestnut Ridge did not have the right to use undepleted strata for storage. The Smiths asked for damages and for a declaratory judgment that the lessee had abandoned the Lease by converting the property to storage before it was depleted. At the time the case was filed, Chestnut Ridge held a certificate from FERC requiring Chestnut Ridge to complete the storage facility, and the Smiths understood that Chestnut Ridge intended to do so.

In its counterclaim, Chestnut Ridge alleges that the Smiths breached the Gas Storage Addendum and slandered its title by opposing the storage facility. App. 0366. The Smiths filed a motion to dismiss the counterclaim. App. 0084.

In considering the motions to dismiss the counterclaim, the circuit court requested briefing on various issues of lease interpretation. After consideration of the parties' submissions, the circuit court entered an order interpreting the Lease and Addendum. Specifically, the circuit court (Judge Clawges) held that the Gas Storage Agreement grants the lessee the right to store gas in any depleted stratum. App. 0384. "Stated another way, in order to be used for storage of gas, a formation or stratum must first be depleted." App. 0388. The circuit court further held that the parties contemplated the industry definition of depleted. *Id.* The circuit court did not decide the industry definition in its order. *Id.* at n.1.

With respect to the Marcellus Shale, the circuit court held that the Addendum granted storage protection rights as well as storage rights, and that at the time the Lease and Addendum were made "the parties could not have contemplated producing natural gas from the Marcellus shale." App. 0388.

Given these rulings, and the fact that the FERC certificate had expired and no storage facility had been constructed, Chestnut Ridge moved for summary judgment. By order entered January 16, 2014, the circuit court granted the motion. App. 0391. The circuit court noted that no gas had been stored on the property and that the gas production had continued from existing wells. App. 0393. The circuit court held that paragraph 15 of the Lease was a waiver of the implied duty to develop.[1] App. 0396. Therefore, the circuit court found there was no duty to develop the Marcellus Shale unless it was being used for storage, as opposed to storage protection. *Id.* The court reiterated, however, that only depleted strata may be used for storage. *Id.*

By Memorandum Decision dated November 20, 2014, the Supreme Court of Appeals affirmed the circuit court's order granting summary judgment. App. 0399. Chief Justice Davis dissented.

Following remand by the Supreme Court of Appeals, the Smiths filed a motion for summary judgment as to the counterclaim. The motion was briefed and argued at a hearing in April 2016 and taken under advisement. By order entered January 18, 2019, the court denied the Smiths' motion on procedural grounds. App. 0407, 0410. The court agreed with Chestnut Ridge that further discovery was necessary

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1. Paragraph 15 of the Lease states: "It is agreed that said Lessee may drill or not drill on said land as it may elect, and the consideration and rentals paid and to be paid hereunder constitute adequate consideration for such privileges." App. 0413. This "drill or not drill" provision has been interpreted as a waiver of the duty to develop during the primary term when delay rentals are paid, but not a waiver of the duty to develop once a well is drilled and the lease is held by production. Robert T. Donley, *Law of Coal, Oil and Gas in West Virginia and Virginia*, §§ 74, 91, 98 (1951).

before considering summary judgment. *Id.* 0410. That discovery was subsequently completed and showed the following with respect to the issues on appeal.[2]

A 30(b)(7) representative for Chestnut Ridge was asked to identify the allegedly slanderous statements made by the Smiths in the FERC proceeding. The sole statement identified by the representative was the Smiths' statement that the strata had to be "fully depleted." App. 0729-0731. The representative testified that this statement is slanderous because the Addendum says the strata must be "depleted," not "fully depleted." *Id.* The representative did not know of any other filings by the Smiths that he thought were inaccurate or wrongful. App. 0731.

With respect to whether the strata on the property are, in fact, depleted, the 30(b)(7) witness for Chestnut Ridge did not know. While the representative contended the strata were depleted, he ultimately admitted that he did not know what areas are depleted and what areas are not. App. 0700-0701, 0708.

The representative admitted that the owners of Chestnut Ridge entered into an agreement to suspend all development of the storage project before the certificate was even issued. *Id.* 0662. The owners agreed not to buy any more equipment for the project and to sell equipment already purchased. *Id.* 0661-0665. The representative had no explanation for why Chestnut Ridge did not inform FERC of this material development. *Id.* 0665.

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2. Although some documents produced in discovery and made exhibits at depositions were marked confidential pursuant to a protective order, the Court removed the confidential designation for all documents filed in connection with the motions for summary judgment. App. 2427. Therefore, none of the documents included in the appendix or described in this brief are confidential.

In disclosures in the circuit court, Chestnut Ridge listed its attorney in the FERC proceeding as an expert witness on its behalf. App. 1534, 1629. The attorney testified that Chestnut Ridge told FERC—both before and after the certificate was issued—that it intended to construct the storage field. *Id.* 1560, 1593-1596. The attorney denied knowing that Chestnut Ridge had formally suspended all development efforts. *Id.* 1570-1571, 1580, 1585-86.

The attorney contended that the Smiths delayed the issuance of the certificate because, he said, it takes longer to get a certificate any time there is a protest. *Id.* 1524-1525. The attorney admitted, however, that there were other people who opposed and protested the project. *Id.* 1589. The attorney also admitted the market for gas storage was bad and at least five other proposed storage projects failed during this same period. *Id.* 1582-1584.

Chestnut Ridge also listed a geologist as an expert witness. App. 1628. The geologist contended that whenever gas is removed from a formation the formation is depleted to some extent. *Id.* 1997-1998. The expert was not aware that an industry publication, which has been cited and relied upon by Chestnut Ridge, defines a "depleted formation" as one "from which all recoverable oil and gas has been removed." App. 1971; Patrick H. Martin & Bruce M. Kramer, 8 *Williams & Meyers Oil and Gas Law*, Manual of Terms (2019). The geologist did not know how much recoverable gas remains on the property. App. 1985-1986.

In discovery, the Smiths identified three experts—an expert on FERC proceedings, an expert in gas reserves and gas storage, and a surveyor. These experts

filed comprehensive reports on their expected testimony and submitted affidavits attesting to the statements made in their reports. Chestnut Ridge did not elect to depose any of those experts. What they have to say stands unimpeached and uncontradicted.

John R. Staffier is an attorney who has practiced before FERC for over 40 years. App. 2274. He is familiar with requirements for applications and with the process and procedures for reviewing and documenting these applications. *Id.* Mr. Staffier reviewed the agency record and prepared a 14-page report on his findings. *Id.*

Mr. Staffier made two principal conclusions:

> As set forth below, based on my review of the FERC record, I find no evidence to suggest, and no reason to believe, that the Smiths' opposition played any role whatsoever in delaying the issuance of Chestnut Ridge's certificate. Instead, the delays that occurred resulted primarily from changes to the project made by Chestnut Ridge during FERC Staff's evaluation of the proposal, and from Chestnut Ridge's failure to timely provide information requested by and needed by FERC Staff to conduct and complete its evaluation.
>
> Similarly, I find no evidence to suggest and no reason to believe that the Smiths' opposition caused the denial of Chestnut Ridge's request for extension of time. Instead, the extension was denied because (1) in the two years following the issuance of the certificate on August 31, 2009, Chestnut Ridge had taken no meaningful steps to implement the certificate, (2) Chestnut Ridge acknowledged that changed market conditions had rendered the project uneconomic and were unlikely to change in the foreseeable future, and (3) Chestnut Ridge had effectively abandoned development of the project.

Id. 2276.

Mr. Staffier's report also addresses the important public policies that protect the right of interested persons to participate in FERC proceedings.

> [I]t should be recognized that under the Natural Gas Act ("NGA") and the Commission's regulations thereunder, landowners affected by a proposed interstate natural gas project have a clear right to receive notice of the proposal, to intervene and participate in the FERC proceeding, and to present their views and positions, whatever they may be.
>
> * * *
>
> In these circumstances, it would make a mockery of the process for landowners to be liable for damages to a project sponsor for presenting their views to the Commission. To suggest otherwise, as Chestnut Ridge is apparently doing in this litigation, is inconsistent with and irreconcilable with the NGA, the Commission's regulations, and the Certificate Policy Statement.

Id. 2288-2289.

Robert W. Chase is a professional engineer with a bachelor's degree, a master's degree, and has a doctorate degree in natural gas engineering. App. 2253. At the request of the Smiths, Dr. Chase reviewed the technical reports relating to the storage project and the amount of recoverable gas on the property.

Dr. Chase summarized his findings as follows:

> 31. The Oriskany sand, Huntersville chert, and Marcellus shale are not depleted on the Smiths' property in the area of the proposed storage facility.
>
> 32. When I say the formations are not depleted, I use the term in the sense that it is normally used in the oil and gas industry. There are large volumes of gas in all three formations, and this gas can and should be developed before any storage commences.

> 33. The gas that remains to be developed in these formations on the Smiths' property far exceeds what is known as "cushion gas." As the term is normally used in the industry, cushion gas is the volume of gas intended to remain as permanent inventory in a storage facility to maintain adequate pressure and deliverability upon withdrawal.
>
> 34. The Gas Storage Addendum only allows the lessee to employ depleted strata for the storage of gas. The formations that Chestnut Ridge planned to use for storage were not depleted in 2007 when Chestnut Ridge applied for a certificate, they were not depleted in 2009 when the certificate was issued, they were not depleted in 2011 when the extension was denied, and they are not depleted today.

Id. 2260.

Based on his review, Dr. Chase also concluded that the proposed gas storage field of Chestnut Ridge was never viable. *Id.* 2261. There was simply two little demand for storage and too much gas in place for in the proposed field for the project to be successful. *Id.*

Glenn F. Phillips is a licensed surveyor who the Smiths hired to review one of the technical reports on the amounts of gas in place in the proposed storage field. App. 2267. Using available maps, Mr. Phillips identified the areas of unproduced gas on the Smith property. *Id.*

There are 11 different areas (or fault blocks) on the Smith property. There are significant quantities of gas in place in each of the 11 areas. Compare App. 2271 with App. 1256-1257. Five of the areas have not had any gas removed. *Id.* Under the certificate obtained by Chestnut Ridge, all future production of gas in all 11 areas would have to cease upon commencement of storage operations. App. 0498 ("Chestnut Ridge

must be prepared to cease production for the entire West Summit Field as soon as any portion of the storage facility is placed in service.")

Following the completion of discovery, the Smiths renewed their motion for summary judgment. Among other things, the Smiths argued that the counterclaim was barred by the litigation privilege and *Noerr-Pennington* doctrine. At the hearing on the motion, Chestnut Ridge admitted that its counterclaim is based entirely on the filings that the Smiths made in the FERC proceeding. App. 2479, 2494, 2507. Chestnut Ridge further admitted that there were no facts in dispute on the issue of litigation privilege. App. 2507-2509. Nevertheless, at the conclusion of the hearing, Judge Scudiere stated she was denying the Smiths' motion for summary judgment because "there is a question of damages." App. 2523. The judge gave no other explanation for her ruling.

The only finding that Judge Scudiere made in her order related to the Gas Storage Addendum. The judge found that under the Addendum the lessee is "the sole judge as to when/whether strata are depleted and gas can be stored." App. 0001. This finding is directly contrary to the plain language of the Addendum and prior rulings in the case by Judge Clawges. App. 0388, 0399, 0419. In any event, the finding would in no way defeat the application of the litigation privilege.

The Smiths filed a timely notice of appeal, and they now perfect it.

III. SUMMARY OF ARGUMENT

In order to construct a natural gas storage field, a company needs a certificate of public convenience and necessity from the Federal Energy Regulation Commission. 15 U.S.C. § 717f(c). The application must be served on interested parties

who then have the right to intervene and state their views. 15 U.S.C. § 717f(d); 18 C.F.R. §§ 385.211 and 385.214. In this case, Chestnut Ridge filed an application with FERC to build a storage field on 2300 acres of the Smiths' property. If the field had been constructed, it would have prevented further development of the Smiths' gas in the field. App. 0498.

The Smiths intervened in the FERC proceeding and opposed the issuance of the certificate. The Smiths argued that their agreement with Chestnut Ridge only allowed Chestnut Ridge to employ depleted strata for storage and the strata being employed for storage by Chestnut Ridge were not depleted.

Although FERC found that the proposed storage reservoir was not depleted and that building the storage field would be inconsistent with the parties' agreement, the agency issued a certificate for the project stating that the Smiths could seek compensation in state court. App. 0460. When the Smiths filed their case in state court, however, Chestnut Ridge filed a counterclaim for slander of title and breach of contract based on the Smiths' filings with FERC.

The counterclaim is barred under both state and federal law. The litigation privilege recognized by West Virginia (and every other state) protects parties from claims based on their participation in judicial and agency proceedings, and the *Noerr-Pennington* doctrine based on federal law protects parties from claims arising from petitioning activity. Although no facts are in dispute on the application of the litigation privilege and *Noerr-Pennington* doctrine, the circuit court—without explanation—denied the Smiths' motion for summary judgment and ordered the case to trial. App. 0001.

Because the litigation privilege and *Noerr-Pennington* doctrine provide the Smiths with immunity from Chestnut Ridge's claims, the circuit court's denial of summary judgment is reviewable under the collateral order doctrine. Upon review, the Court should reverse the order of the circuit court and enter final judgment in favor of the Smiths.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Although this is not a close case, it involves a question of fundamental importance to all citizens—their right to participate in judicial and agency proceedings without fear or threat of retaliatory claims by parties on the other side. The Court should therefore allow argument under Rule 19 and reaffirm by published decision that the litigation privilege and *Noerr-Pennington* doctrine bar claims against citizens seeking to redress their grievances in proceedings before the nation's courts and regulatory agencies.

V. ARGUMENT

A. RIGHT TO REVIEW

The circuit court's order denying immunity to the petitioners is immediately reviewable under this Court's collateral order doctrine. *Robinson v. Pack,* 223 W. Va. 828, 832-33, 679 S.E.2d 660, 664-65 (2009). In *Robinson*, the Court held: "A circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory order which is subject to immediate appeal under the 'collateral order doctrine.'" *Id.* at Syl. Pt. 2. An order denying immunity is immediately reviewable because it "(1) conclusively determines the disputed controversy, (2) resolves an important issue completely separate from the merits of the action[], and (3) is effectively unreviewable from a final judgment." *Id.* at 832, 679 S.E.2d at 664 (internal quotations

omitted) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), and *Durm v. Heck's, Inc.*, 184 W. Va. 562, 566, 401 S.E.2d 908, 912 n.2 (1991)). As the Court explained, "[p]ostponing review of a ruling denying immunity to the post-trial stage is fruitless . . . because the underlying objective in any immunity determination (absolute or qualified) is immunity from suit." *Robinson,* 223 W. Va. at 833, 679 S.E.2d at 665. A party with immunity has "'the right not to be subject to the burden of trial.'" *Id.* (quoting *Hutchinson v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 654 (1996)). The right to an interlocutory appeal in such circumstances has been recognized and applied in numerous cases. *See, e.g.*, *West Virginia Dep't of Health & Human Res. v. V.P.*, 241 W. Va. 478, 484, 825 S.E.2d 806, 812 (2019); *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 525, 745 S.E.2d 556, 563 (2013); *Jarvis v. West Virginia State Police*, 227 W. Va. 472, 475-76, 711 S.E.2d 542, 545-46 (2010); *Crihfield v. Brown*, 224 W. Va. 407, 411, 686 S.E.2d 58, 62 (2009).

B. STANDARD OF REVIEW

The Court employs a de novo standard of review for summary judgment orders. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995); *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). Thus, the Court reviews a grant or denial of summary judgment under the same standard as the circuit court. *Williams*, 194 W. Va. at 58, 459 S.E.2d at 335.

When the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment "shall be rendered forthwith." W. Va. R. Civ. P. 56(c). To overcome a motion for summary

judgment, the opposing party "must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Painter*, 192 W. Va. at 192-93, 451 S.E.2d at 758-59 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Once the moving party has shown that there is no genuine issue of material fact, "the burden of production shifts to the nonmoving party 'who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).'" *Williams*, 194 W. Va. at 60, 459 S.E.2d at 337 (1995) (quoting *Crain v. Lightner*, 178 W. Va. 765, 769, 364 S.E.2d 778, 782 n.2 (1987)). "The evidence illustrating the factual controversy cannot be conjectural or problematic. It must have substance . . . ." *Id.* at 60, 459 S.E.2d at 337.

"Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Id.* at 59, 459 S.E.2d at 336; Syl. Pt. 3, *Pingley v. Perfection Plus Turbo-Dry, LLC*, 231 W. Va. 553, 746 S.E.2d 544, (2013).

C. THE COUNTERCLAIM IS BARRED BY THE LITIGATION PRIVILEGE

The law on the litigation privilege is "perfectly clear"—and it has been for a long time. *Farber v. Dale*, 182 W. Va. 784, 786, 392 S.E.2d 224, 226 (1990); *see*

Higgins v. Williams Pocahontas Coal Co., 103 W. Va. 504, 138 S.E. 112, 113 (1927). As the Court explained in *Collins v. Red Roof Inns, Inc.*, 211 W. Va. 458, 462, 566 S.E.2d 595, 599 (2002) (quoting *Restatement* (Second) *of Torts* § 587 (1977)), the litigation privilege is founded upon the principle that parties should have "'the utmost freedom of access to the courts of justice for the settlement of their private disputes.'" "'[T]he public interest in the freedom of expression . . . is so vital and necessary to the integrity of our system that it must be made paramount to the right of the individual of a legal remedy where he or she has been wronged thereby.'" *Id.* at 464, 566 S.E.2d at 601 (quoting 50 *Am. Jur. 2d*, Libel and Slander § 229 (1995)). For these reasons, the privilege is "absolute." *Id.* at 461, 566 S.E.2d at 598. And it applies equally to both judicial and quasi-judicial proceedings. *Id.* (internal citations omitted); *Farber*, 182 W. Va. at 786, 382 S.E.2d at 226.[3]

The Court reaffirmed these principles only a few days ago. In *Zsigray v. Langman*, ___ W. Va. ___, ___ S.E.2d ___, 2020 WL 1502272 (Mar. 27, 2020), the Court held that "[j]udicial fact witnesses enjoy absolute immunity from defamation claims based on their trial testimony where such testimony is relevant to the judicial proceeding." Syl. Pt. 8. The Court noted that immunity allows witnesses to speak freely without threat of being sued for what they say. *Id.* at *7.

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3. The litigation privilege is subject to limited exceptions. One is a claim for malicious prosecution and the other is a claim for fraud. *Clark v. Druckman*, 218 W. Va. 427, 433, 624 S.E.2d 864, 870 (2005). Chestnut Ridge does not allege that either of these exceptions applies.

In reaching its decision, the Court relied upon its earlier holding in *Collins*, which established absolute immunity for statements made by parties to potential litigation. *Id.* (citing *Collins*, Syl. Pt. 2, 211 W. Va. 458, 566 S.E.2d 595). The immunity for both parties and witnesses, the Court explained, is "'based upon the public interest of encouraging access to the court system while facilitating the truth-seeking process therein.'" *Id.* at *8. (quoting *Collins*, 211 W. Va. at 464, 566 S.E.2d at 601).

Federal courts applying West Virginia law, have likewise recognized and ruled that "[n]o civil remedy may be had for any hardship which may arise from an absolutely privileged communication, even if the absolutely privileged communication is made maliciously." *Riccobene v. Scales*, 19 F. Supp. 2d 577, 584 (N.D. W. Va. 1998). Likewise, in *BriovaRx, LLC v. Johnson*, No. 3:13-12049, 2014 WL 12744704, *2 (S.D. W. Va. July 2, 2014), the federal court explained that the privilege protects both communications and conduct in litigation and bars a claim for tortious interference with contract.

The litigation privilege is not unique to West Virginia. It is recognized throughout the United States. As the *Restatement* (Second) *of Torts* § 587 states:

> A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish a defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.

In support of this rule, the *Restatement* cites hundreds of cases from across the country. *Id.*

All of the allegedly defamatory statements in this case were made by a party—the Smiths—in the course of a quasi-judicial proceeding—the FERC case. App. 0432, 2479, 2494, 2507. Under the controlling decisions of this Court, which the circuit court did not address or even acknowledge, these statements are absolutely privileged. *Collins*, 211 W. Va. at 462, 566 S.E.2d at 599; *Farber,* 182 W. Va. at 786, 392 S.E.2d at 226.

Chestnut Ridge now complains about the statements made by the Smiths, but Chestnut Ridge did not contest the Smiths' participation in the FERC proceeding or the accuracy of what they Smiths said to FERC. In their motion to intervene and protest, the Smiths maintained that the area proposed for storage was not depleted and that the parties' Gas Storage Addendum only allows storage in depleted strata. App. 0432. In response, Chestnut Ridge informed the Commission that it had "no objection" to the Smiths' intervention. App. 0438. Chestnut Ridge did not contend that the field was depleted. Rather, Chestnut Ridge argued that the field was "nearly depleted." App. 0440. Chestnut Ridge informed the Commission that it would compensate the Smiths for the gas remaining in place. App. 0443. "Under this approach," Chestnut Ridge said, "the Smiths will receive the value of the gas remaining in place as if it had actually been produced to economic depletion . . . ." App. 0444.

In issuing the certificate, FERC noted that both parties agreed that "the production field is not yet depleted," and that the project "would be inconsistent with the provisions of the parties' gas storage addendum." App. 0476. Nevertheless, the Commission ruled that compensation would have to be determined by the courts. *Id.*

When the Smiths filed their suit in state court, however, Chestnut Ridge reversed course. Chestnut Ridge filed a counterclaim alleging that the Smiths' filings in the FERC proceeding slandered Chestnut Ridge's title and constituted a breach of contract. App. 0378. Chestnut Ridge sued the Smiths for making statements that Chestnut Ridge did not dispute before FERC and that FERC ultimately found to be true.

In an attempt to justify its counterclaim, Chestnut Ridge has argued that the litigation privilege does not apply to claims for slander of title or breach of contract. Chestnut Ridge is wrong on both counts.

Chestnut Ridge cites *TXO Prod. Corp. v. Alliance Resource Corp.*, 187 W. Va. 457, 462, 466, 419 S.E.2d 870, 875, 879 (1992), for its contention that the litigation privilege does not apply to claims for slander of title. But *TXO* does not say that. The basis for the slander of title claim in *TXO* was the recording of a bogus quitclaim deed. *Id.* at 464-65, 419 S.E.2d at 877-78. As the opinion explains,

> The jury found that by recording a quitclaim deed which it knew to be frivolous, TXO satisfied the requirements for slander of title.
>
> * * *
>
> [T]he evidence clearly shows that TXO intentionally and maliciously recorded a quitclaim deed that *it knew to be without any basis in fact* . . . .

Id. at 466, 468, 419 S.E.2d at 879, 881 (emphasis in original). While TXO later filed a declaratory judgment suit based on the bogus deed, the slander of title was recording the deed, not the filing of the lawsuit.

TXO does not discuss the litigation privilege as a defense because the defense was inapplicable to the recording of a slanderous deed. Cases from across the

country make it clear, however, that the litigation privilege does apply when a plaintiff attempts to base a slander of title claim on a legal proceeding. *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So.2d 380, 384 (Fla. 2007); *Raymond v. Lyden*, 728 A.2d 124, 126 (Me. 1999); *Sailboat Key, Inc. v. Gardner*, 378 So.2d 47, 49 (Fla. App. 1979); *Isobe v. Sakatani,* 279 P.3d 33, 48 (Haw. App. 2012); *Blaurock v. Mattice Law Offices,* No. 64494, 2015 WL 3540903, *1 (Nev. App. May 27, 2015); *Pond Place Partners, Inc. v. Poole*, 567 S.E.2d 881, 897 (S.C. App. 2002); *Bennett v. McKibben*, 915 P.2d 400, 404 (Okla. App. 1996).

Chestnut Ridge has never attempted to explain why the litigation privilege would apply to claims for slander but not to claims for slander of title. As the *Restatement* (Second) *of Torts* § 635 makes clear, the litigation privilege protects against any claims for "injurious falsehood." Slander of title is a type of injurious falsehood. *Id.* § 624; *see Isobe*, 279 P.3d at 48 (holding that the litigation privilege applies to the claim of slander of title). Thus, the privilege protects a party from "any civil liability" based on statements made in a proceeding." *Doe v. Nutter, McClennen & Fish*, 668 N.E.2d 1329, 1333 (Mass. App. 1996). "To rule otherwise would make the privilege valueless . . . ." *Id.*; *see Hoover v. Van Stone*, 540 F. Supp. 1118, 1124 (D. Del. 1982) (stating that by allowing "artful pleading" courts would make the privilege an "empty gesture"); *Rainer's Dairies v. Raritan Valley Farms,* 117 A.2d 889, 895 (N.J. 1955) (rejecting an attempt of the plaintiff to avoid privilege by using "a different label" for its claims).

For these reasons, cases from across the country have applied the litigation privilege to breach of contract claims, as well as to tort claims. *Rain v. Rolls-Royce*

Corp., 626 F.3d 372, 378-79 (7th Cir. 2010) (finding that application of the privilege to a contract claim would advance the purpose of the privilege); *Kelly v. Golden*, 352 F.3d 344, 350 (8th Cir. 2003) (noting that public policy favored application of privilege to contract claims); *Rickenbach v. Wells Fargo Bank, N.A.*, No. 08-2687 (JBS/KMW), 2010 WL 920869, at *5 (D.N.J. Mar. 8, 2010) (applying privilege where contract claims arose from same facts as other barred claims); *O'Brien & Gere Eng'rs, Inc. v. City of Salisbury*, 135 A.3d 473, 485 (Md. Ct. App. 2016) (concluding that privilege would be meaningless if a party could avoid it simply by drafting a claim with a contract label); *Tulloch v. JPMorgan Chase & Co.*, No. H-05-3583, 2006 WL 197009, at *5 (S.D. Tex. Jan. 24, 2006) (finding that privilege applied where contract claim was based on allegedly defamatory statements); *cf. Sun Life Assurance Co. of Canada v. Imperial Premium Fin., LLC*, 904 F.3d 1197, 1219 (11th Cir. 2018) (holding the litigation privilege did not apply where a contract provision prohibited the lawsuit from being filed).[4]

The alleged breach of contract by the Smiths arises entirely from filings they made in the FERC proceeding. In that proceeding, the Smiths stated that the Gas Storage Addendum only allows the lessee to use depleted strata for storage. Although Chestnut Ridge did not dispute this statement when made, it now contends that the

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4. In the circuit court, the Smiths moved for summary judgment based on the litigation privilege, the *Noerr-Pennington* doctrine, waiver and estoppel, truth, lack of damages, and the statute of limitations. Without explanation, the circuit court denied the Smiths' motion on all these defenses. The Smiths have—and exercise—their right to immediate review of their immunity defenses. The Smiths reserve all their other defenses, which are also dispositive of Chestnut Ridge's claims.

statement is a slander of title and a breach of contract. Putting aside the truth of what the Smiths said, the litigation privilege is an absolute defense to Chestnut Ridge's claims.

D. THE COUNTERCLAIM IS BARRED BY THE *NOERR-PENNINGTON* DOCTRINE

The *Noerr-Pennington* doctrine was originally developed to provide antitrust immunity to those who engage in petitioning activity. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *Harris v. Adkins*, 189 W. Va. 465, 468-69, 432 S.E.2d 549, 552-53 (1993); *Baldau v. Jonkers*, 229 W. Va. 1, 7, 725 S.E.2d 170, 176 (2011). Today, the doctrine has been extended to protect against any claims arising from petitioning activity. *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 310 (4th Cir. 2003). Petitioning activity includes filings in litigation and in regulatory proceedings. *Id.* at 312; *see California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

Filings in litigation are privileged unless they are a "sham." *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 58 (1993). In order for a filing to be a sham, it must have been objectively baseless and it must have been made for a purpose other than to achieve a favorable decision. *Id.* at 60-61. An objectiveless baseless filing is one that no reasonable litigant could expect to succeed. *Id.* at 60; *see Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.,* 129 F. Supp. 2d. 578, 592-97 (W.D.N.Y. 2000), *aff'd*, 229 F.3d 1135 (2d Cir. 2000), *cert. denied*, 532 U.S. 1037 (2001) (applying *Noerr-Pennington* doctrine to filings in a FERC proceeding and

dismissing a collateral suit based on those filings). Chestnut Ridge does not contend that the sham exception applies. Chestnut Ridge is in no position to do so given the fact that it did not contest the accuracy of the Smiths' statements to FERC or FERC's decision adopting those statements. App. 0438, 0443, 0476.

The Smiths had a right under federal law to participate in the FERC proceeding. Chestnut Ridge itself recognized that right, telling the Commission that it had "no objection" to the Smiths' intervention. App. 0438. The Smiths' right to participate in the proceeding and to petition the federal agency for relief would be materially and unfairly compromised if Chestnut Ridge were now allowed to maintain state law claims against the Smiths for what they said. Therefore, the counterclaim is independently barred by the *Noerr-Pennington* doctrine and federal law.

E. THE GAS STORAGE ADDENDUM DOES NOT MAKE THE LESSEE THE SOLE JUDGE OF WHEN AND WHETHER STRATA ARE DEPLETED

In *West Virginia Dep't of Health & Human Services v. Payne*, 231 W. Va. 563, 746 S.E.2d 554 (2013), the court held that a circuit court should state the findings that justify denial of summary judgment based on immunity. Syl. Pt. 4. Here, the circuit court made only one finding, and that finding is clearly erroneous and insufficient to support the denial of immunity.

The November 8, 2019, order states: "The Court finds that Chestnut Ridge Storage LLC is the sole judge when/whether strata are depleted and gas can be stored." App. 0001. This finding is (1) contrary to the plain language of the Gas Storage Addendum, (2) contrary to the representations of the lessee when the Addendum was

made, (3) contrary to two prior rulings by Judge Clawges in this case, and (4) contrary to Chestnut Ridge's earlier position on this issue.

Paragraph 2 of the Addendum grants to the lessee the right to store gas on the property with a condition:

> 2. Lessor grants to Lessee the exclusive *right to employ any depleted oil or gas stratum* underlying the Lands for the storage of gas, and may for this purpose reopen and restore to operation any and all abandoned wells on the Leased Premises which may have penetrated said depleted stratum, or may drill new wells thereon for the purpose of freely introducing and storing gas in such stratum and recovering the same therefrom.

App. 0419 (emphasis added). Under the plain language of paragraph 2 of the Addendum, the right to employ a stratum for storage arises only when that stratum is depleted. Until depletion of the stratum occurs, the lessee does not have any storage rights in the stratum. There is nothing in this provision making the lessee the sole judge of when or whether a stratum is depleted.

Paragraph 3 of the Addendum provides that *if* gas is being stored on the leased premises following cessation of production, the term of the Lease shall continue. App. 0420. This is an exception to the general rule that an oil and gas lease terminates upon the cessation of production. *McCullough Oil, Inc. v. Rezek*, 176 W. Va. 638, 645, 348 S.E.2d 788, 795 (1986). Paragraph 3 states:

> 3. It is agreed that the cessation of production from wells on the Leased Premises or upon other lands unitized therewith after the expiration of the original term of the Lease, shall not terminate the Lease whether the pooling units have been dissolved or not, if the Lands are used for the storage of gas prior to the plugging and abandonment of wells

> from which oil or gas has been produced . . . . It is understood that a well need not be drilled on the Leased Premises to permit the storage of gas, and it is agreed that Lessee shall be the sole judge as to whether gas is being stored within the Leased Premises and that its determination shall be final and conclusive.

App. 0420. In this provision, the parties agreed that the lessee would be the sole judge of *whether gas was being stored.* However, the language of paragraph 3 has not been an issue because production has never ceased from the undepleted strata. Neither the lessee nor the lessors have ever contended that gas is being stored on the property.

Thus, while the lessee is the sole judge as to "whether gas is being stored," the Addendum does not make the lessee the sole judge as to whether strata are depleted. The fact that the parties to the Addendum included the "sole judge" language in paragraph 3 but not paragraph 2 is clear textual support for the proposition that the lessee is not the sole judge as to when or whether strata are depleted.

The rules for interpretation of leases are generally the same as for other contracts. *Chesapeake Appalachia, L.L.C. v. Hickman,* 236 W. Va. 421, 436, 781 S.E.2d 198, 2013 (2015). The Court will enforce plain and unambiguous terms of the agreement as written. Syl. Pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962). The Court will construe the agreement "as a whole" and give effect to "all parts" of the agreement. Syl. Pt. 3, *Moore v. Johnson Serv. Co.*, 158 W. Va. 808, 219 S.E.2d 315 (1975). The Court will also read the terms of the agreement "in their context." *Hickman*, 236 W. Va. at 436, 781 S.E.2d at 213. The Court will not "alter, pervert or destroy the clear meaning and intent of the parties as plainly expressed in their

written contract or to make a new contract for them." *Cotiga*, 147 W. Va. at 493, 128 S.E.2d at 633.

The separation of the issues regarding depletion and storage into different numbered paragraphs with only one of them containing the "sole judge" language is unambiguous evidence of the parties' intent. As a result, the circuit court's finding is contrary to the plain meaning of the Addendum.

The circuit court's finding is also contrary to what the lessee told the Smiths when it solicited the Gas Storage Agreement from them. The lessee represented that the Addendum only allowed the lessee to store gas in "a depleted reservoir (empty container)." App. 0426. The lessee further represented that the Addendum "will not diminish the value of the oil and gas if and when the Leased Premises is utilized for Storage." *Id.* The circuit court's finding makes these statements material misrepresentations. *See* Syl. Pt. 1, *Kidd v. Mull*, 215 W. Va. 151, 595 S.E.2d 308 (2004); Syl. Pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981).

Judge Scudiere's ruling is also in direct conflict with the prior rulings in this case. In his order interpreting the Lease, Judge Clawges found that the Gas Storage Addendum "grants to the Lessee the right to store gas in any depleted oil or gas stratum." App. 0388. Judge Clawges further found that "the industry definition of depleted was contemplated by the parties." *Id.* This Court affirmed that decision. App. 0399.

While Judge Clawges did not specify the content of the industry definition, there is no plausible argument that the industry definition makes the lessee the sole judge as to when depletion occurs. Were that the case, there would have been no point in

Judge Clawges addressing the definitional issue at all inasmuch as Chestnut Ridge could simply declare the strata to be depleted, irrespective of the facts.

During the more than eight years that this litigation has been pending, Chestnut Ridge itself recognized, until late last year, that the strata had to be depleted before they could be used for storage. Further, Chestnut Ridge never contended that it could unilaterally declare strata to be depleted whether or not they actually are. To the contrary, Chestnut Ridge recognized that paragraph 2 was a "limitation" on its right to store gas—a reservoir cannot be used for storage until it is depleted. App. 0154. Nor did Chestnut Ridge contend that it was the sole judge as to whether strata are depleted. Instead, Chestnut Ridge, following the ruling of Judge Clawges, told the Court that an "industry definition" of depleted should apply. App. 0151.

Chestnut Ridge proposed that, under the industry definition, strata are not depleted until "'all the recoverable oil and gas has been removed.'" App. 0151 (citing 8 *Williams & Meyers Oil and Gas Law*, Manual of Terms, "Depleted formation"). This is an objective standard, not a subjective one. Thus, the circuit court's ruling is contrary to Chestnut Ridge's own prior position in the case.

With respect, Judge Scudiere's finding is simply not sustainable. The finding is contrary to the plain language and structure of the Addendum; it is contrary to representations made by the lessee when the Addendum was made; it negates prior rulings in this case; and it directly contradicts the prior position of Chestnut Ridge on this very issue. Judge Scudiere held that it does not matter whether or not the strata are actually depleted. All that matters is whether the lessee *deems* them to be depleted.

Judge Scudiere did not cite any evidence or cases to support her finding. Nor did she explain how this finding supported her decision to deny summary judgment to the Smiths. Therefore, this finding by Judge Scudiere should be reversed.

VI. CONCLUSION

Interested parties, like the Smiths, have the right to appear in a FERC proceeding and to state their views on a project without threat of retaliation by the applicant. In this case, Chestnut Ridge is suing the Smiths for what they said in the FERC proceeding. The statements that the Smiths made are protected under both state and federal law. The Court should therefore reverse the decision of the circuit court and dismiss the claims of Chestnut Ridge with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to W. Va. R. Sup. Ct. 37, I hereby certify that a true copy of the foregoing Brief of Petitioners has been mailed and emailed to:

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and that a copy of the Appendix has been mailed to Ms. Kahle and to Mr. Persinger this 7th day of April, 2020.

Wade W. Massie