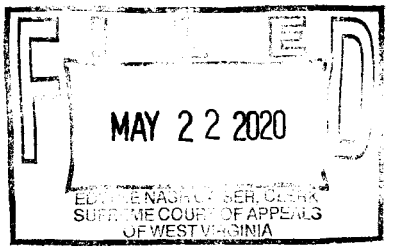
No. 19-1076

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



THOMAS W. SMITH, et al.

Plaintiffs Below, Petitioners,

Vs.

CHESTNUT RIDGE STORAGE, LLC,

Defendant Below, Respondent.

BRIEF OF RESPONDENT CHESTNUT RIDGE STORAGE, LLC

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INTRODUCTION

Petitioners Thomas W. Smith et al are lessors, and Respondent Chestnut Ridge Storage, LLC[1] (hereafter CRS) is lessee, of a Gas Storage Addendum (hereafter GSA) to an oil and gas lease (hereafter Lease) which covers several thousand acres. The sole claim remaining in this civil action, filed in 2011 in Monongalia County, is CRS's counterclaim that Petitioners breached the terms of the GSA, as well as slandered CRS's title to the GSA, by making false statements concerning CRS's contract rights in contested administrative proceedings before the Federal Energy Regulatory Commission (hereafter FERC). As a proximate result, the issuance of CRS's Certificate of Public Convenience and Necessity (hereafter Certificate), a requirement for developing the planned natural gas storage field, was delayed and ultimately, the Certificate was lost.

Because the GSA is a contract, Petitioners have an implied duty to act in good faith and fair dealing, which means refraining from actions which would destroy or injure CRS's right to receive the fruits of the contract: storage of natural gas in depleted strata.[2] Accordingly, Petitioners should not be permitted to make false statements in a contested proceeding which constitute not only anticipatory breaches of the GSA but also violation of the duty of good faith and fair dealing, then turn around and seek to shield themselves from those violations by claiming immunity.

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[1] Chestnut Ridge Storage, LLC is a limited liability company formed for the purpose of developing a natural gas storage field.

[2] 'Strata' is typically defined as a layer of sedimentary rock. Although the parties to the GSA intended the phrase 'depleted' to be consistent with the industry definition [Appendix at 0191], the precise industry definition as well as its application to the land covered by the GSA remains in dispute.

The Noerr-Pennington doctrine does not apply here, because the nature of Petitioners' FERC intervention was not the sort of First Amendment petitioning activity that could potentially result in restraint of trade or monopoly. Further, the protection provided under this doctrine is typically from antitrust, or Sherman Act, claims, not breach of contract or slander of title.

Although immunity under the litigation privilege has been extended to protect *parties* and *witnesses*, it has not been extended to apply to *intervenors* such as Petitioners in the subject FERC proceedings. But even if it had, public policy supports an exception to the litigation privilege in this circumstance, because a party to a contract should not be permitted to make statements in a judicial or quasi-judicial proceeding that constitute not only anticipatory breaches of that contract, but also violation of the duty of good faith and fair dealing, then be absolutely shielded from the legal ramifications by the litigation privilege.

This is an interlocutory appeal, limited to the question of whether the trial court erroneously failed to apply one or both of the proffered immunity defenses and grant summary judgment to Petitioners on the counterclaim.[3] Respondent does not question this Court's jurisdiction to review the immunity defenses, the first two assignments of error, but the trial court properly denied summary judgment. Although the trial court concluded that questions of

[3] This Court has jurisdiction to address immunity defenses prior to conclusion of the litigation under the collateral order doctrine: " "[a]n interlocutory order would be subject to appeal under [the collateral order] doctrine if it `(1) conclusively determines the disputed controversy, (2) resolves an important issue completely separate from the merits of the actions, and (3) is effectively unreviewable on appeal from a final judgment.'" " [Internal citations omitted.] *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660, 664 (2009). In *Robinson*, the Court concluded that failure to apply an immunity defense was a collateral order over which this Court has jurisdiction to review in an interlocutory appeal.

fact exist as to whether those defenses apply, as Respondent argued below and restates here, the defenses do not apply to this situation as a matter of law.

As to the third assignment of error, Petitioners do not proffer any basis for this Court's jurisdiction at this interlocutory stage, because there is none. The third alleged error is a declaratory ruling as to the meaning of a phrase in the GSA. This ruling is not presently appealable because it does not meet the criteria for a collateral order, nor is there any other basis for its review at this intermediate point in the litigation. But notwithstanding its present non-reviewability, the ruling was proper and is consistent with other declaratory rulings in this case.

STATEMENT OF THE CASE

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, Respondent Chestnut Ridge Storage, LLC (hereafter CRS) makes the following statement, in order to correct general and specific inaccuracies and omissions in Petitioners' Statement of the Case.

As to inaccuracies, Petitioners' Statement of the Case goes beyond providing the Court with the requested "statement of the facts of the case that are relevant to the assignments of error." Rule 10(c)(4). As to omissions, Petitioners failed to include the specific statements identified by CRS as forming the basis for its pending counter-claim, as to which Petitioners claim to have immunity.

The first two assignments of error, which are properly before this Court on this interlocutory appeal, address the failure of the Circuit Court to grant summary judgment to Petitioners based on immunity defenses. While an overview of the GSA and the Lease are

necessary to fully understand these assignments of error, the following inclusions in Petitioners' Statement of the Case go well beyond relevancy on those issues:

→ At page 2 of *Brief of Petitioners*, parole evidence as to what Petitioners were allegedly told about the proposed GSA before it was executed is not relevant to this appeal nor frankly, to anything in this litigation;

→ At pages 4-5 of *Brief of Petitioners*, statements as to alleged findings made by FERC, and/or FERC's acknowledgment of the parties' positions in its rulings in the subject contested proceedings, has no relevancy to this appeal nor elsewhere in the litigation;

→ At page 8 of *Brief of Petitioners*, the three paragraphs as to testimony given by CRS's Rule 30(b)(7) representative is not relevant to this appeal; and

→ At pages 9-12 of *Brief of Petitioners*, a review of the experts disclosed by Petitioners, along with their respective proposed opinions, and the statement that because "Chestnut Ridge did not elect to depose any of [the Petitioners' three] experts. What they have to say stands unimpeached and uncontradicted[,]" *Brief of Petitioners* at 10, are not only irrelevant to this appeal, but the inference is inaccurate.

In April 1987, the Petitioners entered into the Lease with Fox Oil & Gas, Inc. (the Lease was subsequently assigned to Oil & Gas Management, Inc. [hereafter OGM]) covering 4,572 acres. Appendix at 0413. Petitioners entered into the subject GSA to the Lease with OGM in January 1993. Appendix at 0419. In July 2007, CRS took a partial assignment from OGM of

certain specified strata underlying approximately 2,300 acres covered by the GSA. Appendix at 0905. In December 2007, CRS filed an application with the FERC seeking issuance of a Certificate to enable it to construct and ultimately operate a natural gas storage facility, with the bulk of intended storage stratum held by CRS under the subject GSA. Appendix at 0469.

It is beyond dispute that obtaining the FERC Certificate and then constructing a natural gas storage field were prerequisites to CRS's ability to store gas in the strata underlying Petitioners' land in conformance with the GSA. It is also undisputed that Petitioners were aware of these prerequisites. Appendix at 0248. Petitioners also knew that at the time CRS filed the FERC application in 2007, CRS had the right to store gas pursuant to the GSA. Appendix at 0247.

Notwithstanding their knowledge of CRS's contractual storage rights and of the necessity for CRS to obtain a Certificate in order to store gas in conformance with the GSA, it is undisputed that in public filings in the contested case regarding CRS's Certificate application before FERC, Petitioners made the following false statements:

→ "This is not a case where the applicant [CRS] already possesses the right to store gas on the landowner's [Petitioners'] property [. ...] In this case, [CRS] has agreed *not* to store gas on the landowner's property until the field is depleted." Appendix at 0274.

→ "Chestnut Ridge has an existing contract that precludes it from using the Smith property for a gas storage facility." Appendix at 0278.

→ "Chestnut Ridge is contractually obligated *not* to use the Smith lands for a storage facility until all the gas in the lands affected by the storage facility is fully depleted." Appendix at 0281.

→ "Chestnut Ridge is legally disabled from seeking the Certificate because it is bound by a contract, the Gas Storage Addendum, which permits it to use only 'depleted oil or gas stratum underlying the Lands for the storage of gas....' (Gas Storage Addendum at [Paragraph] 2.)" Appendix at 0287.

→ "Specifically, Chestnut Ridge is contractually obligated to the Smiths not to construct any storage field on the Smiths' property unless and until the gas on the property is fully depleted. ... The Smiths therefore stand on their protest and pray that the application be denied or conditioned on full depletion of all gas on the Smiths' property." Appendix at 0294, 0295-96.

SUMMARY OF ARGUMENT

Petitioners are not entitled to litigation immunity for their statements before FERC. The Noerr-Pennington doctrine does not apply to this case because CRS's counterclaim is for breach of contract and slander of title, not anti-trust or a business tort. The litigation privilege does not apply because the Petitioners were intervenors in the FERC proceedings, not witnesses or parties, and the privilege has not been extended to apply to intervenors.

Moreover, even if the litigation privilege extended to intervenors in general, an exception should prohibit its application in this case. The statements by the Petitioners before FERC were not bare slanderous statements; rather, they were made in anticipatory breach of a contract

between the parties and in violation of the duty of good faith and fair dealing. As such, countervailing public policies weigh in favor of applying an exception to the litigation privilege.

This Court does not presently have jurisdiction to review the Circuit Court's interlocutory declaratory ruling because it is not a "collateral order." Notwithstanding, the ruling is correct and consistent with other declaratory rulings by the Circuit Court. If the issue was properly before this Court, the Circuit Court's ruling would be reviewed *de novo*. Following such review, this Court would conclude, as did the Circuit Court, that the most reasonable and internally consistent meaning of the subject language of the GSA is that the Lessee has the sole right to determine when a stratum is depleted.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

CRS takes no position on whether oral argument would aid in the decision-making process.

ARGUMENT

1. Litigation Immunity is Unavailable to Petitioners

A. This Court has not expanded the scope of litigation immunity to include intervenors to litigation

The Petitioners argue that the counterclaims are barred by the litigation privilege, a doctrine which provides absolute immunity for certain statements made or actions taken in the context of litigation or other judicial proceedings. But because Petitioners were intervenors in

the contested FERC proceeding in which the wrongful statements were made, litigation privilege immunity is not available to them.

In *Collins v. Red Roof Inn*, 211 W. Va. 458, 566 S.E.2d 595 (2002), this Court addressed a certified question from a Federal district court and concluded that the litigation privilege would be available to provide immunity for pre-litigation statements made by a putative party to one's adversary about a third party. That narrow circumstance is not applicable here, but in reaching its decision, the *Collins* Court reviewed West Virginia law on absolute privilege, noting among other things that "[b]ecause an absolute privilege removes all possibility of remedy for a wrong that may even be committed with malice, such a privilege is permitted only in limited circumstances." *Id.*, 566 S.E.2d at 598. Quoting from *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 706, 320 S.E.2d 70, 78 (1983), the *Collins* Court acknowledged that " '[w]ith a few exceptions ... absolutely privileged communications are limited to legislative, judicial and quasi-judicial proceedings and other acts of the State.' *Parker v. Appalachian Electric Power Co.*, 126 W.Va. 666, 672, 30 S.E.2d 1, 4 (1944)." *Collins*, 566 S.E.2d at 598.

A few years later, in *Wilson v. Bernet*, 218 W. Va. 628, 625 S.E.2d 705 (2005), this Court held that the privilege could provide civil immunity for adverse expert witnesses: "An adverse expert witness enjoys civil immunity for his/her testimony and/or participation in judicial proceedings where such testimony and/or participation are relevant to said judicial proceedings." Syl. Pt. 2, *id.* The Court was very clear that the scope of immunity adopted in *Wilson* applied only to adverse expert witnesses ("Due to the facts involved in the instant proceeding, our discussion herein is necessarily limited to the immunity to be afforded to adverse or hostile expert witnesses[,]" *Wilson*, 625 S.E.2d at 715, n.18), and based this holding on reasons very

specific to such witnesses ("perhaps the most compelling reason to grant adverse expert witnesses immunity for their testimony and trial participation is the built-in mechanism, in the litigation process, itself, to ascertain the truth and credibility of an adverse witness's testimony[,]" *id.* at 712).

Just a few months ago, in *Zsigray v. Langman*, No. 18-0461 (W. Va. March 27, 2020), this 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." *Id.*, Syl. Pt. 8. In reaching this holding, the Court reviewed principles in support of witness immunity as discussed in *Wilson*, 625 S.E.2d 705, and *Briscoe v. LaHue*, 460 U.S. 325 (1983), among others. But as in prior cases, the Court made clear that its grant of immunity was limited to judicial fact witnesses.

Litigation privilege in West Virginia has not been, nor should it now be, enlarged to provide absolute immunity for *intervenors* in a judicial or quasi-judicial proceeding, such as Petitioners. The reasons for which the privilege has been extended by this Court to *parties* and to *witnesses* do not apply to intervenors to litigation. "The Court in *Collins* noted that, in general, absolute privilege attaches to a party in a judicial proceeding "based upon the public interest of encouraging access to the court system while facilitating the truth-seeking process therein." 211 W. Va. at 464, 566 S.E.2d at 601 (Internal citation omitted.) We find this rationale applies equally to the present case [involving a fact witness]." *Zsigray*, No. 18-0461 at 16-17. However, this same rationale does not apply to extending the privilege to intervenors, such as Petitioners.

B. Even if quasi-judicial intervenors could seek the defense of litigation privilege, because of the nature of this counterclaim, an exception should apply

Even if this Court should consider expanding the litigation privilege to intervenors in judicial or quasi-judicial proceedings, nevertheless, because of the nature of CRS's counterclaim, an exception to application of the privilege should apply in this circumstance.

The Petitioners owed CRS a duty of good faith and fair dealing with respect to the GSA, and their relentless and unequivocal opposition to CRS's request for a FERC Certificate violated those duties. Further, Petitioners' misrepresentations to FERC (repeatedly asserting that CRS had no right to store gas under the GSA unless and until all gas was fully depleted) is incontrovertible evidence of Petitioners' anticipatory breach of the GSA: not only were such misrepresentations false, but "full depletion" would be impossible to achieve, manifesting Petitioners' clear and unequivocal repudiation of the GSA.

CRS's claim for slander of title is based upon the same wrongful conduct: that in repeatedly and knowingly asserting an improper and inaccurate interpretation of the GSA to FERC, Petitioners slandered CRS's title to its gas storage rights granted under the GSA, resulting in delay in issuance of the initial FERC Certificate, and denial of the extension of the Certificate sought by CRS two years later, proximately resulting in damages to CRS.

> An 'anticipatory breach' is defined as 'one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evincing an intention to refuse performance in the future. 17A Am. Jur. 2d Contracts, §448.

Stiles Family Ltd. Partnership, III, LLP v. Riggs and Stiles, Inc., Supreme Court of Appeals of West Va., Memorandum Decision, Case No. 16-0220, Nov. 18, 2016, at 3. "This Court has held that '[a]nticipatory repudiation and breach of contract, sufficient to give a cause of action, or to use as a defense to suit, by the repudiating party, must be *unequivocal, absolute and positive.*'

Syl. Pt. 1, *Mollohan v. Black Rock Contracting, Inc.*, 160 W. Va. 466, 235 S.E.2d 813 (1977)." *Stiles, supra*, at 4.

Implied in every contract is a duty to act reasonably and with good faith. *See, e.g., Barn-Chestnut, Inc. v. CFM Dev. Corp.*, 193 W. Va. 565, 572, 457 S.E.2d 502 (1995). "The duty of good faith and fair dealing is not susceptible to precise definition and varies with the contractual contexts in which it arises [internal citations omitted]." *Fremont v. E.I. DuPont DeNemours & Co.*, 988 F. Supp. 870, 877 (E.D. Pa. 1997). "The good faith performance doctrine is generally used to effectuate the intentions of the parties or to honor their reasonable expectations [internal citations omitted]." *Amoco Oil Co. v Ervin*, 908 P.2d 493, 498 (Colo. 1995).

> This covenant embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton*, 87 N.Y.2d at 389, 639 N.Y.S.2d 977, 663 N.E.2d 289, quoting *Kirke La Shelle Co. v. Armstrong Co.*, 263 N.Y. 79, 87 [1933]). While the duties of good faith and fair dealing do not imply obligations "inconsistent with other terms of the contractual relationship" ***136 **501 (*Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 304, 461 N.Y.S.2d 232, 448 N.E.2d 86 [1983]), they do encompass "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 69, 412 N.Y.S.2d 827, 385 N.E.2d 566 [1978], quoting 5 Williston, Contracts § 1293, at 3682 [rev ed 1937]).

511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153, 773 N.E.2d 496 (Court of Appeals 2002).

Petitioners intentionally and maliciously slandered CRS's title to storage rights under the GSA, anticipatorily breached the GSA, and violated the implied duty of good faith and fair dealing owed to CRS under the GSA. At best, there exist unresolved questions of fact as to these counterclaims.

The purpose and intent of the parties by entry into the GSA was to store gas, and it is beyond dispute that construction and operation of an interstate gas storage field cannot be undertaken without authority from the FERC: no entity may undertake to construct or operate a natural gas storage facility "unless there is in force with respect to such natural gas company a certificate of public convenience and necessity issued by the [FERC] authorizing such acts or operations...." 15 U.S.C. § 717f(c); *Columbia Gas Transmission Corp. v. An Exclusive Gas Storage Easement*, 776 F.2d 125, 128 (6th Cir. 1985). Moreover, Petitioners knew that CRS had storage rights on their land, Appendix at 0247, and that CRS could not use those storage rights without a Certificate from FERC, yet Petitioners directly and repeatedly thwarted CRS's efforts to obtain that Certificate.

Petitioners' statements in the FERC proceedings violated the duty of good faith and fair dealing to CRS, because the purpose of the GSA was to grant the right of gas storage to CRS. At the time the FERC application was filed, Petitioners *knew* CRS had the right to store gas, yet they denied that in their public FERC filings. Petitioners' repeated, inaccurate statements in the FERC proceeding had "the effect of destroying or injuring the right of the other party to receive the fruits of the contract," *511 West 232nd Owners Corp.*, 98 N.Y.2d at 153, and as such, violated the implied duty of good faith and fair dealing. *See Amoco Oil Co.*, 908 P.2d 493, 499.

Petitioners unequivocally, absolutely and positively repudiated the GSA by their wrongful filings before FERC. The Petitioners continuously asserted to FERC that CRS would have NO storage rights under the GSA unless and until all gas on the property was fully depleted. Not only was "full depletion" *not* required by the GSA, it *could never* occur; it would be physically impossible to remove every molecule of natural gas from an underground rock

formation. This repeated assertion shows clearly and unequivocally that Petitioners *had no intention* of permitting the lands subject to the GSA to be used for the storage of natural gas by CRS. Petitioners unequivocally, absolutely and positively repudiated the GSA - anticipatorily breached the contract - by these statements and actions.

Further, the knowingly wrongful statements of the Smiths in public filings before the FERC satisfies the elements for slander of title: "1. publication of 2. a false statement 3. derogatory to plaintiff's title 4. with malice 5. causing special damages 6. as a result of diminished value in the eyes of third parties." *TXO Prod. Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870, 879 (1992).

C. Shielding breach of a contract with litigation immunity, when the breach occurs in a quasi-judicial setting, would violate public policy

As a matter of public policy, one should not be immunized from breaching a contract in the setting of a quasi-judicial proceeding by invoking a privilege to shield oneself from the consequences of that breach.

Public policy is not susceptible of a clear and crisp definition. When discussing public policy in general in an alleged wrongful discharge case, this Court quoted the following language from one of its earlier decisions, which had quoted the New Jersey Supreme Court:

> Much has been written by text writers and by the courts as to the meaning of the phrase "public policy." All are agreed that its meaning is as "variable" as it is "vague," and that there is no absolute rule by which courts may determine what ... contravene[s] the public policy of the state. The rule of law, most generally stated, is that "public policy" is that principle of law which holds that "no person can lawfully do that which has a tendency to be injurious to the public or against public good..." even though "no actual injury" may have resulted therefrom in a particular case "to

> the public." It is a question of law which the court must decide in light of the particular circumstances of each case.

Allen v. Commercial Casualty Ins. Co., 131 N.J.L. 475, 477-78, 37 A.2d 37, 38-39 (1944), quoted in *Cordle v. General Hugh Mercer Corp.*, 174 W.Va. 321, 325, 325 S.E.2d 111, 114 (1984), and in *Tiernan v. Charleston Area Medical Center*, 203 W. Va. 135, 506 S.E.2d 578, 584 (1998). Similarly, " 'Public policy in its broad sense is that principle of law holding that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good.' *Makinen v. George*, 19 Wn.2d 340, 354, 142 P.2d 910 (1943); *see also Viking Properties, Inc.*, 155 Wn.2d at 126." *Matthews v. State*, No. 50835-4-II, p. 4, Wash. App. 2018 (unpublished opinion).

Allowing the litigation privilege as a defense to bar a claim for breach of contract against one whose statements in a quasi-judicial proceeding constituted the breach, would be against the public good, and thus violative of public policy.

This Court has "recognize[d] the need for limited exceptions from application of the absolute litigation privilege for certain intentional actions." *Clark v. Druckman*, 218 W. Va. 427, 624 S.E.2d 864, 871 (2005). "[T]he applicability of the privilege must be assessed in light of the specific conduct for which the defendant seeks immunity." *Sun Life Assurance Co. of Can. v. Imperial Premium Fin., LLC*, 904 F.3d 1197, 1219 (11th Cir. 2018). In undertaking this analysis in a breach of contract case, courts have "focused on whether the application of the privilege would further the privilege's public policy reasons[: ...] "whether applying the litigation privilege in this case would promote the due administration of justice and free expression by participants in judicial proceedings." *Rain [v. Rolls-Royce Corp.]*, 626 F.3d [372] at 378 [(7th

Cir. 2010)]." *O'Brien & Gere Engineers, Inc. v. City of Salisbury*, 447 Md. 394, 414, 135 A.3d 473, 485 (Md. App. 2016).

Similar to the situation before this Court, in *Sun Life Assurance*, 904 F.3d 1197, the Eleventh Circuit would not apply Florida's litigation privilege to "immunize a defendant from a breach of contract claim where the act that allegedly breached the contract was the filing of a lawsuit." *Id.* at 1219. The Court reasoned,

> we do not think that applying the privilege here would meaningfully serve the aims of the privilege. To be sure, disallowing the litigation privilege where it would otherwise immunize the litigant from breach of contract suits might to some extent chill the "free and full disclosure of facts in the conduct of judicial proceedings." *Levin*, 639 So.2d at 608. But, the true source of any chilling effect will be the parties' duly-entered contract, which itself bars the filing of the lawsuit.

Id. See also O'Brien & Gere Engineers, Inc., 447 Md. 394.

The same reasoning applies here. In *Sun Life Assurance*, the defendant sought litigation immunity for acts undertaken in a litigation setting, which acts were alleged to have breached a contract. Here, Petitioners seek litigation immunity for statements made in a quasi-judicial setting, which statements are alleged to have anticipatorily breached the GSA. As in the circumstance discussed in *Sun Life Assurance*, permitting use of that defense here would violate public policy as it would have a "chilling effect [on] the parties' duly-entered contract." *Sun Life Assurance*, 904 F.3d at 1219.

Moreover, there is no support for the proposition that the litigation privilege should apply to statements made in a quasi-judicial proceeding which would constitute slander of title. This Court's holding in *TXO Prod. Corp.*, 187 W. Va. 457, does not support application of the

litigation privilege to slander of title cases. In *TXO*, the plaintiff filed a declaratory judgment action against lessor and lessees to clear title to an oil and gas lease. *Id.*, 187 W. Va. at 464. The defendants counterclaimed for, *inter alia*, slander of title. *Id.*

The Circuit Court entered judgment against the plaintiff and in favor of defendant on its counterclaim. The plaintiff appealed. The Supreme Court held that West Virginia recognized a cause of action for slander of title and that the evidence presented at trial was sufficient to support such a cause of action. *Id.*, 187 W. Va. at 466. The litigation privilege was never addressed in *TXO*.

D. The Noerr-Pennington doctrine does not apply to this case

The Noerr-Pennington doctrine does not apply in this case. Petitioners' intervention in the FERC proceeding was not the type of petitioning activity for which immunity under this doctrine is contemplated. Moreover, the liability protection provided by this doctrine is from antitrust claims or business torts which may flow from such petitioning activity, not unrelated breach of contract or slander of title claims.

The Noerr-Pennington doctrine, named for the two United States Supreme Court decisions from which it was crafted, is a doctrine that provides immunity from Sherman Act (antitrust) liability, based on the claim of anti-competitive activity caused through petitioning the government for redress. *Eden Hannon & Co. v. Sumitomo Trust & Banking Co.*, 914 F.2d 556, 564 (4th Cir. 1990) citing *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

> "[T]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *E. R.R. Presidents Conference*

v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961).

City of Moundridge, KS v. Exxon Mobil Corp., 471 F. Supp. 2d 20, 36 (D.D.C. 2007). Essentially, Noerr-Pennington protects a litigant's right to petition the government through its courts, agencies, or legislature for redress, without the fear of reprisal by way of antitrust liability. *Id.*

Protection, or immunity, under the Noerr-Pennington doctrine is traditionally limited to lawsuits brought under the antitrust statutes. *See, e.g., Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993). Courts have, however, extended the doctrine to include related business torts such as tortious interference with contractual relationship or unfair competition. *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 310 (4th Cir. 2003) citing *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128-29 (3d Cir.1999).

Petitioners really stretch to argue that their intervention into the FERC proceeding, as affected landowners, constituted First Amendment petitioning activity which might produce a restraint on trade or a monopoly, and to further argue that they are immune from liability for CRS's counterclaim for breach of contract and slander of title because of that alleged protected petitioning activity. The underlying facts are not close to falling within the Noerr-Pennington doctrine.

E. The lack of an objection to Petitioners' FERC intervention was not a waiver of claims

Petitioners suggest that because CRS did not object to their intervention in the subject FERC proceeding, then CRS is estopped from claiming that Petitioners' statements during the

course of that proceeding can serve as the basis for CRS's counterclaim. Based on the following undisputed evidence in the record, that argument is meaningless. Although it is irrelevant to the issues in this appeal, CRS will address it for purposes of clarification.

Attorney James F. Bowe Jr. of King & Spalding specializes in handling matters before FERC, represented CRS before FERC, and now serves as CRS's FERC expert in this litigation. Bowe was deposed by Petitioners' counsel on July 12, 2019. Bowe testified that he "would have advised the client not to bother opposing the Smiths' intervention because FERC almost never declines to allow parties to intervene in these sorts of proceedings." Appendix at 2342, *see also* 2355.

As landowners whose property would fall within the boundaries of the proposed storage facility, Petitioners had the right to intervene and to express their *legitimate* concerns to the FERC. *E.g.*, Appendix at 2355. But in this instance, the Petitioners were more than simply affected landowners – they were parties to a contract with applicant CRS. And while their bare right as landowners to intervene may have been relatively unassailable, the substance of their objections and statements to the FERC violated the intention and purpose of the GSA to such an extent as to constitute an anticipatory breach and violation of their duty of good faith and fair dealing, as explained earlier.

Notwithstanding CRS's lack of opposition to Petitioners' intervention into the FERC proceeding, that did not give Petitioners free rein to make statements therein in breach of the GSA. Therefore, this lack of opposition to intervention did not result in CRS waiving any claims arising from Petitioners' statements in the course of the FERC proceedings.

F. The state of depletion of the intended storage strata at the time of the FERC proceeding is irrelevant to Petitioners' wrongful statements in breach of the GSA

Petitioners suggest that CRS's acknowledgment during the course of the FERC Certificate proceeding, that not all intended storage strata were then depleted, constitutes an implied admission that CRS had no storage rights. But this makes no sense. Further, it has no relevance to the issues properly before this Court. Moreover, the GSA provides that CRS, as Lessee, has the sole discretion to determine when a produced stratum is depleted.

In an attempt to bolster this argument, Petitioners refer to statements made to them by the original lessee during negotiations for the GSA: "that a 'depleted reservoir' was an 'empty container'" and "that the [GSA] will not diminish the value of the oil and gas if and when the Leased Premises is used for storage." *Brief of Petitioners* at 2.

These statements are wholly irrelevant to the issues in this case, because they constitute inadmissible parole evidence: "A written contract merges all negotiations and representations which occurred before its execution, and in the absence of fraud, mistake, or material misrepresentations extrinsic evidence cannot be used to alter or interpret language in a written contract which is otherwise plain and unambiguous on its face." Syl. Pt. 3, *Iafolla v. Douglas Pocahontas Coal Corp.*, 162 W. Va. 489, 250 S.E.2d 128 (1979). Petitioners have not argued that the GSA is anything other than plain and unambiguous, and no claims of fraud, mistake or material misrepresentations as to entry into the GSA have been raised. Therefore, parole evidence is inadmissible, and thus irrelevant, here.

2. Although This Court Does Not Presently Have Jurisdiction of the Circuit Court's Recent Declaratory Judgment Ruling, Nonetheless, The Ruling Was Proper and Should Be Upheld

A. Applicable contract interpretation principles

"As with other contracts, the language of a lease agreement must be considered and construed as a whole, giving effect, if possible, to all parts of the instrument. Accordingly, specific words or clauses of an agreement are not to be treated as meaningless, or to be discarded, if any reasonable meaning can be given them consistent with the whole contract." Syl. Pt. 3, *Moore v. Johnson Service Co.*, 158 W. Va. 808, 219 S.E.2d 315 (1975). In addition, "[i]t is presumed that parties enter into a contract with the intention of accomplishing some purpose by it; and, therefore, courts will not give to the contract a construction which will render it void if it can reasonably be interpreted in such a way as to give it effect." *Phillips v. Rogers*, 157 W. Va. 194, 200 S.E.2d 676 (1973). Finally, "[t]he 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. 1, *Berkeley Co. Public Serv. Dist. v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968).

A contract "should never be interpreted so as to create an absurd result, but instead should receive a reasonable interpretation, consistent with the intent of the parties. *See, e.g., Thompson v. State Auto. Mut. Ins.*, 122 W.Va. 551, 554, 11 S.E.2d 849, 850 (1940)" (specifically referring to contracts of insurance). *Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 432, 345 S.E.2d 33 (1986). This same rule of reasonable expectations would apply equally to all contracts, as supported by a decision of the West Virginia Supreme Court over 100 years earlier: in *Bloyd v. Pollock*, 27 W. Va. 75 (1885), where the Court concluded that the absolute literal

meaning of the subject commercial contract was "impossible to be performed" and would result in a "perfect absurdity" where goods to be delivered would be placed directly ON TOP of the depot rather than AT the depot. Thus, the Court upheld the jury's conclusion that the goods were to be delivered in a car AT the depot.

Similarly, in *Hunt v. Shamblin*, 179 W. Va. 663, 371 S.E.2d 591 (1988), this Court reversed a lower court ruling which had voided a contract, holding that the contract, while perhaps not perfect, was valid. In so doing, the Court noted:

> In a number of cases this Court has recognized that when parties enter into a contract they attempt to accomplish some purpose. With this in mind, the Court has indicated that it will, if reasonably possible, apply that interpretation to the language of the parties which gives it effect rather than the interpretation which renders the contract void. As stated in syllabus point 1 of Phillips v. Rogers, 157 W. Va. 194, 200 S.E.2d 676 (1973): "It is presumed that parties enter into a contract with the intention of accomplishing some purpose by it; and, therefore, courts will not give to the contract a construction which will render it void if it can reasonably be interpreted in such a way as to give it effect."

Hunt, 179 W. Va. at 666.

B. The Circuit Court's recent explanation of a phrase in the GSA is consistent with the purpose of the GSA and prior declaratory rulings, and it complies with principles of contract interpretation

By way of context, in orders entered September 24, 2013 and January 16, 2014, the Circuit Court explained a number of unambiguous GSA provisions. The GSA is found in the Appendix at 0025-30. The Circuit Court held that "in order to be used for storage of gas, a formation or stratum must first be depleted. Further, there is no requirement, express or implied, that all of the leased property must be depleted before it can be used as storage. Only the stratum that is used for storage has to be depleted." Appendix at 0191.

Further, "no implied covenant to develop exists in this case. ... There is no requirement that [CRS] must develop the property designated for storage. [CRS's] only restriction is to only use depleted stratum for the storage of gas or to compensate the [Petitioners] $11,430.00 annually for the right to store gas." Appendix at 0198.

"[T]he purpose of the Addendum was to grant the right of storage to the Lessee that was not included in the original Lease." Appendix at 0191 ("The Court agrees that the purpose of the Addendum was to grant the right of storage to the Lessee that was not included in the original Lease."). "The Court FINDS that the Gas Storage Addendum grants to the Lessee the right to store gas in any depleted oil or gas stratum. The Court further finds that the industry definition of depleted was contemplated by the parties." *Id.* As widely used in the industry, the term depleted has been defined as a "reservoir from which all the recoverable oil and gas has been removed." Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* Section 8D (December 2011).

In the natural gas industry, economics drives how much gas is recoverable, as recognized by the Alaska Supreme Court: "A gas field is said to be economically depleted when there is not enough pressure left in the field to produce the gas economically given current technology." *City of Kenai v. Cook Inlet Natural Gas Storage Alaska, LLC*, 373 P. 3d 473, 486 n.1 (Alaska 2016).

The decision as to when a stratum is depleted is not necessarily clear cut, but rather, the decision requires some degree of discretion based on the economics of production. That is why it makes sense that the parties to the GSA agreed that the Lessee should have sole discretion to make the determination as to when a stratum is depleted.

The purpose of the GSA is the storage of gas; and gas can only be stored in depleted (as that term is used in the industry) strata. So then, how is it to be determined when a producing stratum, or reservoir, is depleted? The parties included this in the GSA, and the answer is found in the final sentence of paragraph 3:

> 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.* (emphasis added)

Pursuant to the emphasized phrase of this sentence, under the GSA it is the Lessee – CRS – which is solely entitled to determine "whether gas is being stored within the Leased Premises" – and this can mean only one thing – the "Lessee shall be the sole judge as to" whether a stratum is depleted. "The language of a lease agreement must be considered and construed as a whole, giving effect, if possible, to all parts of the instrument. Accordingly, specific words or clauses of an agreement are not to be treated as meaningless, or to be discarded, if any reasonable meaning can be given them consistent with the whole contract." Syl. Pt. 3, *Moore v. Johnson Service Co.*, 158 W. Va. 808. The most reasonable and internally consistent meaning of this language of the GSA is that the Lessee has the sole right to determine when a stratum is depleted.

This is the only explanation for this phrase that makes sense. Because depletion is based on the economics of production, it is a discretionary call, so for clarity's sake the parties vested the discretion with one party: the Lessee. Moreover, it makes sense that the discretion would be vested in the Lessee, as it is the party directly involved in the production and storage operations.

Further, in accordance with standard industry practice, and as previously discussed among the parties, once conversion from production to storage takes place (once "gas is being stored"), CRS would compensate the Smiths for "lost royalties" for recoverable gas left in place, but only in those stratum deemed "depleted" at the time of conversion. Petitioners understood this ("Q: Have you ever heard the proposition that Chestnut Ridge would pay you your one-eighth royalty for gas that was in the land, but still producible, when the land was to be converted to storage? A: Yes." Appendix at 0248.[4]

In addition, this is consistent with the Circuit Court's holding that "[CRS's] only restriction is to only use depleted stratum for the storage of gas ***or*** to compensation the [Petitioners] $11,430.00 annually for the right to store gas." Appendix at 0198 (emphasis added). In other words, when CRS invokes its contractual discretion to make the determination that gas is being stored within the Leased Premises, *then* CRS will be contractually obligated to compensate Petitioners $11,430.00 annually for the right to store gas; and pursuant to standard industry practice, at that time CRS will also compensate Petitioners for "lost royalties" from recoverable gas left in place in the converted strata or reservoirs.

Finally, the parties' intention that the industry definition of 'depleted' would apply to the GSA is entirely consistent with CRS as Lessee being the sole judge as to when/whether strata are depleted and gas can be stored. In the industry, whether a stratum is depleted is driven by economics: essentially, whether the revenues and profits outweigh the costs of ongoing gas production.

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[4] Also, *see Letter from Wade W. Massie to Kimberly D. Bose, Secretary of FERC*, Docket No. CP08-36-000, July 17, 2009, Appendix at 0294.

In order for a particular stratum to be deemed depleted and available to store gas, *someone* has to make that decision, based on the economics of further production (in other words, applying the industry definition of depleted). In accordance with the GSA, the Lessee is the party which has the right to decide when ongoing production from a particular stratum is no longer economically viable and therefore, that the stratum is 'depleted.'

Petitioners offer no reasonable alternative explanation for the GSA phrase which they contend was erroneously explained by the Circuit Court. "As with other contracts, the language of a lease agreement must be considered and construed as a whole, giving effect, if possible, to all parts of the instrument. Accordingly, specific words or clauses of an agreement are not to be treated as meaningless, or to be discarded, if any reasonable meaning can be given them consistent with the whole contract." Syl. Pt. 3, *Moore v. Johnson Service Co.*, 158 W. Va. 808. With this principle of contract interpretation in mind, and given the dispute as to when a stratum has been depleted, the Circuit Court's ruling that the final sentence of paragraph 3 of the GSA means that the Lessee shall be the sole judge as to whether a stratum is depleted is reasonable as a matter of law and is consistent with the GSA as a whole.

CONCLUSION AND RELIEF PRAYED FOR

Based upon the foregoing, Chestnut Ridge Storage, LLC respectfully requests that this Court issue a decision, finding that Petitioners anticipatorily breached the GSA and violated their duty of good faith and fair dealing. CRS further requests this Court find that the litigation privilege does not apply to intervenors in a quasi-judicial proceeding, such as Petitioners in the contested FERC proceeding. Should the Court conclude that the litigation privilege does extend

to intervenors, CRS requests a ruling that public policies weigh in favor of an exception to litigation immunity in this circumstance. Further, CRS requests a ruling that the Noerr-Pennington doctrine does not apply to this case.

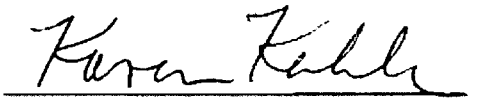
Alternatively, CRS requests that this Court issue a decision that the Circuit Court properly ruled that questions of fact exist as to application of the litigation immunity defenses (litigation privilege and/or the Noerr-Pennington doctrine).

Further, CRS requests that this Court decline to review the third assignment of error, because of lack of jurisdiction. However, should this Court substantively review and rule upon this final assignment, CRS requests that it uphold the ruling as proper as a matter of law.

Dated this 22nd day of May, 2020.

CHESTNUT RIDGE STORAGE, LLC

By Counsel,



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No. 19-1076

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THOMAS W. SMITH, et al.

Plaintiffs Below, Petitioners,

Vs.

CHESTNUT RIDGE STORAGE, LLC,

Defendant Below, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 2020, I served the foregoing **RESPONDENT CHESTNUT RIDGE STORAGE, LLC'S BRIEF** upon all counsel of record by e-mail and by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

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