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

REPLY BRIEF OF PETITIONERS

Wade W. Massie
WV Bar No. 7267
Counsel of Record
PENN, STUART & ESKRIDGE
P.O. Box 2288
Abingdon, Virginia 24212
276/623-4409
wmassie@pennstuart.com

Counsel for Petitioners

Stephen L. Thompson
WV Bar No. 3751
BARTH & THOMPSON
P.O. Box 129
Charleston, West Virginia 25321
304/342-7111
sthompson@barth-thompson.com

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND REGULATIONS:

OTHER AUTHORITIES:

Petitioners 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"), by counsel, submit this reply brief in support of their appeal.

I. STATEMENT OF THE CASE AND FACTS

In its brief, respondent Chestnut Ridge Storage LLC ("Chestnut Ridge") misstates several important facts and omits other key facts. Chestnut Ridge contends that the Smiths "knew" that Chestnut Ridge had the right to store gas on the property and intentionally made false statements to the Federal Energy Regulatory Commission ("FERC") about Chestnut Ridge's rights. Brief of Respondent at 1, 5, 12. This contention is flatly wrong. In support of this contention, Chestnut Ridge cites one page from one of the depositions of the Smiths. App. 0247. On that page, Ms. McGregor testified:

> Q. Did the lessee under the gas storage addendum have the right to store gas in 2007?
>
> A. Yes.

App. 0247. In answer to the very next question, however, Ms. McGregor explained that the right to store gas only extends to depleted strata.

> Q. Can you tell me why you and your other relatives who were – who are involved in the oil and gas lease opposed Chestnut Ridge Storage LLC's application to obtain a certificate from the Federal Energy Regulatory Commission?
>
> A. The gas was not depleted in the storage area, in the area that they wanted to put in the storage.

Id. As Ms. McGregor testified, under the Gas Storage Addendum, a stratum "has to be depleted before it can be used for storage." App. 0261

This is the same point that the Smiths made in their filings with FERC. App. 434. The lessee has storage rights under the Gas Storage Addendum, but those rights only extend to depleted strata. *Id.* In its response filed with FERC, Chestnut Ridge did not deny that the Addendum limits storage rights to depleted strata and that the strata that it intended to use for storage were not depleted. App. 0440-0041, 0476. In issuing the certificate, FERC noted that "[t]he parties agree the production field is not yet depleted" and that converting the field to storage would be "inconsistent with" the Gas Storage Addendum. App. 0476

Chestnut Ridge also misstates the Smiths' position on depletion. Brief of Respondent at 12. Chestnut Ridge tells the Court that the Smiths have insisted that "every molecule of natural gas" must be removed from the strata before storage can occur. *Id.* The Smiths have never said any such thing. They never said that to FERC, and they never said that to the circuit court. What the Smiths have said is that it is not enough for the strata to be "nearly depleted," which is how Chestnut Ridge described the field. App. 0440, 2310. Rather, the strata must be depleted, that is, fully depleted before storage can occur. App. 0419, 0434-0435.

In the circuit court and in its brief to this Court, Chestnut Ridge acknowledged that, under the industry definition, a stratum is 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," (2019)); Brief of Respondent at 22. The Smiths' position is fully consistent with this industry definition.

The record in this case also conclusively shows that the strata proposed for storage are not depleted. In fact, on the Smith property, approximately 80% of the original gas in place in those strata is still undeveloped. App. 2258. As the petroleum engineer hired by the Smiths reported: "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." App 2260.

Chestnut Ridge contends that some of the evidence cited in the Smiths' opening brief is "irrelevant" and "inadmissible." Brief of Respondent at 4, 19. In particular, Chestnut Ridge asks the Court to ignore the representations that the lessee made about the Gas Storage Addendum when it solicited the Addendum from the Smiths in 1992. The lessee told the Smiths that the Addendum only allowed gas to be stored in a "depleted reservoir (empty container)." App. 0426. Chestnut Ridge would like the Court to ignore the statement because it is in direct contradiction to the interpretation that Chestnut Ridge is offering today—that strata are depleted when Chestnut Ridge says they are depleted. Brief of Respondent at 23.

Chestnut Ridge also asserts that the findings by FERC "have no relevancy to this appeal nor elsewhere in the litigation." Brief of Respondents at 4. But the findings of FERC are directly relevant on the proper interpretation of the Gas Storage Addendum and the application of the litigation privilege. FERC found that the Smiths had a right to

intervene, that Chestnut Ridge did not contest the Smiths' position that only depleted strata can be used for storage, and that the strata proposed for storage were not depleted. App. 0476. These findings completely refute Chestnut Ridge's contention that the Smiths made "wrongful statements" to FERC. Brief of Respondent at 13.

II. SUMMARY OF ARGUMENT

In its brief, Chestnut Ridge makes two principal arguments why it should be permitted to sue the Smiths for statements made by them in the FERC proceeding. First, Chestnut Ridge contends that the litigation privilege does not apply to intervenors, only to "parties." Brief of Respondent at 7-9. Because the Smiths intervened in the FERC proceeding, Chestnut Ridge argues that the Smiths have no immunity for what they told the federal agency. *Id.*

Chestnut Ridge does not cite any authority in support of this argument as none exists. As the Smiths explain below, under applicable FERC procedure, a company filing an application with FERC does not name landowners as parties. Rather, landowners are served with notice of the proceeding and given the opportunity to intervene. By intervening, landowners and other interested persons become parties to the proceeding. This is what the Smiths did. All of the supposedly wrongful statements made by the Smiths were made by them in pleadings that they filed as parties to the FERC proceeding.

Chestnut Ridge's second argument is that the litigation privilege should not apply to "false statements concerning . . . contract rights." Brief of Respondent at 1. While acknowledging that the litigation privilege protects against other theories of liability, Chestnut Ridge contends that the privilege does not apply to false statements

concerning contract rights. *Id.* at 9-13. Chestnut Ridge does not explain why the litigation privilege would apply to tort claims, but not to contract claims. In fact, the cases hold that immunity applies regardless of the theory of recovery.

Although the controlling precedents of this Court required the circuit judge to state the findings supporting the denial of immunity, the order in this case contains only one finding, and that finding is clearly erroneous. The circuit judge found that the Gas Storage Addendum makes the lessee "the sole judge as to when/whether strata are depleted and gas can be stored." App. 0001. The Gas Storage Addendum does not say that. Rather, the Gas Storage Addendum states that only depleted strata can be used for storage. The circuit judge's finding that the lessee "sole judge" of whether strata are depleted is contrary to the language of the Addendum and to prior rulings in this case.

III. ARGUMENT

A. THE LITIGATION PRIVILEGE APPLIES TO ALL PARTIES, INCLUDING INTERVENORS

1. *The FERC Proceeding*

Under the Natural Gas Act, 15 U.S.C. §§ 717-717z, a company seeking authorization to build a pipeline or storage field must file an application under FERC. 15 U.S.C. § 717f(d). The application does not name defendants. Rather, a notice of the filing is served upon interested parties "in such manner as the Commission shall, by regulation, require." *Id.*

Under the Commission's regulations, the applicant must serve all landowners with notice of the application by mail or hand delivery. 18 C.F.R. §

157.6(d)(1)(i) and (ii). The applicant must also publish notice in a local newspaper and in the Federal Register. 18 C.F.R. § 157.6(d)(1)(iii); 18 C.F.R. § 157.9(a).

Any landowner desiring to participate in the proceeding must file a motion to intervene within the time allowed. 18 C.F.R. § 157.10(a). Absent extraordinary circumstances, failure to file a timely motion to intervene will bar a person from participating as a party. 18 C.F.R. § 157.10(a)(3). Only a party to a FERC proceeding may contest the agency's decision and seek review by a court of appeals. 15 U.S.C. § 717r(b).

Chestnut Ridge served the Smiths with notice of its application to build a storage facility on their property. App. 2309. In accordance with the regulations, the notice informed the Smiths that if they wished to become a party they must file a motion to intervene. App. 2314. In response to the notice, and as allowed by the Natural Gas Act and the Commission's rules, the Smiths filed a motion to intervene. App. 0432. Chestnut Ridge informed the Commission that it had "no objection" to the intervention. App. 0438. The motion to intervene was thus granted, and the Smiths became parties to the FERC proceeding. App. 0472 n.8.

FERC encourages interested parties like landowners to participate in its proceedings. App. 2289. To deny them the right to participate would violate the Natural Gas Act and established FERC policy. *Id.*

2. *Intervenors Are Parties*

In its brief, Chestnut Ridge argues that the litigation privilege does not apply to intervenors, but Chestnut Ridge never explains why. Brief of Respondent at 7-9.

Chestnut Ridge apparently assumes that an intervenor is not a party, but, as we have seen, intervention is how an interested person becomes a party to a FERC proceeding.

Across civil procedure generally, intervention is the method by which a nonparty becomes a party to a proceeding. *State ex rel. C.H. v. Faircloth*, 240 W. Va. 729, 738, 815 S.E.2d 540, 549 (2018); *In re Harley C.*, 203 W. Va. 594, 598, 509 S.E.2d 875, 879 (1998). "By the very definition of intervention the intervenor is a party to the action." *In re Harley C.*, 203 W. Va. at 598, 509 S.E.2d at 879 (quoting 59 Am. Jur. 2d *Parties* § 170). An intervenor has "all the rights and responsibilities of *any other party* to the action." *Id.* (emphasis added). An intervenor is as much a party as any other party. *Id.*

In its brief, Chestnut Ridge argues that the litigation privilege should not be "enlarged" to provide immunity to intervenors. Brief of Respondent at 9. The Court would not be enlarging the privilege by applying it to intervenors. Rather, the Court would simply be giving the privilege its normal application. Under established precedent, the privilege already applies to parties, as well as to prospective parties, attorneys, experts, and fact witnesses. Syl. Pt. 8, *Zsigray v. Langman*, ___ W. Va. ___, ___ S.E.2d ___, 2020 WL 1502272 (Mar. 27, 2020) (fact witnesses); Syl. Pt. 3, *Clark v. Druckman*, 218 W. Va. 427, 624 S.E.2d 864 (2005) (attorneys); Syl. Pt. 2, *Wilson v. Bernet*, 218 W. Va. 628, 625 S.E.2d 706 (2005) (experts); Syl. Pt. 2, *Collins v. Red Roof Inns, Inc.*, 211 W. Va. 458, 566 S.E.2d 595 (2002) (prospective parties); *Higgins v. Williams Pocahontas Coal Co.*, 103 W. Va. 504, 138 S.E. 112, 113 (1927) (parties).

B. THE LITIGATION PRIVILEGE BARS BOTH TORT AND CONTRACT CLAIMS

1. *Tort Claims*

Chestnut Ridge argues that the Smiths made "knowingly wrongful statements" to FERC and thus slandered Chestnut Ridge's title. Brief of Respondent at 13. As noted earlier, however, the filings that the Smiths made with FERC were entirely accurate. The Smiths pointed out that Chestnut Ridge had storage rights, but those rights only extended to depleted strata. App. 0434-0435. Chestnut Ridge did not dispute this fact; nor did it dispute the fact that the strata proposed for storage were not depleted. App. 0476. Chestnut Ridge argued, successfully, that the project should go forward because the Smiths could pursue compensation in an appropriate court. App. 0443-0444, 0477.

In any event, Chestnut Ridge does not have a claim merely by calling the Smiths' statements false. "The availability of absolute immunity does not depend upon the statement's truth or the speaker's intent." *Diver v. Peterson*, 524 N.W.2d 288, 291 (Ct. App. Minn. 1995); *see Briscoe v. LaHue*, 460 U.S. 325, 342-43 (1983). There would be no need for immunity if it only protected correct statements because those statements do not require any protection.

In support of its claim for slander of title, Chestnut Ridge cites *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992). Brief of Respondent at 13. But as the Smiths showed in their opening brief, the slander in that case was the recording of a bogus deed, not the filing of a pleading. Brief of Petitioners at 21-22. For this reason, *TXO* does not address the litigation privilege. *Id.*

Chestnut Ridge does not cite any cases holding that the litigation does not apply to claims for slander of title. In contrast, the Smiths have cited numerous cases holding that the litigation privilege applies to claims for slander of title, just as it applies to other defamation claims. Brief of Petitioners at 22. Chestnut Ridge makes no attempt to distinguish these cases because it cannot.

2. *Contract Claims*

Citing three cases, Chestnut Ridge argues that the litigation privilege does not apply to claims for breach of contract. Brief of Respondent at 14-15. The first case is distinguishable, and the other two cases actually support the Smiths' position, not that of Chestnut Ridge.

In *Sun Life Assurance Co. v. Imperial Premium Finance, LLC*, 904 F.3d 1197, 1219 (11th Cir. 2018), the court of appeals considered whether the litigation privilege bars a claim for breach of contract "where the act that breached the contract was the filing of a lawsuit." The contract at issue in that case specifically prohibited the suit filed by the insurance company, but the insurance company filed the suit anyway. *Id.* (noting the act that allegedly breached the contract "was the filing of a lawsuit"). Under those circumstances, the court held that the insured's claim for breach of contract was not barred by the litigation privilege. *Id.* at 1219-20.

There is no provision in the Lease or Gas Storage Addendum prohibiting the Smiths from intervening in a proceeding before FERC or any other tribunal. Recognizing this, Chestnut Ridge told FERC it had "no objection" to the Smiths' intervention. App. 0438.

The other two cases cited by Chestnut Ridge hold that the litigation privilege applies to claims for breach of contract. In *Rain v. Rolls-Royce Corp.*, 626 F.3d 372, 378 (7th Cir. 2010), the court of appeals concluded that applying the privilege to contract claims "would promote the due administration of justice and free expression by participants in judicial proceedings"—the policy underlying the privilege.

Likewise, in *O'Brien & Gere Engineers, Inc. v. City of Salisbury*, 135 A.3d 473, 484-85 (Md. Ct. App. 2016), the court, citing decisions of several other courts, held that the litigation privilege applies to claims for breach of contract. The court found that the privilege would be "'valueless' or 'meaningless' if the opposing party could bar application of the privilege just by drafting the claim with a non-tort label." *Id.* at 485.

In their opening brief, the Smiths cited numerous other cases holding that the litigation privilege applies to contract claims. Brief of Respondent at 22-23. Chestnut Ridge makes no attempt to distinguish any of these cases.

C. THE ONLY FINDING MADE BY THE CIRCUIT COURT IS CLEARLY ERRONEOUS

The circuit court was required to make findings supporting its denial of immunity to the Smiths. Syl. Pt. 4, *West Virginia Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, 746 S.E.2d 554 (2013). In this case, however, the circuit court made only one finding—"that Chestnut Ridge Storage LLC is the sole judge as to when/whether strata are depleted and gas can be stored." App. 0001.

Chestnut Ridge contends that this finding is "not presently appealable." Brief of Respondent at 3. But this is a finding—the only finding—that the circuit court

made in its order denying immunity. Therefore, the finding is properly reviewable under the collateral order doctrine. *Robinson v. Pack*, 223 W. Va. 828, 832-33, 679 S.E.2d 660, 664-65 (2009).

From the time the Gas Storage Addendum was negotiated in 1992 until the fall of last year, the parties interpreted the Gas Storage Addendum in accordance with its plain language. The lessee has the right to store gas, but only if the strata being employed for storage are depleted. That is what the lessee represented to the Smiths when it solicited the Addendum, that is how both parties described the Addendum to FERC, that is how both parties described the Addendum to the circuit court, and that is what the circuit court found in its prior orders in 2014. App. 0388, 0396, 0426, 0434, 0441, 0476.

Last fall, however, Chestnut Ridge came up with a new interpretation of the Addendum. App. 0234-0236. Chestnut Ridge argued, for the first time, that the strata being employed for storage do not need to be depleted. *Id.* It is enough that the lessee *deems* them to be depleted. *Id.* According to Chestnut Ridge, the lessee is the "sole judge" of whether strata are depleted, and its judgment on the issue cannot be questioned by anyone.

The plain language of the Addendum provides otherwise. Under paragraph 2 of the Addendum, storage is limited to a "depleted oil or gas stratum." App. 0419. Paragraph 2 does not make the lessee the "sole judge" of whether a stratum is depleted, and there is no reason it should have. The primary purpose of the Lease was the "drilling, producing, and otherwise operating for oil and gas." App. 0413. The

Addendum was a supplement to the Lease, and it allows for the Lease to continue for purposes of gas storage *if the strata being employed for storage are depleted.*

In contrast, paragraph 3 of the Addendum does make the lessee the sole judge of whether gas is being stored. App. 0420. If production ceases and gas is not being stored, the Lease will automatically terminate. Paragraph 3 allows the lessee to declare that storage has begun and thereby avoid termination of the Lease. The provision does not change the requirement in paragraph 2 that the strata being employed for storage must first be depleted.

Whether the strata are depleted is an objective determination based on an industry definition. App. 0388. The only industry definition of depleted that has been cited requires "all the recoverable oil and gas" to be removed. Brief of Respondent at 22; App. 151; 8 *Williams & Meyers Oil & Gas Law*, Manual of Terms, "Depleted formation" (2019). Under Chestnut Ridge's new interpretation, however, "depleted" does not mean depleted. Rather, Chestnut Ridge can deem the strata depleted after removing as much or as little gas it wants. "When I use a word . . . it means just what I choose it to mean—neither more nor less." Lewis Carroll, *Alice in Wonderland* 163 (D. Gray ed. 1971).

Chestnut Ridge argues that the Court should not be concerned about its new interpretation because it will pay the Smiths lost royalties on "recoverable gas left in place in the converted strata or reservoirs." Brief of Respondents at 24. Notice the wording. The offer is to pay for recoverable gas "but only in those strat[a] deemed 'depleted' at the time of conversion." *Id.*

In the 2300 acres that Chestnut Ridge planned to appropriate for storage, there were 11 different areas or fault blocks. App. 1256-1257, 2258, 2271. Chestnut Ridge planned to store gas in the areas where some, but not all, of the recoverable gas had been removed. According to Chestnut Ridge, it will compensate the Smiths for the remaining gas in those areas, but not in the five areas where no gas has been removed. Nor will Chestnut Ridge compensate the Smiths for gas lost in the 2000 foot horizontal buffer zone around the storage field or in the 500 foot vertical buffer zone above and below the storage field. App. 2256.

Under the certificate from FERC, once storage began, Chestnut Ridge was obligated to cease production of all gas in the storage field and buffer zones. App. 0498. Yet, Chestnut Ridge is offering to pay the Smiths royalties on only a portion of the gas they will lose. The primary purpose of the Lease is to produce gas not to store gas. The lessee is permitted to store gas only after all recoverable gas has been removed and the strata are depleted. The circuit court's finding that the lessee is "the sole judge as to when/whether strata are depleted" is contrary to the Gas Storage Addendum, and it should be reversed.

IV. CONCLUSION

The counterclaim by Chestnut Ridge should have never been filed. The Smiths had a right to participate in the FERC proceeding and to state their views on the project. All of the statements by the Smiths to FERC are privileged. Chestnut Ridge should not be permitted to punish its critics by filing retaliatory suits like this.

Respectfully submitted,

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

By Counsel

Wade W. Massie
WV Bar No. 7267
PENN, STUART & ESKRIDGE
P.O. Box 2288
Abingdon, Virginia 24212
276/623-4409
wmassie@pennstuart.com

By Wade W. Massie
Wade W. Massie

Stephen L. Thompson
WV Bar No. 3751
BARTH & THOMPSON
P.O. Box 129
Charleston, West Virginia 25321
304/342-7111
sthompson@barth-thompson.com

By Stephen L. Thompson
Stephen L. Thompson By WWM

Counsel for Petitioners

CERTIFICATE OF SERVICE

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

Karen E. Kahle, Esq.
Kahle Law Office
39 Fifteenth Street
Wheeling, WV 26003
karenkahle@comcast.net

Counsel for Respondent Chestnut Ridge Storage LLC

Howard M. Persinger, III, Esq.
Persinger & Persinger, L.C.
237 Capitol Street
Charleston, WV 25301
hmp3@persingerlaw.com

Counsel for *Amicus Curiae*, West Virginia Land and Mineral Owners' Association, West Virginia Royalty Owners' Association, West Virginia Farm Bureau, National Association of Royalty Owners, Appalachia

this 8th day of June, 2020.

Wade W. Massie

Wade W. Massie