IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0572

EQT PRODUCTION COMPANY,

Petitioner/Defendant Below

v.

ANTERO RESOURCES CORPORATION,

Respondent/Plaintiff Below.

PETITIONER'S BRIEF

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I. ASSIGNMENT OF ERROR

The Circuit Court erred by granting summary judgment in favor of Plaintiff/Respondent Antero Resources Corporation ("Respondent") on its declaratory judgment claim and denying Defendant/Petitioner EQT Production Company's ("Petitioner") Motion for Summary Judgment on the same claim. The Court erroneously concluded that Respondent's top lease takes priority over Petitioner's base lease, as amended, covering the same property.

II. STATEMENT OF THE CASE

A. Procedural History

This case was filed in the Circuit Court of Tyler County, West Virginia, and involves the issue of whether Respondent or Petitioner has the right to develop and produce natural gas and/or oil from property owned by Larry W. Lemasters and Linda J. Lemasters ("the Lemasters").

Petitioner's right to develop and produce natural gas from the subject property arises from the lease dated December 13, 2011 (the "Base Lease") and Amendment and Ratification of Oil and Gas Lease covering the subject property (the "Lease Amendment"), which extended the primary term of the Base Lease, both of which are identified in the pleadings in this matter. (AR 30-31; 40-41; 88-91; 106-107). Respondent's claims in this case arise from a "top lease" executed with respect to the same property (the "Top Lease") and which is also identified in the pleadings in this matter. (AR 32-39; 94-101).

On November 5, 2018, Respondent served the "Motion for Partial Summary Judgment of Antero Resources Corporation (Counts II and III)" (the "Motion") requesting that the court, among other things, declare that its Top Lease is superior to Petitioner's Base Lease as amended, and that Respondent's Top Lease is the only valid and subsisting lease affecting the subject property. (AR 68-87).

On November 26, 2018, Petitioner served "Defendant EQT Production Company's Motion for Summary Judgment on its Counterclaim for Declaratory Judgment" with supporting Memorandum and Memorandum in Opposition to Respondent's Motion (AR 115-135) (the "Response Memorandum"). In the Response Memorandum, Petitioner, *inter alia*, opposed Respondent's Motion on the grounds that the Top Lease did not preclude Petitioner from amending the terms of its Base Lease; the conditions necessary for the Top Lease to become effective did not occur; the "no modification clause" included within the Top Lease conveyed no property interest to Respondent that would preclude Petitioner from extending the term of its Base Lease; and, the "no modification clause" is unenforceable and void as against the public policy of this State. Along with its Response Memorandum, Petitioner filed a counter Motion for Summary Judgment on its Counterclaim for Declaratory Judgment filed in this action. (AR 115-135).

On January 3, 2019, without a hearing on the cross-motions for partial summary judgment, the Circuit Court granted Respondent's Motion and denied Petitioner's cross-motion, holding that the Base Lease, as amended, is subject to the Top Lease and that the Top Lease is the superior, valid and existing lease covering the subject property. (AR 5-16).

On May 23, 2019, the Circuit Court amended its Jan. 3, 2019, Order, finding upon express determination that the award of summary judgment in favor of Respondent on its declaratory judgment claim is a final order subject to immediate appellate review as provided by Rule 54(b) of the Rules of Civil Procedure and W. Va. Code § 58-5-1. (AR 1-4).

Petitioner timely filed a Notice of Appeal of the Circuit Court's entry of summary judgment in favor of Respondent on its declaratory judgment claim. This Court accepted this

appeal and placed it on the docket in accordance with Rule 5(b) of the Rules of Appellate Procedure.

B. Statement of Facts

The relevant facts are not in dispute.

The Lemasters own 100% of the oil and gas within and underlying the certain tract of land containing approximately 15.25 acres located in Ellsworth District, Tyler County, West Virginia, designated for tax purposes as tract or parcel number 2-23-20, and more particularly described in Tyler County Deed Book 328, page 325 (the "Subject Property"). (AR 2).

The Lemasters executed and entered into an oil and gas lease with PetroEdge Energy, LLC, dated December 13, 2011, which covered the Subject Property (the "Base Lease"). A Memorandum of the Base Lease was recorded January 12, 2012. (AR 30-31; 88-93). Petitioner was assigned this Base Lease through certain mesne conveyances. (AR 53).

The Base Lease originally granted the lessee the right to explore for, drill, and produce oil and natural gas from the Lease premises for "a term commencing December 13, 2011[,] and terminating 5 (five) years thereafter, and so much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the Premises in paying quantities, in the judgment of Lessee, or as the Premises shall be operated by Lessee in the search of oil or gas and as further set forth in the Lease, unless earlier terminated in accordance with the terms and provisions of the Lease." (AR 30-31; 88-93).

Prior to the time of the potential termination of the Base Lease (December 13, 2016), on or about September 24, 2016, the Lemasters and Petitioner entered into an Amendment and Ratification of Oil and Gas Lease covering the subject property (the "Lease Amendment") which, among other things, extended the primary term of the Lease for an additional period of

five years. (AR 40-41; 106-107). It is undisputed that the Lease Amendment was executed by the parties prior to the expiration of the term of the Base Lease.

The Top Lease, which gives rise to Respondent's claims in this case, was dated June 24, 2016, but was not intended to be made effective until December 14, 2016, and only upon certain necessary and preceding conditions, including the expiration of the Base Lease, that have not occurred. (AR 32-39; 94-101). A Memorandum of the Top Lease was recorded on August 30, 2016. (AR 37-39; 99-101).[1] The "Memorandum of Oil and Gas Lease" relating to the Top Lease states that the Memorandum is "dated this 24th day of June, 2016, but made effective as of the 14th day of December, 2016 ..." and, further, that,

> Lessor and Lessee acknowledge that the lands described in this [Top] Lease are presently subject to Oil and Gas Lease dated December 13, 2011 and set to expire on December 13, 2016 ... (the 'Existing Lease'). This [Top] Lease is granted on Lessor's reversionary interest in the leased premises and is hereby vested in interest, but, as subject to the Existing Lease, the interest covered by this [Top] Lease shall vest in possession upon the termination of the Existing Lease.

(AR 37-39; 99-101).

The Top Lease similarly states that the agreement is "made and entered into this 24th day of June, 2016, but made effective as of the 14th day of December, 2016 ("Effective Date") ..." (AR 32-36; 94-98).

III. SUMMARY OF THE ARGUMENT

The Circuit Court's ruling that the Top Lease takes priority over Petitioner's Base Lease as amended by the Lease Amendment is erroneous and should be reversed. Petitioner and the Lemasters, as parties to the Base Lease, had the absolute right under well-settled principles of contract law to amend that Lease and extend its primary term. There is no dispute that: (i)

[1] Respondent paid the Lemasters a bonus for executing the Top Lease in the amount of $2,478.13. An additional payment of $47,048.38 was subsequently mailed to the Lemasters, which payment was returned. (AR 7).

Petitioner's Base Lease was in effect at which time the Amended Lease between Petitioner and the Lemasters was executed; and (ii) the subject property was held by the Base Lease at the time of the execution of the Amended Lease. The plain language of the Top Lease directs that it was not intended to be made effective unless or until the expiration of the Base Lease, which did not occur. Moreover, the Top Lease conveyed no property interest to Respondent that would preclude Petitioner from extending the term of its Base Lease. *See e.g., Chesapeake Appalachia, L.L.C. v. Hickman,* 236 W. Va. 421, 434, 781 S.E.2d 198, 211 (2015) (recognizing that a top lease becomes effective only "if and when the existing lease expires or is terminated"); *St. Luke's United Methodist Church v. CNG Dev. Co.,* 222 W. Va. 185, 187 n. 6, 663 S.E.2d 639, 641 n. 6 (2008) (recognizing that a top lessee must first "defeat the lease of the original lessee" to enforce any rights under the top lease). Respondent's recording of its Top Lease, therefore, provided no basis upon which to find that Petitioner's Base Lease as amended by the Lease Amendment was taken subject to the Top Lease. No present property interest was conveyed by that Top Lease and the Top Lease was not in effect at the time that Petitioner amended its Base Lease to extend its primary term. The Circuit Court's ruling adversely impacts the right of freedom to contract between parties to an oil and gas lease, which freedom includes the right to modify or amend a valid existing contract upon the mutual consent of the parties to that contract. Petitioner's Base Lease, as amended, should be the only valid, effective, and enforceable lease affecting the subject property.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner respectfully requests oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. A Rule 19 argument is appropriate because the Petitioner alleges that the Circuit Court's ruling in favor of Respondent/Plaintiff on the declaratory judgment claim is in error and against the weight of the evidence

V. ARGUMENT

A. Standard of Review

This Court reviews the Circuit Court's grant of summary judgment that resulted in the entry of declaratory judgment in favor of Respondent *de novo*. "A circuit court's entry of a declaratory judgment is reviewed *de novo*." Syl. pt. 1, *City of Martinsburg v. Berkeley County Council*, 241 W. Va. 385, 825 S.E.2d 332 (2019), *quoting*, Syl. pt. 3, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995). *Accord*, *Wakim v. Pavlic*, 239 W. Va. 681, 685, 805 S.E.2d 442, 446 (2017) ("Pursuant to Rule 56 of the *West Virginia Rules of Civil Procedure*, a motion for summary judgment may be filed in a declaratory judgment action. A declaratory judgment thus entered is reviewed by this Court *de novo*").

B. The Circuit Court erred in entering summary judgment for Respondent on its Declaratory Judgment action and in denying Petitioner's Motion for Summary Judgment on the same claim.

The Circuit Court's ruling in favor of Respondent with respect to its declaratory judgment claim is erroneous. The Circuit Court's decision was based upon the following findings:

- Absent an express right to extend the term of a lease included within the lease language, "a base lease extension ... taken subsequent to the execution of a validly recorded top lease, does not affect the rights of a top lessee and is taken subject to the rights of the top lessee." (AR 10).

- Under West Virginia's Recording Act, W. Va. Code §§ 40-1-8 and 40-1-9, the Base Lease, as amended, is subject to Respondent's Top Lease. (AR 11-12).

The Circuit Court's Order erroneously failed to apply well-established law that permits parties to a contract to amend that contract. *See e.g. Thornsbury v. Cabot Oil & Gas Corp.*, 231 W. Va. 676, 680, 749 S.E.2d 569, 573 (2013); *Wilkinson v. Searls*, 155 W. Va. 475, 184 S.E.2d

735 (1971); *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 606, 245 S.E.2d 157, 159, (1978). Indeed, the Circuit Court did not directly address this right in its Order. Rather, the Circuit Court wrongly found that the extension of the term of the Base Lease was taken subject to Respondent's Top Lease on the ground that the language of the Base Lease did not include an expressly stated right to extend. (AR 10). The Circuit Court's entry of summary judgment on the parties' cross-motions seeking summary judgment on their declaratory judgment claims was in error and should be reversed.

1. Petitioner had a right to amend its Base Lease.

An oil and gas lease is both a contract and a conveyance under WV law:

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

Syl. pt. 1, *Bryan v. Big Two Mile Gas Co.*, 213 W.Va. 110, 117, 577 S.E.2d 258, 265 (2001), *quoting,* Syl. pt. 1, 2, 3, and 4, *McCullough Oil, Inc. v. Rezek*, 176 W.Va. 638, 346 S.E.2d 788 (1986). *Accord*, *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W. Va. 421, 434, 781 S.E.2d 198, 211 (2015).

"Because of the contractual nature of oil and gas leases, principles of contract law generally govern their interpretation." *Leggett v. EQT Production Company*, No. 1:13cv4, 2016 WL 297714, at *4 (N.D.W. Va. Jan. 22, 2016). *Accord, SWN Production Company, LLC v. Edge*, 5:15cv108, 2015 WL 5786739, at *4 (N.D.W. Va. Sept. 30, 2015) ("Under West Virginia law, an oil and gas lease is both a conveyance and a contract ... Because of the contractual nature of oil and gas leases, principles of contract law generally govern their interpretation ... Therefore, '[w]hen the language of a written instrument is plain and free from ambiguity, a court must give effect to the intent of the parties as expressed in the language employed and in such

circumstances resort may not be had to rules of construction.' "). *See also, Iafolla v. Douglas Pocahontas Coal Corp.*, 250 S.E.2d 128 (W. Va. 1978) (applying contract principles to an oil and gas lease); *Jolynne Corp. v. Michels*, 446 S.E.2d 494, 499-500 (W. Va. 1994) (applying contract principles to an oil and gas lease).

There is no dispute that Petitioner's Base Lease was in effect on September 24, 2016, at which time the Amended Lease was executed. There is also no dispute that the subject property was held by the Base Lease at the time of the execution of the Amended Lease. (AR 30-31; 40-41; 88-93; 106-107).

Where, as here, a contract is amended or modified by a later contract, the two contracts will be construed together and only the provisions of the original contract that are inconsistent with those of the latter will be disregarded. *See e.g.* Syl. pt. 1, *United Fuel Gas Co. v. Ledsome*, 109 W.Va. 14, 153 S.E. 303 (1930) ("Where a new contract is made with reference to the subject-matter of a former contract, containing provisions clearly inconsistent with certain provisions of the original contract, the obligation of the earlier contract, in so far as they are inconsistent with a later one, will be abrogated and discharged, and the two contracts will be construed together, disregarding the provisions of the original, which are inconsistent with those of the latter"); *Sanford v. First City Co.*, 192 S.E. 337, 341 (W.Va. 1937) ("A written contract may be modified by the subsequent conduct of the parties thereto relating to the same subject-matter ... But the new contract will be held to depart from the first to the extent only that its terms are inconsistent therewith").

The intent of the parties to modify certain provisions of the Base Lease but maintain other rights and obligations within that Lease is clearly stated in the Lease Amendment:

> ... Lessor and Lessee now desire to amend the primary term of the Lease to extend it to allow Lessee additional time to commence operations on the Leased Premises and further ratify the Lease as being in full force and effect.
>
> *****
>
> ... The primary term of the lease is hereby amended and modified to extend the primary term for an additional five (5) years such that the total primary term shall be ten (10) years from the effective date.

(AR 40; 106).

Petitioner had the absolute right under well-settled principles of contract law to amend the lease. Parties to a contract have the right to amend their contract by mutual consent. It is a well-established principle that a valid, unambiguous written contract may be modified by a subsequent contract based on a valuable consideration. *See e.g. Thornsbury v. Cabot Oil & Gas Corp.*, 231 W. Va. 676, 680, 749 S.E.2d 569, 573 (2013); *Wilkinson v. Searls*, 155 W. Va. 475, 184 S.E.2d 735 (1971); *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 606, 245 S.E.2d 157, 159, (1978). Accordingly, while the Base Lease may not have included language expressly providing that the parties had the right to modify its terms, the right to amend or modify by mutual consent is implicit with any contract. *Id.*

2. The conditions necessary for Respondent's Top Lease to become effective did not occur and that Top Lease is subordinate to Petitioner's base lease.

A top lease is generally defined as "[a] lease granted by a landowner during the existence of a recorded mineral lease which is to become effective if and when the existing lease expires or is terminated." *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W. Va. 421, 434, 781 S.E.2d 198, 211 (2015), *quoting*, Patrick H. Martin and Bruce M. Kramer, 8 *Williams & Meyers Oil and Gas Law* 1083 (2014). A top lease does not invalidate a bottom/base lease. Rather, a top lease is subject to a valid prior lease covering the same lease premises and does not become effective as to those premises unless or until the bottom/base lease expires or is terminated. *See e.g.*,

Chesapeake Appalachia, L.L.C., 236 W. Va. at 434, 781 S.E.2d at 211; *St. Luke's United Methodist Church v. CNG Dev. Co.*, 222 W. Va. 185, 187 n. 6, 663 S.E.2d 639, 641 n. 6 (2008); Patrick H. Martin and Bruce M. Kramer, 8 *Williams & Meyers Oil and Gas Law* 1081 (2017). Further, no property interest conveys with a top lease. Rather, "[t]o enforce [the] rights under the top lease, [the top lessee] must defeat the lease of the original lessee ..." *Cawthon v. CNX Gas Co., LLC*, No. 11-1231, 2012 WL 5835068, at *1 (W. Va. Nov. 16, 2012), *quoting*, *St. Luke's United Methodist Church v. CNG Dev. Co.*, 222 W. Va. 185, 187 n. 6, 663 S.E.2d 639, 641 n. 6 (2008).

Respondent's Top Lease is typical of others in that it is subordinate and subject to the prior Base Lease existing with respect to the subject property. The plain language of Respondent's Top Lease directs that the Top Lease was not intended to be made effective until December 14, 2016, and only upon certain necessary and preceding conditions, including the expiration of the underlying Base Lease. (AR 32-39; 94-101).

Where the language of an agreement is plain and ambiguous, the "language should be applied according to such meaning." *Drake v. West Virginia Self-Storage, Inc.*, 203 W. Va. 497, 500, 509 S.E.2d 21, 24 (1998), *quoting*, *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont,* 196 W. Va. 97, 101, 468 S.E.2d 712, 716 (1996). *Accord*, Syl. pt. 4, *McElroy Coal Co. v. Schoene*, 240 W. Va. 475, 813 S.E.2d 128 (2018).

Here, the undisputed facts establish that the term of the Base Lease did not expire. Accordingly, by its own terms, the conditions necessary for the Top Lease to become effective did not occur and the Top Lease remains subordinate to Petitioner's Lease and rights to the subject property.

3. Recording of the Top Lease did not render Petitioner's Base Lease as amended subordinate.

No present property interest was conveyed by the Top Lease and the Top Lease was not in effect at the time that Petitioner amended its Base Lease to extend its primary term. Petitioner's notice of the Top Lease, including its "no modification clause," is, therefore, immaterial. The Circuit Court's conclusion that Petitioner's extension of the primary term of its Base Lease was taken subject to Respondent's Top Lease on the ground that Petitioner had knowledge of the existence of the Top Lease or that the Top Lease included the "no modification clause" is clearly erroneous.

Petitioner had the right under well-settled contract principles to amend its Base Lease by mutual consent. *See e.g. Thornsbury*, 231 W. Va. 676, 749 S.E.2d 569; *Wilkinson*, 155 W. Va. 475, 184 S.E.2d 735; *John W. Lodge Distributing Co., Inc.*, 161 W. Va. 603, 245 S.E.2d 157. There is no dispute that Petitioner's Base Lease was in effect on September 24, 2016, at which time the Amended Lease was executed; and, the subject property was held by that Base Lease at the time of the execution of the Amended Lease. (AR 30-31; 40-41; 88-93; 106-107).

Further, Respondent's Top Lease conveyed no property interest which would interrupt Petitioner's ability to extend the term of its Base Lease during the term of that Lease. *See e.g.*, *Chesapeake Appalachia, L.L.C.*, 236 W. Va. at 434, 781 S.E.2d at 211 (recognizing that a top lease becomes effective only "if and when the existing lease expires or is terminated"); *St. Luke's United Methodist Church,* 222 W. Va. 185, 187 n. 6, 663 S.E.2d 639, 641 n. 6 (recognizing that a top lessee must first "defeat the lease of the original lessee" to enforce any rights under the top lease). By its very language and purpose, the Top Lease would not become effective (and would therefore convey no vested interest in the property) unless or until the Base Lease expired or was terminated, neither of which has occurred. (AR 32-39; 94-101).

The out-of-state cases cited by the Circuit Court to support its finding that Petitioner's Base Lease, as extended by the Amended Lease, is subordinate to Respondent's Top Lease are not controlling. In fact, *Rorex v. Karcher*, 224 P. 696 (Okl. 1923), which is relied upon by the Nebraska court in *Willan v. Farrar*, 124 N.W.2d 699 (Neb. 1963), both of which are cited by the Circuit Court, includes no discussion to indicate what law the court considered in deciding the issue of whether principles of contract or other law applicable in those states (as opposed to language in the contracts) might have permitted the original lessee and lessor a right to amend their leases.

Neither the existence nor recording of the Top Lease, or language within that Top Lease purporting to preclude modification of the Base Lease (the "no modification clause"), preclude Petitioner, as the lessee with a valid, superior, and existing lease with respect to the subject property, from acting to preserve its interests with respect to that property. Indeed, had Petitioner, for example, pulled trucks onto the property to begin mobilization efforts to explore for and extract natural gas from its Lease premises, the term of the Base Lease would also have been extended. (AR 88-93). There is no practical difference here where Petitioner exercised its recognized rights under established contract law to extend the term of the Base Lease by mutual consent.

4. The "no modification clause" included within Respondent's Top Lease is unenforceable and void as against public policy.

The Circuit Court's conclusion that Petitioner's extension of the primary term of its Base Lease was taken subject to Respondent's Top Lease on the ground that Petitioner had prior notice of the Top Lease is also erroneous because the "no modification clause" included within Respondent's Top Lease is unenforceable and void as it is against the public policy of this State. Under West Virginia law, "no action can be predicated upon a contract of any kind or in any

form which is expressly forbidden by law or otherwise void." *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W.Va. 33, 39, 614 S.E.2d 680, 86 (2005).

In determining whether a contract provision contravenes a state's public policy, the state's Constitution, laws, judicial decisions, and common law must be considered. *See e.g. Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 357 (1931); *Cordle v. General Hugh Mercer Corp.*, 174 W.Va. 321, 325, 325 S.E.2d 111, 114 (1984). The relevant principle is that a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement. *See e.g.* Syl. pt. 1, *Town of Newton v. Rumery*, 480 U.S. 386, 386 (1987). In considering whether a contract or provision is void as it contravenes public policy, the Supreme Court of Appeals of West Virginia has recognized as follows:

> [T]here is no absolute rule by which courts may determine what contracts contravene 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.

Cordle, 174 W.Va. at 325, 325 S.E.2d at 114 (citation omitted). *Accord*, *Wellington Power Corp.*, 217 W.Va. at 39, 614 S.E.2d at 686.

Here, while top leases are not expressly forbidden by law, the existence and application of the "no modification clause" which purports to interfere with and circumvent the right to lawfully modify the existing contract and/or Petitioner's superior rights in and to the subject property contravenes public policy and provides no basis upon which to find that the Top Lease is superior to Petitioner's Base Lease as extended by the Lease Amendment. Indeed, the "no modification clause" in the Top Lease is in the nature of a restrictive covenant as it purports to restrict rights relating to the subject property. The Top Lease, however, does not convey a

vested interest in the subject property as it does not ever become effective unless or until specific conditions - which have not occurred - are met. Further, under West Virginia law, a restrictive covenant that is unreasonable in its scope is not enforceable. *See e.g., Huntington Eye Associates, Inc. v. LoCascio*, 210 W.Va. 76, 83–84, 553 S.E.2d 773, 780–81 (2001) (discussing restrictive covenants in the context of an employment contract). The "no modification clause" in the Top Lease at issue is unreasonable and unenforceable as applied to the rights of the existing parties to the Base Lease to continue the term of that Lease, all of which is contrary to public policy.

In this case, this Court must consider two competing public policies. The first derives from the law pertaining to the priority of leases, including W. Va. Code § 40-1-8 (relating to the recording of leases). The second is the right and freedom to contract, which freedom includes the right to modify or amend a valid existing contract upon the mutual consent of the parties to that contract. *See e.g. Thornsbury*, 231 W. Va. 676, 749 S.E.2d 569; *Wilkinson*, 155 W. Va. 475, 184 S.E.2d 735; *John W. Lodge Distributing Co., Inc.*, 161 W. Va. 603, 245 S.E.2d 157. As an initial matter, if a recorded instrument is invalid, it cannot take priority over a valid lease. Here, the Top Lease at issue did not ever go into effect and is not a valid instrument which took priority over Petitioner's lease rights.

Moreover, West Virginia's "public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public." *Wellington Power Corp.*, 217 W.Va. at 38, 614 S.E.2d at 685. Here, enforcement of Respondent's Top Lease and any finding that it is superior – by reason of the "no modification clause" or the law pertaining to the priority of leases - violates exactly that principle: the freedom to contract. Under the established facts of this case, the public policy in

favor of the freedom of contracts outweighs any statute, including W. Va. Code §40-1-8, that prioritizes leasing interests, and compels a finding against Respondent and in favor of Petitioner with respect to the priority of the leases at issue. The Circuit Court's ruling in favor of Respondent with respect to its declaratory judgment claim is, therefore, erroneous and should be reversed.

VI. CONCLUSION

Petitioner had the right under well-settled contract principles to amend its Base Lease by mutual consent. Petitioner's Base Lease was in effect on September 24, 2016, at which time the Amended Lease was executed, and the subject property was held by the Base Lease at that time. The Circuit Court's conclusion that Petitioner's Base Lease as amended by the Lease Amendment is subordinate to Respondent's Top Lease on the ground that Petitioner had knowledge of the existence of Respondent's Top Lease or that the Top Lease included the "no modification clause" is erroneous. Respondent's Top Lease conveyed no property interest to Respondent to preclude Petitioner from extending the term of its Base Lease. The Circuit Court's ruling in favor of favor of Plaintiff/Respondent Antero Resources Corporation on its declaratory judgment claim and denial of Defendant/Petitioner EQT Production Company's Motion for Summary Judgment on the same claim is erroneous and should be reversed.

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