IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 19-0572

EQT PRODUCTION COMPANY,

Petitioner, Defendant Below

v.

ANTERO RESOURCES CORPORATION,

Respondent, Plaintiff Below

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Larry W. Lemasters and Linda J. Lemasters (collectively "the Lemasters") own the oil and gas within and underlying a certain tract of land containing 15.25 acres, located in Ellsworth District, Tyler County, West Virginia, designated for tax purposes as Tax Map 23, Parcel 20 (the "Subject Property"), being more particularly described in Deed Book 328, page 325.[1] [Joint Appendix, 19].

The Lemasters entered into an oil and gas lease with PetroEdge Energy, LLC ("PetroEdge"), dated December 13, 2011, which covered the Subject Property ("Base Lease"). [J.A. 88]. A Memorandum of the Base Lease was recorded on January 12, 2012, in Deed Book 390, page 635 ("Memorandum of Base Lease"). [J.A. 30]. The Memorandum of Base Lease provided, among other things, that the primary term of the lease commenced on December 13, 2011 and terminated five years thereafter, on December 13, 2016. [J.A. 30]. Critical to this case, the Base Lease did not provide for a right of renewal or right of extension of the primary term of the Base Lease. [J.A. 30]. Accordingly, the Memorandum of Base Lease did not provide notice of any renewal or extension rights because no such rights existed. [J.A. 30]. Petitioner EQT Production Company ("Petitioner" or "EQT") was assigned the Base Lease through certain mesne conveyances. [J.A. 7].

Thereafter, the Lemasters entered into an oil and gas lease with Respondent Antero Resources Corporation ("Respondent" or "Antero") dated June 24, 2016, but made effective December 14, 2016, covering the Subject Property for a primary term of five years from the effective date (the "Antero Top Lease"). [J.A. 32]. A memorandum of the Antero Top Lease was

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[1] All references to recorded instruments are to documents of record in the office of the Clerk of the County Commission of Tyler County, West Virginia, unless otherwise noted.

recorded on August 30, 2016, in Deed Book 542, page 794 ("Memorandum of Antero Top Lease"). [J.A. 37]. Under the terms of the Antero Top Lease, Antero and the Lemasters agreed that Antero would pay the Lemasters 5.0% of the total bonus payment, being $2,478.13, at the time of signing, which amount Antero and the Lemasters agreed was sufficient consideration to form a binding contract, and the remaining 95%, being $47,048.38, would be paid within fifteen business days of the effective date. [J.A. 98]. Antero timely tendered both payments to the Lemasters.[2] [J.A. 98, 103-04].

In the Antero Top Lease and the Memorandum of the Antero Top Lease, the Lemasters covenanted and agreed as follows:

> [A]s of the date Lessor executes this Lease, Lessor has not agreed to extend, amend, modify, or renew the Existing Lease [the Base Lease], or to take any action which would result in such extension, amendment, modification, or renewal of the Existing Lease, and Lessor further covenants and agrees that Lessor shall not enter into any such agreement or take any such action at any time after the date Lessor executes this Lease.

[J.A. 36, 38]. Thus, as of August 30, 2016, EQT and all other parties had constructive notice of the Antero Top Lease – including the Lemasters' agreement not to extend, amend, modify, or renew the Base Lease.

Despite the terms of the Antero Top Lease and the recorded Memorandum of Antero Top Lease, the Lemasters and EQT entered into an Amendment and Ratification of the Base Lease dated September 24, 2016, and recorded on December 12, 2016 in Deed Book 550, page 517 ("Base Lease Amendment"). [J.A. 40]. In the Base Lease Amendment, the Lemasters and EQT agreed to modify the Base Lease to extend the primary term for an additional five years. [J.A. 40].

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[2] The $47,048.38 payment was subsequently returned to Antero by letter from the Lemasters' counsel on January 31, 2017.

Prior to entering into the Base Lease Amendment, EQT employees Russell Greathouse, John Damato, George Heflin and Becky Heflin were aware of the Antero Top Lease. [J.A. 109]. Russell Greathouse, George Heflin, and Steven Prelipp, another EQT employee, had a copy of the Memorandum of Antero Top Lease prior to entering into the Base Lease Amendment. [J.A. 109] [J.A. 111-12, 114]. Moreover, George Heflin knew and understood that the Lemasters had covenanted with Antero not to extend or amend the Base Lease. [J.A. 113]. Despite EQT employees having constructive and actual notice of the terms of the Antero Top Lease and the Memorandum of Antero Top Lease, EQT and the Lemasters entered into the Base Lease Amendment to the detriment of Antero's rights and in violation of the Antero Top Lease.

II. PROCEDURAL HISTORY

On March 16, 2017, Antero filed its Amended Complaint against EQT and the Lemasters in the Circuit Court of Tyler County, West Virginia, asserting claims for breach of contract (Count I), intentional interference with contractual relationship (Count II), declaratory judgment (Count III), and slander of title (Count IV). Relevant to the current appeal, Antero sought a declaratory judgment from the Circuit Court that, (i) the Base Lease Amendment was void as to Antero, (ii) the Antero Top Lease was the only valid subsisting lease affecting the Subject Property, and (iii) the Base Lease Amendment was invalid or, in the alternative, subordinate to the Antero Top Lease. On March 28, 2017, EQT served its Answer to the Amended Complaint and Counterclaim. [J.A. 55]. Count I of EQT's counterclaim sought a declaratory judgment that the Base Lease, as amended, was the only lease in effect regarding the Subject Property and that the Antero Top Lease was subject to the Base Lease and Base Lease Amendment.

On November 5, 2018 Antero served its Motion for Partial Summary Judgment on Counts II (intentional interference with a contract) and III (declaratory judgment) of its Complaint and a Memorandum in support thereof ("Antero's Motion"). On November 26, 2018, EQT served

"Defendant EQT Production Company's Motion for Summary Judgment on its Counterclaim for Declaratory Judgment" with supporting Memorandum and Memorandum in Opposition to Antero's Motion ("EQT's Response").

On January 3, 2019, the Circuit Court entered the "Findings of Fact, Conclusions of Law and Order Granting the Motion for Partial Summary Judgment of Antero Resources Corporation (Counts II and III)" ("January 3, 2019 Order"). The January 3, 2019 Order denied EQT's cross-motion for summary judgment, granted Antero's Motion on its declaratory judgment claim, and held that under the West Virginia Recording Act, the Base Lease and Base Lease Amendment are subject to the Antero Top Lease, and the Antero Top Lease is the valid and existing oil and gas lease covering the Subject Property.[3]

On May 23, 2019, the Circuit Court amended its January 3, 2019 Order, finding upon express determination that the summary judgment award in favor of Antero for its declaratory judgment claim was a final order subject to immediate appellate review under Rule 54(b) of the Rules of Civil Procedure and W. Va. Code § 58-5-1. On June 21, 2019, EQT filed a Notice of Appeal of the Circuit Court's entry of summary judgment in favor of Antero on the declaratory judgment claim and subsequently perfected the appeal on September 20, 2019.

STATEMENT REGARDING ORAL ARGUMENT

Antero respectfully requests oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. Oral argument pursuant to Rule 19 and a memorandum decision

[3] The Circuit Court further granted summary judgment on Antero's claim against EQT for intentional interference with a contract. The Court reasoned that, in the Antero Top Lease, the Lemasters had covenanted not to amend or otherwise extend the Base Lease, which covenant was also contained in the Memorandum of Antero Top Lease. The Court further held that EQT had both constructive and actual knowledge of the Lemasters' agreement not to extend the Base Lease. Despite that actual knowledge and notice, EQT intentionally entered into the Base Lease Amendment with the Lemasters and injured Antero's leasehold rights.

disposing of this case are appropriate because this matter involves the application of the well settled rules under the West Virginia Recording Act and this Court's precedent.

STANDARD OF REVIEW

This Court reviews a circuit court's entry of summary judgment *de novo*. *See Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994) ("A circuit court's entry of summary judgment is reviewed de novo." Further, "[a]ppellate review of a partial summary judgment order is the same as that of a summary judgment order, which is de novo." *Syl. pt. 1, Mason v. Smith*, 233 W. Va. 673, 760 S.E.2d 487 (2014); *Syl. pt. 1, W. Virginia Dep't of Transp., Div. of Highways v. Robertson*, 217 W. Va. 497, 618 S.E.2d 506 (2005).

SUMMARY OF ARGUMENT

The issue before this Court is squarely addressed by the West Virginia Recording Act and this Court's precedent. It is undisputed that the Base Lease did not provide for a right to extend the primary term, thus the Memorandum of Base Lease did not provide notice of a right to extend. Even assuming that the Lemasters and EQT had a latent right to amend and extend the Base Lease, the Lemasters and EQT entered into and recorded the Base Lease Amendment after Antero and the Lemasters entered into and recorded the Antero Top Lease. A lease amendment is "void, as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record . . . ." W. Va. Code § 40-1-9. Because Antero is a bona fide purchaser and protected by the Recording Act, EQT's Base Lease Amendment is void as to Antero and subject to the Antero Top Lease.

While, as EQT argues, parties may have a right to amend contracts, such amendments are subject to the rights of intervening third parties. *See Rorex v. Karcher*, 101 Okla. 195, 224 P. 696 (1923). EQT's argument, that it may amend its lease without regard to the rights of intervening third parties, is legally incorrect and untenable. This Court has long held that courts

may reform deeds based upon mistakes by parties, "but, if the rights of an innocent bona fide purchaser for value have intervened, the reformation and correction will not be made." *Stickley v. Thorn*, 87 W. Va. 673, 106 S.E. 240 (1921). It would be odd for this Court to hold that a court may not reform a deed based upon a mistake if such reformation will injure a bona fide purchaser; and then, on the other hand, hold that parties may amend a lease (which is no different than a deed under the West Virginia Recording Act) to the detriment of a bona fide purchaser, such as Antero. Moreover, such an untenable rule would disrupt other types of real estate transactions.

Further, as the Circuit Court held, the Base Lease Amendment tortiously interfered with Antero's contractual rights. A promise that tortiously interferes with performance of a contract with a third person is unenforceable on grounds of public policy. *Burgess v. Gateway Commc'ns, Inc.*, 26 F. Supp. 2d 888, 891 (S.D. W. Va. 1998); Restatement (Second) of Contracts § 194 (1981). Thus, the Base Lease Amendment is unenforceable and void based on its tortious interference with Antero's rights.

Finally, EQT's argument—that a holding that the Antero Top Lease is superior to the Base Lease and the Base Lease Amendment would be contrary to public policy—is wholly without merit. EQT argues, in error, that the public policy in favor of freedom of contracts outweighs any statute, including W. Va. Code § 40-1-8 and W. Va. Code § 40-1-9. That argument is directly contrary to this Court's precedent because it is the Legislature's duty to establish policy and embody that policy in legislation. *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 594, 730 S.E.2d 368, 377 (2012). This State's public policy, under the West Virginia Recording Act, favors recordation of real estate contracts and the protection of bona fide purchasers, such as Antero.

The Circuit Court correctly analyzed and applied the West Virginia Recording Act, this Court's precedent, and the persuasive reasoning and holdings from courts in other jurisdictions in ruling that the Base Lease Amendment is void as to Antero and thus subject to the Antero Top

Lease. This Court should therefore affirm the Circuit Court's Order and remand this case to the Circuit Court of Tyler County for further proceedings.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY HELD THAT THE BASE LEASE AMENDMENT IS VOID AS TO ANTERO, A BONA FIDE PURCHASER, AND THE ANTERO TOP LEASE TAKES PRIORITY OVER THE BASE LEASE AMENDMENT.

Petitioner's Brief identified one assignment of error – that the Circuit Court erroneously granted Antero's Motion and found that the Antero Top Lease took priority over EQT's Base Lease Amendment. This Court should reject EQT's arguments because the Circuit Court properly applied the West Virginia Recording Act and this Court's precedent. The Circuit Court correctly held that the Antero Top Lease takes priority over the Base Lease Amendment because the Base Lease did not contain a right to extend the primary term and the Antero Top Lease was signed and recorded prior to the signing and recording of the Base Lease Amendment.

A. Under the West Virginia Recording Act, the Base Lease Amendment is Void as to Antero, a Bona Fide Purchaser, and subject to the Antero Top Lease.

"A bona fide purchaser is one who actually purchases in good faith" *Kourt Sec. Partners, LLC v. Judy's Locksmiths, Inc.*, 239 W. Va. 757, 761, 806 S.E.2d 188, 192 (2017). *See also*, *Wolfe v. Alpizar*, 219 W.Va. 525, 530, 637 S.E.2d 623, 628 (2006) (finding status as bona fide purchaser for value without notice where "innocent purchaser" bought land in absence of "documentation of which [purchaser] could have or should have been aware that would have alerted her to the appellants' claims...."); *Stickley v. Thorn*, 87 W. Va. 673, 106 S.E. 240, 242 (1921) (a bona fide purchaser is "one who purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him on inquiry.").

This Court has long held that the purpose of the West Virginia Recording Act is to protect bona fide purchasers. *Wolfe v. Alpizar*, 219 W. Va. 525, 529, 637 S.E.2d 623, 627 (2006)

(citing *Bank of Marlington v. McLaughlin*, 121 W. Va. 41, 44, 1 S.E.2d 251, 253 (1939)). Specifically, W. Va. Code § 40-1-9 provides that a contract conveying real estate, such as a lease, "shall be void, as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record . . . ." Further, W. Va. Code § 40-1-8 provides that in lieu of recording the actual lease, a memorandum of lease may be recorded. However, any such memorandum of lease must contain certain information to be valid, including, among other things:

> if there is a right of extension or renewal, the maximum period for which, or date to which the lease may be extended, or the number of times or date to which it may be renewed and the date or dates on which such rights of extension or renewal are exercisable.

Id. After providing that a memorandum of lease may be recorded in lieu of the actual lease, § 40-1-8 specifically provides, "[s]uch memorandum shall constitute notice of only the information contained therein."[4]

Under the West Virginia Recording Act, Antero is a bona fide purchaser. Antero did not (and could not) know of any right to extend the Base Lease beyond the primary term because no right existed, and in good faith, Antero paid the Lemasters valuable consideration to enter into the Antero Top Lease. Antero recorded the Memorandum of Antero Top Lease, which fully complied with the requirements of § 40-1-8 and provided constructive notice of the Antero Top Lease and the Lemasters covenant not to extend or amend the Base Lease, prior to EQT signing and recording the Base Lease Amendment. Because Antero is a bona fide purchaser and

[4] "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 586, 466 S.E.2d 424, 437 (1995); *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 312, 465 S.E.2d 399, 414 (1995), (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S. Ct. 1146, 1149, 117 L.Ed.2d 391, 397 (1992)).

the Antero Top Lease was signed and recorded prior to the Base Lease Amendment, the Base Lease Amendment is void as to Antero, and thus subject to the terms of the Antero Top Lease.

EQT attempts to evade the clear language of the West Virginia Recording Act by arguing that, under general contract principles, it may amend the Base Lease at any time and that, evidently, all parties are on notice of some latent right of extension. [*See* Petitioner's Brief, 6]. Assuming *arguendo* that the Lemasters and EQT had a latent right to extend the Base Lease, such a right does not trump the West Virginia Recording Act or this Court's precedent, which require notice to third parties and protection to bona fide purchasers when the notice requirements are not met. As such, the Circuit Court properly applied the West Virginia Recording Act in holding the Base Lease Amendment is void as to Antero, a bona fide purchaser, and that the Antero Top Lease takes priority over the Base Lease Amendment.

B. Under this Court's Precedent Applying the West Virginia Recording Act, the Antero Top Lease takes Priority over the Base Lease Amendment.

This Court has considered the impact of a subsequent lessee of oil and gas and has held that if a subsequent oil and gas lessee does not have constructive, actual, or inquiry notice of the rights of a prior lessee, then the subsequent lessee takes the lease free and clear of the prior lease. *See Heck v. Morgan*, 88 W. Va. 102, 106 S.E. 413, 417 (1921); *see also Trans Energy, Inc. v. EQT Prod. Co.*, 743 F.3d 895 (4th Cir. 2014) (holding that an oil and gas lessee who has the leasehold title pursuant to a duly recorded assignment of oil and gas leases has superior rights to an oil and gas lessee who has leasehold title pursuant to an unrecorded assignment).

In *Heck v. Morgan*, the subsequent lessee claimed that he was a bona fide purchaser, without notice, of a lessee under a previous lease, which was not recorded, and thus the subsequent lessee argued that his lease took priority over the previous lease. *Id.* at 417. This Court agreed on

the legal point advanced by the subsequent lessee but found that the subsequent lessee had inquiry notice of the previous lease, and was, accordingly, not a bona fide purchaser.

> The defendant . . . claims that he was a purchaser for value in good faith, and without notice of the plaintiff's rights under the lease which had been theretofore executed to him by Morgan, and that therefore his rights under the lease executed to him by Morgan in September, 1919, are superior to the rights of the plaintiff, and this would be correct if the facts justified this conclusion, for under our recording statutes the plaintiff's lease would be void as to a purchaser for value in good faith without notice.

Id.

Here, it would be impossible for Antero to have actual, constructive or inquiry notice of any right of EQT to extend the primary term of the Base Lease because no right existed in the first place. Thus, as this Court instructed in *Heck*, the Base Lease Amendment is void as to Antero, the subsequent bona fide lessee, and the Antero Top Lease takes priority over the Base Lease Amendment.

C. Courts in Other Jurisdictions Hold that Top Leases take Priority over Base Lease Amendments when the Top Lease was Recorded Prior to the Base Lease Amendment.

Although this Court has not specifically considered a case pertaining to competing rights between base lessees and top lessees, the Circuit Court properly applied the holdings from Courts in other jurisdictions in reaching its conclusion that the Antero Top Lease takes priority over the Base Lease Amendment. In *Rorex v. Karcher*, 101 Okla. 195, 224 P. 696 (1923), a landowner executed a base oil and gas lease to the defendants on November 1, 1913 for a primary term of five years. On December 11, 1917, and while defendants' base lease was still in force, the landowner executed a top lease to plaintiff for a period of 1 1/2 years from the date of the top lease. *Id*, 224 P. at 697. The defendants' base lease would have expired on November 1, 1918, but on September 26, 1918, the defendants procured an extension of the base lease for a period of one

year. *Id.* The Supreme Court of Oklahoma held that the top lease executed by the landowner to the plaintiff was a valid lease, although executed while there was a valid lease on the property, and that the base lessees' rights under the extension agreement were subject to the superior rights of the top lessees under the top lease. *Id.*

The defendants argued that "one of the rights of the lessees under the first lease was to procure an extension of time during the lifetime of the first lease." *Id.* Rejecting this argument, the court reasoned, "[t[here was no provision in the [base] lease contract granting an extension or right of extension to the lessees, and any extension procured by the lessees was subject to the rights of intervening third persons." *Id.* Thus, the court held that "[p]rior to the time the extension was procured, the rights of the plaintiff [top lessee] intervened by reason of his lease, and any extension granted after the execution of the lease to the plaintiff was taken subject to the rights of the [top lessee] under his lease." *Id.*, 224 P. at 697-98.

In addition to the Supreme Court of Oklahoma, the Nebraska Supreme Court has also held that actions taken by a base lessee subsequent to the execution of a top lease do not affect the rights of a top lessee. In *Willan v. Farrar*, 176 Neb. 1, 124 N.W.2d 699 (1963), the landowners executed three oil and gas leases to plaintiff, covering 22,000 acres. *Id.* at 3, 124 N.W.2d at 702. Each lease provided for termination on June 15th of each succeeding year unless drilling operations were commenced or delay rentals were paid on or before that day. *Id.* No drilling operations ever took place. *Id.* In April 1961, prior to expiration of the primary term of the three base leases, the landowners executed top leases to Hemisphere, the top lessee, covering the 22,000 acres, which top leases were to go into effect upon termination of the base leases. *Id.*

Prior to June 15, 1961 (the day by which delay rentals were required to be paid under the base lease), the landowner agreed to extend the delay rental deadline to June 26, 1961, and the landowner accepted payment of the delay rentals before the June 26th deadline. *Id.*

Although the court held that acceptance of the check by the landowner operated as a waiver by the landowner of strict performance and estopped him from claiming termination of the lease, such actions did not affect the rights of intervening third parties, such as Hemisphere:

> [A]cceptance of delay rentals by the lessor in an oil and gas lease containing an 'unless' provision after the date they were due or an extension of payment thereof by such lessor do not continue the lease in force as against subsequent lessees and purchasers . . . .

Id. at 5, 124 N.W.2d at 703 (internal citations omitted). Analyzing the facts of the case, the Nebraska Supreme Court reasoned:

> In the case before us Hemisphere's top leases covered the premises involved before the rental payments provided in the 'unless clause' of [base] leases became due. According to the authorities cited any extension granted by [landowners] alone or any waiver caused by their acceptance of the rentals could not affect the rights of Hemisphere. If the rentals were not paid on time the leases expired according to their terms and were at an end. The authorities also appear based on sound reasoning. If [the landowners] could extend the leases or waive payments of delay rentals for 10 days they could do so for 6 months or any extended period. The top leases were expressly given to be in force on the termination of the prior ones because of nonpayment of the rentals. The [landowners] evidently desired that their premises remain under lease if [the base lease] delay rentals were not paid. Though [the base lessee] had an option by which he could continue the leases by paying the rentals when they became due, he was under no obligation to do so. [The landowners] having given the top leases to Hemisphere owed a duty not to render their provisions ineffective. The purpose of Hemisphere's leases should not be permitted to be defeated by the actions of the lessors at will.

Id. at 6, 124 N.W. at 703-04.

The Nebraska Supreme Court's decision in *Willan* and the Supreme Court of Oklahoma's decision in *Rorex* both address an issue that is squarely on point with the issue in this case: may a landowner and base lessee (such as the Lemasters and EQT) abrogate and nullify the terms of a valid top lease by amending the terms of the base lease after the execution and

recordation of the top lease? As the courts held in *Willan* and *Rorex*, although the landowner and base lessee may amend the terms of their base lease, any such amendment is subject to the lessee's rights under the top lease. *See also First Nat. Bank in Santa Ana v. Coast Consol. Oil Co.,* 84 Cal. App. 2d 250, 190 P.2d 214 (1948) (holding that that an amendment and modification of an oil and gas lease is subject to a previously recorded deed of trust, even though the original oil and gas lease was recorded before the deed of trust).

Willan and *Rorex* address the exact situation presented in this case, are well-reasoned, and conform to this Court's jurisprudence regarding the West Virginia Recording Act. Moreover, *Willan* and *Rorex* are reflections of common practices in real estate leasing anytime residential, industrial or commercial property is repeatedly leased. Therefore, the Circuit Court properly applied the holdings in *Willan* and *Rorex*, in conjunction with the West Virginia Recording Act and this Court's precedent, in holding that the Antero Top Lease takes priority over the Base Lease Amendment.

II. PURSUANT TO THIS COURT'S PRECEDENT, CONTRACT AMENDMENTS OR REFORMATIONS ARE SUBJECT TO THE RIGHTS OF INNOCENT, INTERVENING THIRD PARTIES SUCH AS ANTERO.

EQT's argument is also directly contrary to this Court's precedent regarding contract and deed reformation. This Court permits reformation of deeds or contracts based upon clear and convincing evidence of a mistake between the parties. However, this Court has repeatedly held that reformation is not permitted if it is detrimental to the rights of bona fide purchasers, such as Antero:

> Equity will not reform and correct a deed on account of mistake unless it is shown by clear, convincing and unequivocal evidence that the mistake was mutual; but if the rights of an innocent bona fide purchaser for value have intervened, the reformation and correction will not be made.

Stickley v. Thorn, 87 W. Va. 673, 106 S.E. 240 (1921); *Wells v. Tennant*, 180 W. Va. 166, 169, 375 S.E.2d 798, 801 (1988); *accord*, *Johnston v. Terry*, 128 W. Va. 94, 102, 36 S.E.2d 489, 493 (1945) ("But there can be no reformation of a deed for mutual mistake of the parties, or a mistake of the scrivener, where such reformation would operate to prejudice the rights of one who claims the land as an innocent purchaser for value."); *Syl. pt. 2*, *Lough v. Michael*, 37 W. Va. 679, 17 S.E. 181 (1893) ("A mistake of the scrivener in drawing a deed, whereby the reservation of such lien is omitted, will be corrected by a court of equity, but not to the prejudice of a lienholder whose debt was contracted on the faith of the vendee's ownership of the property convened by a deed of record.") This rule is fundamental to real estate law and recognized by the great majority of jurisdictions. *See McKnight v. Johnson*, 236 Ky. 763, 34 S.W.2d 239, 241 (1930) ("No rule of law is better settled than that reformation of an instrument will not be decreed as against a subsequent purchaser for value without notice."); *Crahane v. Swan*, 212 Or. 143, 149, 318 P.2d 942, 945 (1957) ("It is an almost universal rule of equity not to grant relief by way of reformation to the injury of innocent third persons such as bona fide purchasers . . . .").

Under this Court's precedent regarding contract reformation, EQT's argument fails. It would be untenable for this Court to hold that a deed or contract may not be reformed, based upon a mutual mistake of the parties, if it would prejudice the rights of an innocent purchaser for value and, on the other hand, to permit a lease or contract to be amended, without even the presence of a mutual mistake, to the detriment of an innocent purchaser for value. To be clear, EQT has not, at any time during this litigation, alleged that PetroEdge and the Lemasters actually intended for the Base Lease to contain a right of extension and that the failure to include such a provision was a mistake. EQT simply argues that it has a latent right to amend and extend its Base Lease. However, under this Court's clear precedent, that argument is incorrect. If a court will not reform one type of contract because of a mistake to the detriment of innocent purchasers for value, then

parties should not, by agreement, be permitted to amend another type of contract to the detriment of innocent purchasers for value.

If EQT is permitted to amend and modify its Base Lease at any time—and supersede the rights of bona fide purchasers such as Antero—then the provisions of W. Va. Code §§ 40-1-8 and 40-1-9 will be severely limited in effect. Under such a holding, EQT and its successors in interest could amend the Base Lease at any time, enlarging its rights and extending the term, without regard to the rights of top lessees, mortgagees, intervening surface owners, and related entities and persons. Leases could be subsequently amended to add surface rights to the detriment of intervening surface right owners. Mortgages and deeds of trust could be amended to add additional property even though the additional property was already conveyed to another intervening third party. Mineral lessees could amend their leases by adding mineral tracts after the lessor has leased those tracts to other parties. It is because of these clear, unworkable effects that this Court should hold that an amendment to a base or primary lease is subject to a top lease taken after the primary lease but before the amendment.

III. THE ANTERO TOP LEASE WAS A VALID CONTRACT AT THE TIME THE BASE LEASE AMENDMENT WAS SIGNED AND THE LEMASTERS' COVENANT TO NOT VOLUNTARILY EXTEND OR OTHERWISE AMEND THE BASE LEASE DOES NOT CONTRAVENE PUBLIC POLICY.

EQT argues that the conditions necessary for Antero's Top Lease to become effective (the expiration of the Base Lease) did not occur and, therefore, the Antero Top Lease is subordinate to the Base Lease. Again, that argument first operates under the flawed contention that the Base Lease Amendment was enforceable. It is not, because, as addressed below, the Base Lease Amendment tortiously interfered with Antero's rights under the Antero Top Lease. *Burgess v. Gateway Commc'ns, Inc.*, 26 F. Supp. 2d 888, 891 (S.D. W. Va. 1998).

Moreover, the Base Lease (excluding the terms of the Base Lease Amendment), provided that it would expire on December 13, 2016, unless oil or gas were produced on the Subject Property or Lessee was otherwise operating on the property. [J.A., 30]. It is undisputed (i) that neither oil nor gas were produced from the Subject Property and (ii) that EQT has not operated on the Subject Property. An oil and gas lease is both a conveyance and a contract. *Bryan v. Big Two Mile Gas Co.*, 577 S.E.2d 258, 265, 213 W. Va. 110, 117 (2001); *Jolynne Corp. v. Michels*, 446 S.E.2d 494, 499, 191 W. Va. 406, 411 (1994); *SWN Prod. Co., LLC v. Edge*, No. 5:15CV108, 2015 WL 5786739, at *4 (N.D. W. Va. Sept. 30, 2015). "Because of the contractual nature of oil and gas leases, principles of contract law generally govern their interpretation." *SWN Prod. Co., LLC v. Edge*, No. 5:15CV108, 2015 WL 5786739, at *4 (N.D. W. Va. Sept. 30, 2015); *Iafolla v. Douglas Pocahontas Coal Corp.*, 162 W. Va. 489, 493, 250 S.E.2d 128, 131 (1978). In construing the terms of contracts, "it is elementary that the intentions of the parties to the agreement must control the obligations thereunder." *Columbia Gas Transmission Corp. v. E. I. du Pont de Nemours & Co.*, 159 W. Va. 1, 11, 217 S.E.2d 919, 925 (1975).

Under the clear terms of the Base Lease and the Memorandum of Base Lease, those two conditions subsequent—production of oil and gas from, or operations on, the Subject Property—were the only mechanisms by which the Base Lease could be extended. It follows that Antero's Top Lease was subject only to the terms contained in the Base Lease and the Memorandum of Base Lease. As EQT acknowledges in its brief, the Base Lease Amendment was a second contract. As the Circuit Court correctly held, the Base Lease Amendment tortiously interfered with Antero's rights under the Antero Top Lease, the Base Lease Amendment is unenforceable and its terms are void. Moreover, under the clear terms of the Antero Top Lease, all conditions necessary for the primary term of the Antero Top Lease to become effective were met, being the expiration of the five-year primary term and the lack of oil and gas production and

operations on the Subject Property. Antero and the Lemasters agreed that the only way the Antero Top Lease would not go into effect was if the "[e]xisting Lease [the Base Lease] is validly extended under any provision contained therein . . ." [J.A. 98] (emphasis added). The Base Lease was not extended under any provisions contained therein.

EQT misconstrues the Antero Top Lease by arguing that the conditions necessary for the Antero Top Lease to become effective did not occur. Pursuant to its terms, the Antero Top Lease was a binding contract upon signing. The terms of the Antero Top Lease provide that it was vested in interest upon singing. [J.A. 98]. EQT further attempts to argue that none of the terms of the Antero Top Lease were effective until December 14, 2016. That is incorrect. Although the primary term (the date Antero was permitted to begin operations) did not begin until December 14, 2016, the Antero Top Lease was otherwise a binding, effective contract upon signing. Indeed, the Lemasters and Antero agreed the installment of the bonus payment was "sufficient consideration to form a binding contract between Lessor and Lessee." [J.A. 98].

Ultimately, the intent of the parties in this case is clear on the face of the Antero Top Lease. The Lemasters and Antero recognized that the Base Lease affected the Subject Property and that the primary term of the Base Lease was set to expire on December 13, 2016. The parties further recognized that the Base Lease could only be extended if oil and gas was produced or if EQT or its predecessors in interest operated for oil and/or gas on the Subject Property. No other provision for extending the Base Lease existed in the Base Lease. Thus, the Lemasters accepted valuable consideration from Antero for an agreement not to amend or otherwise extend the Base Lease.

EQT's argument—that the Lemasters' agreement not to extend the Base Lease is void as against public policy—is wholly incorrect. Accepting EQT's argument would greatly reduce the common practice of top leasing in this state and would hinder production of oil and gas.

The Legislature has declared that it is the public policy of this State and in the public interest to "[f]oster, encourage and promote exploration for and development, production, utilization and conservation of oil and gas resources" W. Va. Code § 22C-9-1; *St. Luke's United Methodist Church v. CNG Dev. Co.*, 222 W. Va. 185, 192, 663 S.E.2d 639, 646 (2008). If this Court were to hold that the Lemasters covenant is unenforceable, oil and gas lessees, such as Antero, would have little interest in entering into top leases. Under such a ruling, lessees, such as EQT, could extend leases in perpetuity without ever producing oil and gas, which, as declared by the Legislature, is against this State's public policy.

This Court should therefore hold that the Base Lease Amendment is unenforceable and void, hold that all conditions necessary for the Antero Top Lease to become effective were met, and affirm the Circuit Court's ruling that the Antero Top Lease is the valid oil and gas lease affecting the Subject Property.

IV. THE BASE LEASE AMENDMENT IS VOID AND UNENFORCEABLE BECAUSE IT CAUSED THE LEMASTERS TO INTENTIONALLY BREACH THE ANTERO TOP LEASE AND CONSTITUTED TORTIOUS INTERFERENCE WITH ANTERO'S CONTRACTUAL RIGHTS.

EQT argues that parties have a right, without limitation, to amend a contract during the term of the contract. While that might generally be true, any such amendment is (i) as discussed above, void as to bona fide purchasers and subject to the rights of innocent intervening third parties, and (ii) unenforceable if it causes one of the parties to the amendment to breach a previous agreement. As multiple courts have held, and as the Restatement (Second) of Contracts provides, "[a] promise that tortiously interferes with performance of a contract with a third person ... is unenforceable on grounds of public policy." *Burgess v. Gateway Commc'ns, Inc.*, 26 F. Supp. 2d 888, 891 (S.D. W. Va. 1998); Restatement (Second) of Contracts § 194 (1981); *see also* 7 Williston on Contracts § 16:14 (4th ed.) (stating that "[a] number of decisions declare illegal a bargain

necessarily involving a breach of a previous contract with another party or tending to induce such wrongful nonperformance."); *Roberts v. Criss*, 266 F. 296, 302 (2d Cir. 1920) (holding that "[a]n agreement is illegal and void where its object is the commission of a civil wrong against a third person.").

As the Circuit Court correctly held, by entering into the Base Lease Amendment, EQT tortiously interfered with Antero's rights under the Antero Top Lease. Specifically, the Circuit Court found that prior to the execution of the Base Lease Amendment, several EQT employees were aware of the Antero Top Lease and had a copy of the Memorandum of Antero Top Lease. [J.A. 13]. Despite EQT's actual and constructive knowledge of the terms of the Antero Top Lease, EQT intentionally entered into the Base Lease Amendment and attempted to extend the Base Lease for an additional five years, in clear violation of the Antero Top Lease. *Id.* The Circuit Court correctly concluded that, in spite of its knowledge of the covenant in the Antero Top Lease that the Lemasters would not voluntarily amend or otherwise extend the Base Lease, EQT intentionally interfered with Antero's contractual relationship with the Lemasters by inducing the Lemasters to execute the Base Lease Amendment. [J.A. 12-13]. Accordingly, the Circuit Court granted summary judgment in favor of Antero on the tortious interference count.

EQT's argument is predicated on the flawed premise that, because a latent right to amend exists in all contracts, it could amend its contract to the detriment of Antero's rights. That is incorrect. As EQT states in Petitioner's Brief, the Base Lease Amendment was a second contract. [See Petitioner's Brief, 9] (A "written contract may be modified by a subsequent contract based on a valuable consideration."). A latter contract, such as the Base Lease Amendment in this case, may not tortiously interfere with the rights of a third party, such as Antero. Pursuant to the clear weight of authority, because the Base Lease Amendment tortiously interfered with the rights of Antero, it is unenforceable as against public policy. Thus, because the Base Lease has expired and

the Base Lease Amendment is void an unenforceable, the Antero Top Lease is the only valid and subsisting lease affecting the Subject Property.

CONCLUSION

For all the reasons set forth in this brief and such other reasons as may appear in the record, the Respondent Antero Resources Corporation respectfully requests that this Court hold that the Antero Top Lease is the valid and subsisting oil and gas lease affecting the Subject Property, affirm the Circuit Court's order granting summary judgment in favor of Antero as to the validity of the Antero Top Lease, and remand this case to the Circuit Court of Tyler County for further proceedings.

Respectfully submitted,

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