IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 08-

ESTATE OF GARRISON G. TAWNEY, BY LELA ANN GOFF, EXECUTRIX, LELA ANN GOFF AND VERNON B. GOFF, HUSBAND AND WIFE, JANICE E. COOPER AND CLIFFORD R. COOPER, HUSBAND AND WIFE, LARRY G. PARKER, JOHN W. PARKER, ORTON A. JONES, ANCILLARY ADMINISTRATOR OF THE ESTATE OF RICHARD L. ASHLEY, AND ORTON A. JONES, ADMINISTRATOR OF THE ESTATE OF ALICE MYRTLE ASHLEY JONES,
PLAINTIFFS BELOW, RESPONDENTS

VS.

COLUMBIA NATURAL RESOURCES, LLC, A DELAWARE CORPORATION, F/K/A COLUMBIA NATURAL RESOURCES, INC., A TEXAS CORPORATION; NISOURCE INC., A DELAWARE CORPORATION; COLUMBIA ENERGY GROUP, A DELAWARE CORPORATION; AND CHESAPEAKE APPALACHIA, L.L.C., AN OKLAHOMA LIMITED LIABILITY COMPANY,
DEFENDANTS BELOW, PETITIONERS

HONORABLE THOMAS C. EVANS, III, JUDGE
CIRCUIT COURT OF ROANE COUNTY
CIVIL ACTION NO. 03-C-10E

PETITION FOR APPEAL

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TABLE OF CONTENTS

I. INTRODUCTION

This is an appeal on behalf NiSource Inc. ["NiSource"]; Columbia Energy Group ["CEG"]; Chesapeake Appalachia, L.L.C. ["CNR"],[1] and Columbia Natural Resources, LLC, f/k/a Columbia Natural Resources, Inc. ["CNR"], from a judgment of over $400 million. The Petitioners submit that among many reasons their petition for appeal should be granted, six are particularly compelling.

First, the imposition of $270 million in punitive damages was erroneous and violated the Petitioners' due process rights. Second, instructing the jury, immediately prior to trial, that the Petitioners had been violating public policy for more than two decades, was erroneous. Third, the imposition of $29.2 million in compensatory damages arising from the retroactive reformation of the Petitioners' flat-rate leases was erroneous and violated the Petitioners' constitutional rights. Fourth, the imposition of $44.2 million in damages arising from the ruling invalidating fixed-priced sales contracts was erroneous. Fifth, the refusal to allow the Petitioners to introduce as evidence the very leases which are the heart of this case until all of the testimony had concluded was erroneous. Finally, the trial court's certification of a class involving disparate claims by disparate class members with disparate leases was erroneous and violated the Petitioners' due process rights.

II. PROCEDURAL HISTORY

In 2003, the Respondents filed suit against CNR alleging as their causes of action: (1) breach of contract; (2) breach of fiduciary duty; (3) violation of the flat-rate statute; (4) fraudulent

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[1]"CNR," an oil and gas exploration and production company, was formed in 1985, as a subsidiary of Columbia Energy Resources ("CER"), which was a subsidiary of CEG. In November 2000, NiSource, an unaffiliated holding company, merged with and acquired the interests of CEG, including CER and CNR. In August 2003, CEG, which owned all of CER's capital stock, sold CER, which owned all of CNR's capital stock, to Triana Energy Holdings, Inc. ("Triana"). Pursuant to a Stock Purchase Agreement, NiSource served as a guarantor of some of CEG's obligations with respect to that transaction. Also in August 2003, Triana converted CNR to a limited liability company, and changed its name to Columbia Natural Resources, LLC. In November of 2005, Triana sold the stock of CER and CNR to Chesapeake Energy Corporation. In February 2006, CER and CNR merged with Chesapeake Appalachia, another subsidiary of Chesapeake Energy Corporation. The oil and gas exploration and production company continues to operate as Chesapeake Appalachia, L.L.C.

concealment "of the rents and royalties to which they are entitled;" and (5) violation of the consumer protection statute.[2] The complaint also sought punitive damages and class certification.[3]

On January 27, 2007, following a three-week trial, the jury returned a verdict as follows:

(1) $10,159,672 on a claim that CNR improperly deducted "gathering and processing fees;"[4]

(2) $6,544,318 on a claim that CNR "under reported volume to royalty owners (shrinkage/line loss)";[5]

(3) $44,185,207 on a claim that "CNR breached its lease agreements with the Respondents and breached the prudent operator rule by paying royalty based on subsidiary and forward sales (Mahonia);"[6]

(4) $33,187,809 on a claim that CNR engaged in the "improper measurement of volume of natural gas between the well and the meter on the 1/8th royalty wells;"

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[2]Complaint, Counts I through V.

[3]*Id.* at Counts VI and VII. The complaint set forth putative common questions as to the class as (1) what were the appropriate deductions from rents and royalties under the subject leases; (2) was there intentional concealment of deductions from rents and royalties; (3) was there any violation of the consumer protection statute; (4) was there fraudulent concealment of the deductions from rents and royalties; (5) are class plaintiffs entitled to punitive damages for fraudulent concealment; (6) did the deductions breach the terms of the leases; and (7) was there any violation of the flat-rate statute? A first amended complaint added the putative common question of whether NiSource and/or CEG were jointly liable for any judgment against CNR, and an additional count claiming that Respondents were third-party beneficiaries of an indemnification agreement between NiSource and/or CEG and Triana Energy Holdings, which had purchased CNR. First Amended Complaint (Dec. 22, 2004). A second amended complaint was filed which added "alter ego," civil conspiracy, and joint venture claims, but did not make any changes to the causes of actions. Second Amended Complaint, (Apr. 8, 2005). A third amended complaint added Chesapeake, but did not make any other changes. Third Amended Complaint, (Dec. 11, 2006).

[4]Liability on this claim was directed as a matter of law pursuant to the opinion in *Estate of Tawney v. Columbia Natural Resources, LLC*, 219 W. Va. 266, 633 S.E.2d 22 (2006) [*Tawney I*].

[5]Liability on this claim was directed as a matter of law pursuant to the trial court's ruling that Respondents were entitled to recover on their claim.

[6]Liability on this claim was effectively directed as the trial court instructed the jury that CNR was obligated to obtain the market price at the time of production and delivery.

(5) $21,628,388 on a claim that the Respondents were entitled to recover a 1/8th royalty payment on metered wells where a flat-rate royalty was paid;[7]

(6) $7,595,266 on a claim that the Respondents were entitled to recover a 1/8th royalty payment on un-metered wells where a flat-rate royalty was paid;[8]

(7) $11,034,478 on a claim that there had been improper measurement of the volume of gas between the well and the meter on flat rate royalty wells;[9] and

(8) $270,000,000 in punitive damages for "CNR's acts and/or omissions [which] were fraudulent with regard to taking deductions for gathering and volume" and "defendants' acts and/or omissions with regard to sales to affiliates and forward sales (Mahonia)." [10]

In summary, the jury returned compensatory damages of $134,335,138 and punitive damages of $270,000,000 for a total verdict of $404,335,138.

III. STATEMENT OF FACTS

As parties or successors-in-interest to oil and gas leases with CNR or its predecessors-in-interest, the Respondents alleged that they were underpaid royalties for a variety of reasons, including the wrongful deduction of post-production expenses from royalties owed and the fact that CNR entered into contracts to sell gas to a third party, Mahonia II, at a fixed price, after which the market subsequently rose, making the contract price less than what could have been obtained on the spot market. This Court held in *Estate of Tawney v. Columbia Natural Resources, LLC*,[11] that the subject leases that called for royalties to be determined "at the wellhead" were ambiguous with regard to

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[7]Liability on this claim was directed as a matter of law pursuant to this Court's ruling that flat-rate leases were legislatively invalidated by the enactment of W. Va. Code § 22-6-8.

[8]*Id.*

[9]Liability on this claim was effectively directed as a matter of law as mis-measurement would not have been an issue on flat-rate wells.

[10]The jury rejected the Respondents' claim that "CNR failed to pay royalty for natural gas liquids." In addition, the jury returned no compensatory damages for fraudulent concealment.

[11]219 W. Va. 266, 633 S.E.2d 22 (2006).

post-production expenses, and, thus, construing such leases liberally in favor of the lessors and strictly against the lessee,[12] did not permit CNR to deduct from the lessors' royalties any portion of the costs incurred between the wellhead and the point of sale.[13] The case was remanded to determine damages for any breach of a variety of leases for deduction of post-production expenses.

Even though this Court ruled, as a matter of law, that the subject leases were "ambiguous" and that "reasonable minds" could differ in their interpretation,[14] the trial court allowed the Respondents to present claims of fraud and punitive damages to the jury based upon construction of the leases rather than any evidence of fraudulent or malicious intent. This error severely prejudiced the Petitioners and resulted in the jury awarding $270 million in punitive damages in a pure contract action, for which punitive damages are not available.[15] The trial court further compounded this error

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[12] *Id.* at Syl. Pt. 7 ("The general rule as to oil and gas leases is that such contracts will generally be liberally construed in favor of the lessor, and strictly as against the lessee." Syllabus Point 1, *Martin v. Consolidated Coal & Oil Corp.*, 101 W. Va. 721, 133 S.E. 626 (1926).).

[13] *Id.* at Syl Pt. 11 ("Language in an oil and gas lease that provides that the lessor's 1/8 royalty (as in this case) is to be calculated 'at the well' 'at the wellhead,' or similar language, or that the royalty is 'an amount equal to 1/8 of the price, net all costs beyond the wellhead,' or 'less all taxes, assessments, and adjustments' is ambiguous and, accordingly, is not effective to permit the lessee to deduct from the lessor's 1/8 royalty any portion of the costs incurred between the wellhead and the point of sale.").

[14] *Id.* at 28 ("[T]he term 'ambiguity' is defined as language 'reasonably susceptible of two different meanings' or language 'of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.'" *Payne v. Weston*, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995), quoting Syllabus Point 1, in part, *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W. Va. 337, 332 S.E.2d 639 (1985)); *id.* ("[A] contract is ambiguous when it is reasonably susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 65 n. 23, 459 S.E.2d 329, 342 n. 23 (1995).).

[15] *Warden v. Bank of Mingo*, 176 W. Va. 60, 341 S.E.2d 679 (1985); *Williams v. Prof'l Transp.II, Inc.*, 294 F.3d 607, 614 (4th Cir. 2002) (citing *Goodwin v. Thomas*, 184 W. Va. 611, 403 S.E.2d 13 (1991)); *Berry v. Nationwide Mut. Fire Ins. Co.*, 181 W. Va. 168, 381 S.E.2d 367 (1989); *Cotton v. Otis Elevator Co.*, 627 F. Supp. 519, 521-22 (S.D.W. Va. 1986)(". . . [I]t is no tort to breach a contract, regardless of motive. A tort exists only if a party breaches a duty which he owes to another independently of the contract, that is, a duty which would exist even if no contract existed. . . [P]unitive damages, without exception, are not recoverable in breach of contract actions, and this is true even if the breach is willful" (citations omitted.)). Even a wrongful act, done under a bona fide claim of right and without malice, constitutes no basis for punitive damages. *Warden*, 176 W. Va. at 65, 341 S.E.2d at 679.

with numerous other erroneous and prejudicial legal and evidentiary rulings, including its instructing the jury, at the beginning of the trial, that the Petitioners had been violating public policy regarding flat-rate leases for more than two decades, and its refusal to allow the Petitioners to question any witnesses on the leases which are the subject of this action.

IV. DISCUSSION OF LAW[16]

A. THE IMPOSITION OF $270 MILLION IN PUNITIVE DAMAGES IN THIS CASE WAS IMPROPER AND VIOLATED THE PETITIONERS' DUE PROCESS RIGHTS.

1. The Award of Punitive Damages for Breach of Contract was Improper.

This Court's standard for the award of punitive damages was first established in 1895:

> In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.[17]

As recently as in Syllabus Point 9 of *Bowyer v. Hi-Lad, Inc.*,[18] this Court reiterated this standard:

> "Our punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award under *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895);[19] second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991)."

Without an independent "tort," under *Mayer*, there can be no award of punitive damages. In its order denying the Petitioners' post-verdict punitive damages motion, however, the trial court held that,

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[16]The Petitioners have sought to present their arguments as concisely as possible, but for additional authorities in support of these arguments incorporate by reference their post-trial motions and memoranda.

[17]Syl pt. 4, *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895)(emphasis supplied).

[18]Syl. pt. 9, in part, *quoting* Syl. pt. 7, *Alkire v. First Nat'l Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996)(emphasis supplied).

[19]Or, as the *Alkire* Court remarked in the context of post-trial review of punitive damages awards: "Why go through the analysis of determining whether a verdict is excessive if there is no verdict to analyze?" *Id.* at 127, 475 S.E.2d at 127.

"punitive damages are recoverable in a 'contract' action where a Defendant is guilty of fraud and acted wilfully, wantonly, or with reckless misconduct or criminal indifference to civil obligations."[20]

In holding that punitive damages are recoverable in contract actions, the trial court relied upon *Goodwin v. Thomas*,[21] but that case involved both a separate tort, the physical destruction of a tenant's property, and a breach of contract, interference with a tenant's use of the leased premises. Indeed, the Court's analysis was as follows:

> We dispute the lower court's finding that Goodwin's suit was simply an action for damages for breach of a contract of lease. Goodwin's complaint clearly alleged tortious activity by the appellees in that they deliberately tore down the garage in willful and wanton disregard of his rights under lease.[22]

Of course, in the instant case, there was no separate independent intentional tort. CNR took certain deductions from its royalty payments based upon leases later held to be ambiguous, as did other producers, and entered into forward sales contracts, as did other producers. Ultimately, this Court construed the leases against CNR, and the trial court effectively invalidated forward gas sales contracts, but none of CNR's acts or omissions would have constituted a breach of contract, let alone a tort, had the lease language been construed differently or had gas prices increased.[23]

The trial court also relied upon insurance cases, *Warden v. Bank of Mingo*[24] and *Hayseeds, Inc. v. State Farm Fire & Cas. Co.*,[25] but West Virginia implies a covenant of good faith and fair dealing

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[20]Order at 9.

[21]184 W. Va. 611, 403 S.E.2d 13 (1991).

[22]*Id.* at 614, 403 S.E.2d at 16.

[23]In *Goodwin*, even if the landlord had been correct in his interpretation of the subject lease, it would still have been a tort for him to destroy the tenant's property. In this case, if CNR had been adjudged correct in its deductions and in the Mahonia transactions, the periodic royalty statements would have been correct, and no tort would have occurred. Thus, *Goodwin* provides no support for punitive damages in this case.

[24]176 W. Va. 60, 341 S.E.2d 679 (1986).

[25]177 W. Va. 323, 352 S.E.2d 73 (1986).

in all insurance contracts which creates a continuing obligation on the part of an insurer to process its policyholders' claims in a fair manner. No court has ever extrapolated the covenant of good faith and fair dealing to non-insurance contracts in order to support an award of punitive damages. Moreover, even assuming the same standard applicable to first-party bad faith claims under insurance policies applies to all contracts, the trial court never instructed the jury on the "actual malice"[26] standard which is required in first-party insurance bad faith suits. Thus, *Warden* and *Hayseeds* provide no precedential support for punitive damages.[27]

Moreover, courts in other jurisdictions, in cases involving similar facts, have rejected the theory that a failure to pay under a contract's terms constitutes fraud:

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[26]Syl. pt. 2, in part, *McCormick v. Allstate Ins. Co.*, 202 W. Va. 535, 505 S.E.2d 454 (1998)("By 'actual malice' we mean that the insurance company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally utilized an unfair business practice in settling, or failing to settle, the insured's claim.").

[27]Other West Virginia courts have held that punitive damages are unavailable in contract cases:

> The plaintiff's tort claims stem from his allegation that the defendant perpetrated an intentional, fraudulent scheme to avoid paying him the monies due pursuant to the contract. The Supreme Court of Appeals of West Virginia has stated:
>
> > Tort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation. An action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract.
>
> *Lockhart* . . . (emphasis added). [*Lockhart* stands] for the proposition that a separate tort claim can go forward only if it would be viable in the absence of a contract between the parties. In this case, the plaintiff would not be able to allege a claim in tort in the absence of the contract. There is no independent legal duty of payment imposed by law based upon the relationship between the plaintiff and the defendant. The fraudulent scheme alleged by the plaintiff stems directly from the defendant's alleged omission to perform a contract obligation, and not from any independent duty it held to the plaintiff or the public at large.

Monroe v. Elmo Greer & Sons of Ky., LLC, 369 F. Supp. 2d 824, 830-31 (N.D. W. Va. 2005) (emphasis supplied).

> The alleged "fraudulent underpayment" claim is actually a claim for breach of contract. Under the contract, performance was required by both parties. Initially, Morita was required to perform by paying NRC 50% of the "total cost" to drill and complete the wells. Each Participation Agreement sets forth the "total cost" of drilling the well through completion. In exchange for contributing 50% of the "total cost" of the drilling and completion costs of the well, NRC was required to provide to Morita/Pioneer a 50% working interest and 40% revenue interest until such time as he recouped his investment. At that point, the Participation Agreements provide that Morita/Pioneer's working interest in each well would be reduced to 25%.
>
> The Complaint alleges that "Nami has fraudulently . . . underpaid Pioneer." According to Pioneer, NRC under reported the volume of gas produced by the wells and, therefore, failed to pay the amount of money it was owed. Inasmuch as the duty to pay Morita/Pioneer for the working and revenue interests arose by virtue of the Defendant's contracts with Morita, the Court finds that this is a classic breach of contract claim.[28]

Similarly, in *Exxon Mobil Corp. v. Alabama Dept. of Conservation and Natural Resources*,[29] the Alabama Supreme Court reversed a $3.5 billion punitive damages award obtained by its sister branch of the Alabama government based upon the same prohibition on punitive damages in contract cases that exists in West Virginia:

> The prohibition against punitive damages for breach of contract, even where the breach seems particularly egregious, often results in framing complaints as asserting fraud so that punitive damages will be available. This case is such a case, and the fraud claim has overshadowed the actual cause of action, which sounds in contract.

Respectfully, this case is indistinguishable from *Monroe*, *Pioneer*, and *Exxon*. If one assumes that there were no leases, then there would be no relationship between the Respondents and the Petitioners. They would be strangers and there would be no duty on the part of the Petitioners to disclose anything to the Respondents. Because everything flows from their contractual relationship, no independent common law duty existed for the Petitioners that would permit the award of punitive

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[28]*Pioneer Res. Corp. v. Nami Res. Co., LLC*, No. 6:04-465-DCR, 2006 WL 1778318, at *9 (E.D. Ky. 2006)(emphasis supplied, footnote omitted, and citation omitted); *see also Leona's Pizzeria, supra.*

[29]2007 WL 3224585 at *21 (Ala.)(emphasis supplied).

damages. As the Alabama Supreme Court held in almost identical circumstances in *Exxon*, the award of any punitive damages in this case was improper.

2. The Award of Punitive Damages Without the Award of Compensatory Damages for Fraudulent Concealment was Improper.

In addition to requiring a tort completely independent from any contractual obligations, courts have held that punitive damages are unavailable unless the plaintiff proves separate compensatory damages. In *Osgood v. State Farm Mut. Auto. Ins. Co.*,[30] for example, the plaintiff sued for breach of contract and fraud, contending that the defendant intentionally misrepresented the terms of the contract. The Tenth Circuit dismissed the plaintiff's complaint as follows:

> In the instant case, appellant has failed to allege any additional injury arising from State Farm's alleged misrepresentations. In her complaint, she requested the same amount of actual damages on both her contract and tort claims; this amount equaled the difference between the policy coverage and the amount actually received by the estates. Significantly, appellant's counsel conceded during his offer of proof before trial that the pecuniary and nonpecuniary damages claimed in both counts were identical.[31]

Here, it is undisputed that no compensatory damages were returned for any tort because the verdict form told the jury that the Respondents' contract and tort damages were the same; the Respondents themselves offered no evidence that they suffered any separate damages from the alleged tort. Even in closing argument, the Respondents conceded they suffered no separate fraud damages:

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[30] 848 F.2d 141, 144 (10th Cir. 1988).

[31] *Id.* at 144 (emphasis supplied). Likewise, in *Myers Building Industries, Ltd. v. Interface Technology, Inc.*, 13 Cal. App. 4th 949, 17 Cal. Rptr. 2d 242 (1993), the jury returned a verdict for breach of contract and found that such breach involved "oppression, fraud, or malice." It did not, however, award any monetary damages for the plaintiff's separate claim of fraudulent misrepresentation. The court set aside the punitive damages verdict stating: "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. . . . Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper. . . . Where such an award is made, the reviewing court may modify the judgment to strike the punitive damages and affirm the judgment as so modified." *Id.* at 960, 17 Cal. Rptr. 2d at 248. (emphasis supplied and citations omitted).

> [W]hen Mr. Masters said that the fraud damages are the same as the contract damages, he's telling you we don't want to be double dipping. We're not asking you to pay us twice for the violation of the contract that is also caused by the fraud. We're not asking you to pay us twice for the difference in the index price, that caused part-time in fraud. What fraud gives us, and what you should consider fraud for, is the state of mind of these defendants. These defendants engaged in willful, wanton – willful and wanton misconduct which gives rise to punitive damages . . . . That's why the fraud is important in this case, Ladies and Gentlemen.[32]

In other words, the Respondents expressly asked that the jury award punitive damages for the Petitioners' alleged "fraudulent breach of contract."

In its order denying the Petitioners' post-trial motion, the trial court held that "the Jury plainly found Defendants guilty of fraudulent concealment," referencing the verdict form upon which the jury found the acts of the defendants were "fraudulent."[33] The order then recites the evidence which allegedly supported this finding, all of which arose from CNR's interpretation of the leases and its right to enter into the Mahonia transactions. Although the verdict does reflect findings, there is no verdict for a tort of fraud; rather, the findings are solely related to breach of contract.

To address this obvious defect in the verdict, the trial court found that the Petitioners waived any objection to problems with the verdict form: "the reality is that this verdict form was prepared by the attorneys for the Respondents and the attorneys for the Defendants."[34] This is incorrect, however, as a matter of both fact and law.

> First, the Petitioners tendered a verdict form that provided as follows:
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> 9. Do you find by clear and convincing evidence that defendant' [sic] Chesapeake Appalachia, L.L.C.'s acts and/or omissions with regard to deductions from royalty were reasonably relied upon by plaintiffs to their detriment and damage?

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[32]Tr. at 183 (Jan. 27, 2007).

[33]Order at 11.

[34]Order at 13.

> 10. Do you find by clear and convincing evidence that defendants' acts and/or omissions with regard to the Mahonia contracts were fraudulent and were reasonably relied upon by plaintiffs to their detriment and damage?[35]

Likewise, the Respondents tendered a verdict form that would have permitted the jury to find that they had proven a "Fraud Cause of Action" as to eight separate claims, including "Gathering and Processing Fees," "Under Reported Volume to the Royalty Owner," "Pricing – Subsidiary Sales and Forward Sales (Mahonia)," "Value of Sold [sic] NGLs," "Line loss between the Well and the Meter," "Flat Rate wells with Meters," "Flat Rate Unmetered wells," and "Flat Rate Wells Line Loss between the Well and the Meter."[36] When the Petitioners objected to submitting the fraud claims to the jury because there had been no evidence of fraud damages, the trial court agreed and, ultimately, the verdict form did not submit the Respondents' tort claims to the jury. The verdict form was not "stipulated" by the Petitioners; rather, it was the product of the trial court's ruling that because Respondents had no evidence of fraud damages, it would not submit the issue to the jury.[37]

Second, it was the Respondents' legal burden, not the Petitioners', to make certain that the verdict form contained what was necessary to obtain a verdict on <u>their</u> tort claims:

> Absent extenuating circumstances, the failure to timely object to a defect or irregularity in the verdict form when the jury returns the verdict and prior to the jury's discharge, constitutes a waiver of the defect or irregularity in the verdict form.[38]

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[35]Defendants' Proposed Verdict Form (Jan. 27, 2007).

[36]Plaintiffs' Proposed Verdict Form (Jan. 26, 2007).

[37]The Court's punitive damages order nevertheless states "the Defendants stipulated and agreed that the Jury be told – <u>twice</u> – via this verdict form, that: 'Fraud damages are the same as for the contract damages . . . .'" *See also* Order at 17 ("Defendants are bound by their stipulation and agreement and, therefore, cannot maintain a contrary position.").

[38]Syl. pt. 2, *Combs v. Hahn*, 205 W. Va. 102, 516 S.E.2d 506 (1999).

> "A responsibility rests upon a litigant who desires a verdict which is irregular in form to be clarified to request that it be done, and to specify the particulars before the members of the jury are discharged."[39]

It was not the Petitioners who "desired a verdict" on the Respondents' tort claims for fraud; rather, it was the Respondents who desired such verdict, and it is the Respondents, not the Petitioners, who must bear the consequences of the absence of any verdict for any tort.

The trial court's statements, "[U]nder Plaintiffs' theory of the case, and as found by the verdict of the Jury, the Plaintiffs were deprived of royalty due under the lease agreements by means of the active, intentional, fraudulent concealment of material information by the Defendants" and "It is the opinion of this court that the Jury Verdict form was structured by the attorneys in the case in a way to avoid the issue of double recovery for the same loss,"[40] underscore its conclusion that there is a cause of action for punitive damages arising from fraudulent breach of contract even in the absence of any conduct that would constitute an independent tort. Punitive damages cannot be awarded for "fraudulent breach of contract," however, in the absence of separate damages for fraud.[41]

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[39] *Id.* at 107, 516 S.E.2d at 511 (citation omitted).

[40] Order at 15.

[41] In its punitive damages Order, the Court also relies upon the case of *Okland Oil* Co. v. *Conoco*, 144 F.3d 1308 (10th Cir. 1998), but the *Okland* case, which is of questionable precedent, is distinguishable. First, in *Okland*, the "jury found Conoco separately liable for the torts of fraud and deceit, both of which may support an award of punitive damages under Oklahoma law." *Id.* at 1314. Here, there was a finding of "fraudulent" conduct, but no actual verdict on a separate tort of fraud. Second, the Oklahoma cases relied upon by the *Okland* court, are clearly distinguishable. In *Zenith Drilling Corp. v. Internorth, Inc.*, 859 F.2d 560 (10th Cir. 1989), for example, the court actually rejected punitive damages because, as in this case, the plaintiff alleged no damages for the alleged tort that were any different than the damages alleged for breach of contract. In *Burk v. K-Mart Corporation*, 770 P.2d 24 (Okla. 1989), the court rejected an implied covenant of good faith and fair dealing that would give rise to a suit for wrongful discharge and, instead, held that such cause of action would lie not in contract, but exclusively in tort. Finally, the *Okland* court was bound to apply Oklahoma law and 23 Okla. St. Ann. § 9.1, cited by the *Okland* court, specifically allows punitive damages in contract cases. Its constitutionality apparently was not challenged by Conoco.

3. The Award of Punitive Damages in Light of this Court's Rulings in *Tawney I* on "Ambiguity" and "Reasonable Minds" was Improper.

With respect to the Petitioners' argument that it is impermissible to impose punitive damages based upon one party's interpretation of ambiguous contract language, the trial court acknowledged, "It is correct that the lease provisions in question are ambiguous . . . ."[42] The trial court proceeded to hold, however, that the Petitioners should have anticipated that a court would rule that these provisions were ambiguous and with "established legal departments" should have anticipated that such ambiguities would be construed against them:

> This court is of the opinion that while CNR's interpretation of the subject leases was certainly one of at least two that can be made of "doubtful" language appearing in the subject leases – standing alone – does not establish that Defendants' conduct . . .was a mere 'wrongful act done under a bona fide claim of right and without malice'.[43]

Of course, if contract language is reasonably susceptible to the interpretation asserted by one party, as this Court held in *Tawney I*, then how can that party's interpretation be characterized as anything other than "bona fide" and "without malice"? In addition to bolstering its conclusion that punitive damages can be awarded despite a party's reliance upon ambiguous contract language, the trial court also relied upon the absence of evidence that it excluded over the repeated objections of the Petitioners: "no one on behalf of the Defendants testified to the Jury that the 1993 decision to begin taking the deductions from Plaintiffs' royalty was based on CNR's interpretation of these leases."[44] No one on behalf of the Petitioners testified, however, because the trial court precluded their witnesses from testifying as to their interpretation of the leases; delayed allowing the Petitioners to

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[42]Order at 18.

[43]Order at 20.

[44]Order at 20.

use the leases, including the cross-examination of the Respondents and their experts, and the direct examination of the Petitioners' witnesses and experts, until after the close of the evidence; and never instructed the jury that this Court had held the lease provisions to be ambiguous.

4. The Award of Punitive Damages was Improper When Some of the Information Allegedly Not Disclosed was Publicly Available and There was Otherwise No Duty to Disclose.

In the trial court's punitive damages order, it reaffirmed that there was no fiduciary relationship between the parties. Where there is no fiduciary relationship, as the trial court held, then the contracting parties are natural adversaries, bound only by the terms and the law of contract. Nevertheless, the trial court held that the Petitioners violated some unspecified extra-contractual duties which supported an award of $270 million in punitive damages.

First, the trial court reasoned that CNR could have informed its lessors when deregulation of the gas industry caused a number of producers,[45] including CNR, to change their procedures.[46] Of course, the trial court identified no basis for requiring one contracting party to inform another contracting party of any change in its internal procedures. The parties' relationship is contractual and is governed by the law of contracts. If the contracting party miscalculates and pays too much, the party may be bound by such payments. If the contracting party miscalculates and pays too little, the party may be held liable for the difference. In no case, however, is the party liable for punitive damages because it failed to inform the other party that it had changed its method of calculation.

Second, the trial court reasoned that CNR admitted that lessors had a right to know about their royalties. Again, the evidence was undisputed that royalty statements and payments were sent

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[45]Indeed, a number of suits are currently pending against other West Virginia gas producers making the same allegations as in this case.

[46]Order at 25.

by CNR to the royalty owners. When royalty owners questioned those statements or payments, there was no evidence that false information was provided; rather, the only evidence was that correct information was provided. The Petitioners are not suggesting that royalty owners do not have a remedy if royalty statements or payments were incorrect; rather, they are suggesting that the sole remedy is contract damages and pre-judgment interest, not punitive damages.

Finally, the trial court reasoned, CNR was paying less than the industry-standard royalty.[47] "Industry standard" is a tort concept, not a contract concept. If a defendant, such as a bank or insurance company, violates "industry standards," thereby proximately causing injury to a customer, policyholder, or other client, the defendant may be held liable in tort for damages. The only "industry standards," however, applicable to a contract, such as a lease, are the actual terms of the contract. Parties can agree to exchange goods or services for more or less than market rates. Whether a party to a contract pays more or less than market rates is wholly irrelevant unless the contract provides that market rates shall apply. Again, to the extent that the trial court's justification for affirming punitive damages was based upon its belief that the Petitioners failed to pay an "industry-standard royalty," it was erroneous and should be set aside.[48]

With further respect to the issue of "duty," the trial court's order states:

> It was admitted that Defendants always reported that there were $0.00 deductions taken from each Plaintiffs' royalty during the entire class period. Even though there

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[47]Order at 25.

[48]The trial court also reasoned that CNR admitted that a one-eighth royalty was relatively standard. Order at 25. There was no evidence, however, that a one-eighth royalty was universal. Indeed, the undisputed evidence was that there was a considerable variability in gas lease provisions, including various formulae for royalty calculations. It is unclear to the Petitioners from the trial court's order how it believed an alleged standard of a one-eighth royalty justifies the imposition of punitive damages.

was a change in 1993, *and thereafter deductions were taken*, CNR never changed the form or changed the procedure.[49]

The trial court's reference to $0.00 deductions refers to a column on CNR's royalty statements entitled "Your Share Prod. Charges."[50] Common usage within the industry, however, has always differentiated between "production" expenses, i.e., the cost of bringing gas to the surface, and "post-production" expenses, i.e., the cost of transporting gas from the well to the interstate pipeline.[51] Because no "production" charges were passed on to the lessors, these royalty statements were neither false nor misleading, and the Respondents' entire theory that the royalty statements were deceptive is nothing more than a red herring.

The trial court also noted that accurate information was available in CNR's database and that it would have been possible to change royalty statements to accurately reflect the deductions being taken.[52] Although this describes the information that could have been disclosed, but was not, it does nothing to justify the existence of any "duty" as no statutory, regulatory, contractual, or common law basis is identified that mandated such disclosure. In *Yourtee v. Hubbard*,[53] for example, the defendant could have taken his keys, instead of leaving them in his car parked outside a store and a teenager would not have been killed while taking a joy ride in the vehicle, but the Court nevertheless found there was no "duty." Likewise, the fact that the Petitioners could have changed their procedure, or could have changed the way deductions were reported, does not create a "duty."

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[49]Order at 26.

[50]See Defendants' Ex. 33.

[51]For example, in *Wellman v. Energy Resources, Inc.*, 210 W. Va. 200, 210, 557 S.E.2d 254, 264 (2001), this Court observed, "Two states, Texas and Louisiana, have recognized that a lessee may properly charge a lessor with a pro rata share of such 'post-production' (as opposed to production or development) costs." (emphasis supplied).

[52]Order at 26-27.

[53]196 W. Va. 683, 474 S.E.2d 613 (1996).

In its punitive damages order, the trial court also committed clear error when it relied upon Section 511 of the RESTATEMENT (SECOND) OF TORTS, which requires a fiduciary or similar relationship:

> For the meaning of "fraudulent" under § 10(b), the Eighth Circuit looked to *Chiarella*. See 92 F.3d, at 625. In that case, the Eighth Circuit recounted, this Court held that a failure to disclose information could be "fraudulent" under § 10(b) only when there was a duty to speak arising out of "'a fiduciary or other similar relation of trust and confidence.'" *Chiarella*, 445 U.S., at 228, (*quoting* RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1976)).[54]

Respectfully, the trial court's analysis is contrary to the plain language of Section 551:

> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated . . .
>
> (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and . . .
>
> (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

The trial court relied upon subsections (b) and (e) in its order,[55] but the trial court held earlier in its order that there was neither a fiduciary relationship nor any "similar relation of trust and confidence." Moreover, Section 511 is a "fraud in the inducement" rule limited to negotiations that result in the "consummation" of a "transaction." Certainly, a contract may be voided if procured not only by false statements, but by misdirection, deception, and half-truths, but this type of "fraud in the inducement"is limited to the time period prior to entering the contract and does not apply to the time period after and during the course of performance.[56] Thus, the trial court's reliance on Section 511 is erroneous.

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[54]*United States v. O'Hagan*, 521 U.S. 642, 670 (1997).

[55]Order at 29.

[56]See *Croston v. Emax Oil Co.*, 195 W. Va. 86, 90, 464 S.E.2d 728, 732 (1995)("'Fraud cannot be predicated on a promise not performed. To make it available there must be a false assertion in regard to some existing matter by which a party is induced to part with his money or his property.'")(citation omitted).

In addition to Section 511, the trial court's punitive damages order contains a discussion of the "objective circumstances" which it concludes "imposed a duty upon Defendants to disclose the truth."[57] Of course, this discussion, predicated upon the fact that CNR had information to which the Respondents were not privy, ignores the fact that it is almost always the case that one contracting party has knowledge that the other party to the contract does not have. The only case upon which the trial court relied in support of this "superior knowledge" duty to speak is *Kessel v. Leavitt*,[58] but in that case, a mother secretly placed her child for adoption in a Canadian province which did not recognize a father's rights in order to frustrate those rights. The predicate for the analysis in *Kessel* was not "superior knowledge," but a concerted effort to thwart the father's investigation:

> Explaining the types of wrongful behavior contemplated by this section, Comment b to § 550 states that fraudulent concealment may arise
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> > when the defendant successfully prevents the plaintiff from making an investigation that he would otherwise have made, and which, if made, would have disclosed the facts; or *when the defendant frustrates an investigation* .... Even a false denial of knowledge or information by one party to a transaction, who is in possession of the facts, may subject him to liability as fully as if he had expressly misstated the facts, if its effect upon the plaintiff is to lead him to believe that the facts do not exist or cannot be discovered.
>
> (Emphasis added). Thus, the active concealment of information from a party with the intent to thwart that party's efforts to conduct an investigation, relating to such information, constitutes actionable fraudulent concealment.[59]

In this case, had CNR actively concealed its deductions in response to an investigation by a royalty owner, there might have been fraudulent concealment, but *Kessel* offers no basis for a finding that

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[57]Order at 29.

[58]204 W. Va. 95, 511 S.E.2d 720 (1998).

[59]*Id.* at 128, 511 S.E.2d at 753.

the Petitioners had a duty to disclose the effect of post-production deductions or the Mahonia transactions on royalty payments in this case. Of course, the evidence in this case was that CNR gave accurate information to all who inquired, and that there was no concealment of any kind.

5. The Trial Court Erred by Instructing the Jury that it Could Award Punitive Damages Based Upon Constructive Fraud.

Over the strenuous objections of the Petitioners, the trial court erroneously permitted the jury to award punitive damages based upon "constructive," as opposed to "actual" fraud:

> The Court instructs the jury that fraud may be actual or constructive. Constructive fraud is a breach of legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate the public or private confidence or to injure public interests. Thus, constructive fraud does not require scienter or intent to mislead; it can be established whether the representation is innocently or knowingly made.

"A finding of legal fraud or constructive fraud," however, "is not sufficient to support an award of exemplary or punitive damages. Punitive damages may be awarded only if the evidence establishes an intent to deceive or defraud."[60] In its punitive damages order, the trial court cited *Boyd v. Goffoli*[61] for the proposition that punitive damages can be based upon constructive fraud,[62] but there is no discussion in *Boyd* of which verdict was actually returned, for actual or constructive fraud. Because the jury could have returned punitive damages based upon "constructive fraud," and because the Court improperly instructed the jury that CNR had been violating the public policy of the State for years, the punitive damages award should be set aside.

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[60]*Tallant v. Grain Mart, Inc.*, 432 So. 2d 1251 (Ala. 1983); *see also Crum v. McCoy*, 41 Ohio Misc. 34, 40, 322 N.E.2d 161, 165 (1974)("Where the concealment from the vendee by a broker, of a latent defect in a property listed with him for sale is not done with malicious intent, there arises only a bare case of constructive fraud which does not warrant the assessment of exemplary damages.").

[61]216 W. Va. 552, 608 S.E.2d 169 (2004).

[62]Order at 36-37.

6. Punitive Damages Based upon the "Mahonia" Claim Were Improper.

The Mahonia claim was predicated upon a theory that CNR was negligent in entering into certain long-term, fixed-price sales contracts and, because CNR never disclosed to the Respondents that their royalty payments were at times less than what they would have been had CNR foregone the certainty of the long-term deal and sold the gas on the spot market, the Petitioners were liable for punitive damages. Over the Petitioners' many objections,[63] the trial court allowed this claim to be presented to the jury, which expressly based its award on these long-term fixed-price sales contracts, the details of which were publicly reported in filings with the SEC.

With respect to the Petitioners' argument that because the Mahonia transactions were "publicly reported," they could not have been "concealed," the trial court's order states that, "Plaintiffs/lessors had no duty to investigate."[64] If the Respondents had "no duty to investigate," then how did CNR have a "duty to disclose" beyond the public disclosures required by law? The Mahonia transactions were publicly reported, including their fixed-price nature. The market prices for gas were publicly available. The royalty statements provided to the Respondents indicated the amount paid per unit of gas. What was "concealed" from the Respondents that would justify an award of

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[63]The Respondents never indicated in their complaints or discovery responses that they were seeking punitive damages for the Mahonia claims. The trial court addressed this issue by holding that Respondents "adequately pleaded fraud related to the Mahonia claim," citing the third amended complaint. Order at 64. Nowhere in the third amended complaint or subsequent discovery responses, however, did the Respondents indicate that they were seeking punitive damages for the Mahonia claims. The trial court resolved this issue by essentially amending the Respondents' complaints, sua sponte, to conform to the evidence: "The court also believes that if there were deficiencies in the pleadings related to fraud, the issue was tried by the consent of the parties." Order at 64. The trial court's order, however, makes no reference to the record in support of a finding of such "consent" nor, in the midst of the Petitioners' numerous objections to the Mahonia claims during the trial, have they been able to locate where they "consented." Thus, in addition to the substantive errors associated with allowing punitive damages for the Mahonia claim, the Petitioners assert that their due process rights were violated.

[64]Order at 65.

$270 million in punitive damages? Moreover, what could a royalty owner have done differently, armed with actual knowledge of the Mahonia transaction?

The trial court relied upon Syllabus Point 10 of *Kidd v. Mull*,[65] which states, "The doctrine of constructive notice will not defeat a cause of action for fraud or negligent misrepresentation where the entity asserting the cause of action did not undertake independent investigation to ascertain the truth of the allegedly fraudulent representation," but *Kidd* relied upon the decision in *Shapiro v. Goldberg*,[66] where the Supreme Court held: "There are cases where misrepresentations are made which deceive the purchaser, in which it is no defence to say that had the plaintiff declined to believe the representations and investigated for himself he would not have been deceived." If CNR had made false representations to a royalty owner, as in *Kidd* or *Shapiro*, it obviously could not rely upon the truth in official documents as a defense to fraud, but there was no evidence presented of any active concealment. Again, what was "concealed" about Mahonia that was not public?[67]

In response to the Petitioners' argument that it is impermissible to impose punitive damages for what in hindsight might be deemed a bad business judgment,[68] the trial court stated as follows:

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[65]215 W. Va. 151, 595 S.E.2d 308 (2004).

[66]192 U.S. 232, 241 (1904).

[67]Another of the issues raised in the Petitioners' punitive damages motion was that, in order for conduct to support punitive damages, it must have been directed to the Respondents, and the Mahonia transactions were obviously not directed to the Respondents. One cannot be said to have "defrauded" someone with respect to a transaction to which that person was not a party. The Respondents were not parties to the Mahonia transactions and, thus, the manner in which they were effectuated could not, as a matter of law, have "defrauded" the Respondents. The trial court's order, however, essentially reasoned that because the transactions resulted in the payment of royalties at below-market rates, the Mahonia transactions were directed to the Respondents. Order at 35. The fact that a third-party may be adversely affected by conduct does not mean that the conduct was directed to the third-party.

[68]In its punitive damages order, the trial court acknowledged that it would be unfair to impose punitive damages upon the Petitioners because they failed to foresee that flat-rate leases would be invalidated due to a 1982 statute stating that flat-rate leases, in the trial court's view, violated public policy to the extent of their invalidation. It does not explain, however, how the same legal departments were supposed to foresee that a court would rule that post-production deductions were invalid and the Mahonia transactions were

> There was also substantial evidence in the record that rebutted Defendants' claims that the forward-sale contracts were entered into to protect Plaintiffs/lessors and CNR from declining gas prices . . . . Many experts, including the federal government, were forecasting increasing natural gas prices after several years of generally lower, stagnant prices for gas . . . . There was also substantial evidence of an upward spike in natural gas prices between the first and second Mahonia contracts . . . yet CEG/NiSource, Inc. nonetheless elected to proceed . . . . The evidence supports an inference that the Defendants knew that it was likely that W. Va. royalty owners would suffer as a result of the decisions not only to enter into the Mahonia contracts, but to willfully violate the clear provisions of the royalty clauses of the subject leases in the likely event gas prices rose significantly.[69]

Obviously, the Petitioners do not dispute that there was evidence that gas prices might increase, but there was also evidence that gas prices might decrease. The fact that the jury might have decided that the evidence of future increase was more compelling does nothing to avoid the problem of allowing a jury not only to sit in judgment over business decisions, but to impose punitive damages as well. Not only has the trial court created the tort of "fraudulent breach of contract," it has also created the tort of "wilfully bad business judgment," both of which can result in punitive damages if a non-party to a contract is adversely affected thereby.

With respect to the Petitioners' argument that allowing the imposition of punitive damages for bad business judgments will have a chilling effect on business activity, the trial court stated:

> Defendants and their experts admitted that nothing in the Mahonia transactions prevented Defendants from paying Plaintiffs/lessors royalty based on the market price . . . instead of the artificial Mahonia contract prices. . . . One important reason to this court for this conclusion is that Defendants wholly failed to prove that it was the custom or practice of gas producers in the natural gas industry in 1999 and 2000, similarly situated to Defendants and under the same or reasonably similar circumstances as Defendants, to commit gas production for 5 or 6 years into the future at fixed rates that were reasonable only if natural gas prices spiraled downwards

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"fraudulent." Moreover, based upon the trial court's instructions, it cannot be said that the jury did not base its award of punitive damages on all of the compensatory damages, including those for the flat-rate leases. Despite this, the trial court refused to set aside what it acknowledged would be unfair.

[69]Order at 66-67 (emphasis supplied).

over the 5 or 6 year period. The reason, of course, is because the question was not whether gas prices would decline, but how much were gas prices going to increase.[70]

Clearly, the trial court has embraced the proposition that a jury can second-guess the business judgments of a company based upon contemporaneous conditions and impose punitive damages if, in the opinion of the jury, those judgments were incorrect.[71] Obviously, the proposition that punitive damages can be imposed for bad business judgments based upon the benefit of hindsight should have a chilling effect on any company doing business in West Virginia.[72]

The trial court's punitive damages order states that "Mahonia was plainly a 'bad' deal for everyone except CEG and NiSource, Inc., who received the $400 million up front."[73] But, this ignores the evidence that the funds were used for exploration and development; it would have been a "good deal" for everyone, including the royalty owners, if gas prices had declined; and CEG and NiSource bore seven-eighths of any lost opportunity to receive a higher price for the gas. Punitive damages can only be based upon conduct which, at the time of its occurrence, would have reasonably placed the actor on notice, because of its intentional and harmful nature, that punitive damages may follow.[74]

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[70]Order at 67-68 (emphasis supplied).

[71]Moreover, the underscored language is a tacit acknowledgment that long-term gas supply contracts were used in the industry, but in the trial court's opinion, should not have been used by CNR under existing market conditions.

[72]It has long been recognized that this is not the law. Even a company's shareholders are precluded by the "business judgment rule" from seeking damages based upon what, in hindsight, are bad business decisions, in the absence of self-interest and self-dealing. See BLACK'S LAW DICTIONARY (8th ed. 2004)("The presumption that in making business decisions not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest. The rule shields directors and officers from liability for unprofitable or harmful corporate transactions if the transactions were made in good faith, with due care, and within the directors' or officers' authority.").

[73]Order at 68.

[74]With respect to the Mahohia transactions, the trial court's order also states: "A reasonable royalty owner . . . would reasonably expect that the 'rate' would be market value or the highest price reasonably obtainable or at least fair value for the gas, especially where as here Defendants failed to provide any

7. The Award of Punitive Damages Based on "Line Loss" and "Mis-Measurement" was Improper.

With respect to the Petitioners' arguments that the compensatory damages for "line loss" and "mis-measurement" should have been deducted from the punitive damages analysis, the trial court essentially concluded that negligence is enough to support an award of punitive damages because the Petitioners failed to disclose the line loss "deduction" on the royalty statements:

> The court recalls that credible evidence was presented to the Jury that CNR's maintenance of its gathering lines was less than adequate. . . . Be that as it may, the deductions for line loss was fraudulently concealed from the royalty owners . . . . Further, to the extent that the actual line loss is the result of the Defendants' negligence, Defendants did profit from fraudulently concealing the fact of this deduction from royalty.[75]

This, of course, makes no sense. No one "profited" from line loss, including the Petitioners. "Line loss" is not a deduction. Lost gas is never sold and no one is ever paid for it. The fact that the Petitioners may have been "negligent" in maintaining the lines cannot support the imposition of punitive damages. As to "mis-measurement," the trial court's order states:

> The . . . mis-measurement . . . relates to CNR measuring production from unmetered wells and then . . . arbitrarily deducting a major portion thereof and subsequently reporting in the royalty statement, as volume produced, this false measure of actual production.[76]

This negligence-based analysis suffers from the same infirmity. Again, it is one thing to hold that a gas operator may be liable for compensatory damages for negligent "line-loss" or "mis-

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notice . . . that the 'rate' at which the gas was sold was completely artificial . . . ." Order at 69. Again, the trial court relied upon Section 551 of the Restatement (Second) of Torts even though this section involves "fraud in the inducement,"not the conduct of the parties after a contract is executed.

[75]Order at 77 n. 34.

[76]Order at 77 n. 34.

measurement;" but it is quite another to hold that punitive damages may be imposed because its royalty statements contain no reference to the "deductions" for "line-loss" or "mis-measurement."

8. The Award of Punitive Damages was Improper When There was No Differentiation in the Instructions or the Verdict Form Among Leases or Class Members, and When the Jury was Instructed that Fraud was to be Presumed Across the Entire Class and Reliance Could be Inferred Despite Differences Among the Leases and Class Members.

As to the failure of the verdict form to differentiate among the various class members and lease types, the trial court's punitive damages order states as follows:

> As noted by Defendants, at trial the Court offered the opinion that the Verdict Form should account for variations in royalty clauses and, perhaps, other differences in the various leases. This did not occur. However, the Court did not prepare the verdict form. The Plaintiffs and the Defendants jointly submitted to this court an agreed Jury Verdict Form.[77]

This is, however, incorrect. Both the Respondents and Petitioners submitted varying verdict forms, and made objections to each other's forms. Emails were exchanged by the parties and the trial court regarding the competing verdict forms. Eventually, a verdict form was accepted by the trial court that reflected the input of both Respondents and Petitioners, but preserved all parties' objections, including the objections regarding the failure to differentiate among the leases.

Perhaps sensing that this "waiver" argument might not be adequate, the trial court seemingly reversed the position it had taken throughout the trial as follows: "As a practical matter, the differences in the leases and the differences in the circumstances of the parties making up the Plaintiff Class may not be what initially appeared to this Court to be major differences."[78] For example, the trial court's order recasts the scope of the "sole discretion" leases, which on their face should have permitted CNR to enter into the Mahonia transactions, to only "the time and method of marketing

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[77]Order at 59.

[78]Order at 59 (emphasis supplied).

leases."[79] Without any recitation of authority, the trial court held that the Mahonia transactions did not involve "marketing," but a determination of "the price for gas to be sold."[80] Every sales transaction, however, involves determination of the price at which a product is to be sold and the negotiations with buyers regarding the sales price is "marketing."

Respectfully, the trial court's inconsistent application of the facts continued with its treatment of the Petitioners' arguments regarding the differentiation among classes of royalty owners. In order to get around the problem of imposing punitive damages upon a party for its mistaken interpretation of an ambiguous contract, the trial court noted that the Petitioners had sophisticated legal departments. When the Petitioners pointed out that about a third of the damages were sought by large land companies with access to their own specialized legal counsel, the trial court stated:

> The argument is that since large landowners owned approximately 1/3rd of the leases and since some lessors were represented by counsel during the formation of specific leases, then fundamental differences within the Plaintiff Class result in a conclusion that fraudulent concealment could not have occurred across the entire class. . . The fact that some of the lessors had attorneys or were more sophisticated than other lessors is immaterial.[81]

Respectfully, if the fact that the Petitioners had attorneys is to be deemed by the Court "material" to whether they can be punished for their interpretation of "ambiguous" contracts, the fact that many of the Respondents had attorneys should not have been deemed by the trial court to be "immaterial" to whether the Respondents can recover $270 million in punitive damages.[82] Unfortunately, as set

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[79]Order at 61.

[80]Order at 61.

[81]Order at 62-63 (emphasis supplied).

[82]Similarly, the Petitioners note that when it benefitted the Respondents' case, the trial court allowed Respondents' witnesses to offer their opinions that might touch upon legal issues: "Mr. Abcouwer, CEO of CNR in 2000 and 2001, knew what the law required when the market value for gas rose . . . ." Order at 58. Yet, when the Petitioners tried to offer similar testimony regarding management's interpretation of the leases, such testimony was excluded by the trial court.

forth in this petition for appeal, the trial court frequently applied different standards to the Petitioners and Respondents with respect to its rulings.

Several of the instructions, taken together, relieved the Respondents of their burden of proving fraud. The trial court's punitive damages order parses through them in an attempt to rehabilitate those instructions that permitted the improper inference that "fraud as to one is fraud as to the whole."[83] For example, the jury in this case was instructed:

> The Court instructs the jury that if plaintiffs prove, by clear and convincing evidence active fraudulent concealment by defendants by omission of material facts in a way and manner common to the class, plaintiffs are entitled to an inference that they justifiably and detrimentally relied on the omission. In other words, upon such proof, you may infer reliance to the entire class even though all of the named and unnamed members of the Plaintiff class have not directly, positively provided evidence of such justifiable, detrimental reliance.

In its order, the trial court first defended this instruction by noting that proof of fraud was a prerequisite to the inference, but merely because a party may have made misrepresentations to two other parties does not mean that both of the other parties relied upon the representation, particularly where there was such a profound disparity in the characteristics of the parties. A statement of ownership of the Brooklyn Bridge for purposes of a proposed fraudulent sale cannot be said to have engendered the same degree of reliance by both the Mayor of New York and a new immigrant.

The trial court's order also cites Williston, Section 479 of the RESTATEMENT (SECOND) OF CONTRACTS, and several cases,[84] but those authorities involve situations where a party's fraud actually induced action by the other party. For example, Section 1515 of WILLISTON ON CONTRACTS ,states that where action is taken in response to material representations "it will be presumed that the representations were relied upon." There was no evidence in this case that any of the Respondents

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[83]Order at 31-32.

[84]Order at 32-34.

changed their positions or otherwise took any action as a result of any fraudulent representation. Likewise, Section 479 of the RESTATEMENT (SECOND) OF CONTRACTS, provides, "Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed . . . that it was induced by the fraud or misrepresentation." Again, none of the Respondents entered into any "transaction" as a result of any fraud or misrepresentation.

Indeed, the only evidence at trial was that when royalty owners inquired regarding the manner in which their royalties were calculated, they were provided accurate information. The trial court acknowledged that one of the class representative Respondents actually made inquiry and was not provided misleading information, but it dismissed this as "1 royalty owner – out of over 10,000." Of course, this begs the question of how can the trial court justify an "inference of fraud" instruction across a class of "over 10,000" when there was affirmative evidence that "1" of the handful of class representatives was not defrauded? In Syllabus Point 1 of *Jones v. McComas*,[85] this Court held:

> Though a purchaser may rely upon particular and positive representations of a seller, yet if he undertakes to inform himself from other sources as to matters easily ascertainable, by personal investigation, and the defendant has done nothing to prevent full inquiry, he will be deemed to have relied upon his own investigation and not upon the representations of the seller.

In the instant case, at least one of the Respondents conducted his own investigation and, therefore, is deemed as a matter of law to have relied upon his own investigation.

9. The Award of Punitive Damages Based on the Financial Condition of NiSource was Improper.

Although the jury was instructed on the Respondents' theory of alter ego, the jury never made any finding regarding alter ego. With respect to this issue, the trial court first noted that the verdict form refers to "defendants" in the plural; so, the trial court stated, "When the Defendants

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[85]92 W. Va. 596, 115 S.E. 456 (1922)(emphasis supplied).

participated and agreed to a joint submission regarding the Jury Verdict Form . . . the Court finds that they clearly submitted the issue of *alter* ego to the jury for its decision and by answering 'yes' the Jury impliedly found that CNR was the *alter* ego of CEG/NiSource, Inc."[86] Even though the trial court concluded that the word "defendants" on the verdict form was sufficient to infer that the jury found for the Respondents on their theory of alter ego,[87] fifteen pages of the trial court's order discusses the alter ego issue. In support of what the trial court intuited as a jury finding of alter ego, the trial court cited (1) the employment by NiSource of CEG's former CFO after the merger of NiSource and CEG, but the idea of a "merger" is that two workforces are combined; (2) CNR's employees reported to CEG's management when CNR was a subsidiary of CEG, but one would hope that a subsidiary's employees would occasionally make reports to the subsidiary's parent corporation; (3) CEG employees were on CNR's board of directors, but it is certainly common that a parent's employees serve on a subsidiary's board of directors; (4) CEG's supervision over CNR's budget, but it is common that a parent corporation supervises its subsidiaries' budgets; and (5) NiSource's supervision of CNR's activities after CNR became a subsidiary of NiSource,[88] but it is common that a parent supervises its subsidiaries.

There is a presumption in the law that parent and subsidiary corporations are separate and distinct and that each are not liable for the acts of the other. For example, "A parent-subsidiary

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[86]Order at 39. As discussed elsewhere, however, R. Civ. P. 49(a) provides, "The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury" and it is the Respondents' failure to request a finding on alter ego that constitutes waiver.

[87]The Respondents are obviously concerned about the absence of any verdict on alter ego, because they unsuccessfully filed a post-trial motion seeking judgment as a matter of law upon the issue.

[88]Order at 40-55.

relationship between corporations, one of which is 'doing business' in West Virginia, does not without the showing of additional factors subject the nonresident corporation to this state's jurisdiction."[89] Only where "the parent and its subsidiary operate as one entity" will the parent be liable for the actions of the subsidiary and it is the "extent of control" exercised by the parent over the subsidiary that determines whether the corporate veil between the two can be pierced.[90] This Court has adopted a non-exclusive, eleven-factor test[91] for determining whether the extent of control by a parent over a subsidiary warrants piercing the corporate veil. For most of these factors, there was no evidence at trial and certainly not enough to warrant a post-trial award of judgment as a matter of law to cure the defect in the jury's verdict.

"The propriety of piercing the corporate veil," it has been noted, "should rarely be determined upon a motion for summary judgment. Instead, the propriety of piercing the corporate veil usually involves numerous questions of fact for the trier of the facts to determine upon all of the evidence."[92] Plainly, it was the Respondents' burden to demand that the issue of alter ego be placed

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[89]Syl. pt. 2, in part, *Norfolk Southern Ry. Co. v. Maynard*, 190 W. Va. 113, 437 S.E.2d 277 (1993).

[90]*Id.*

[91]*Id.* at 118, 437 S.E.2d at 282 ("(1) Whether the parent corporation owns all or most of the capital stock of the subsidiary; (2) Whether the parent and subsidiary corporations have common directors and officers; (3) Whether the parent corporation finances the subsidiary; (4) Whether the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation; (5) Whether the subsidiary has grossly inadequate capital; (6) Whether the parent corporation pays the salaries and other expenses or losses of the subsidiary; (7) Whether the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation; (8) Whether in the papers of the parent corporation or in the statement of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own; (9) Whether the parent corporation uses the property of the subsidiary as its own; (10) Whether the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest; and (11) Whether the formal legal requirements of the subsidiary are not observed.")

[92]Syl. pt. 6, *Laya v. Erin Homes, Inc.*, 177 W. Va. 343, 352 S.E.2d 93 (1986).

before the jury in order to impose liability on NiSource.[93] In the absence of a jury verdict on alter ego, it was prejudicial error for NiSource financials and other evidence concerning the merger of NiSource and CEG to be presented.

10. The Award of Punitive Damages was Improper Under *Garnes*.

The Petitioners contend that no punitive damages award is proper, but even if such damages could be awarded, the award in this case was unconstitutionally excessive. The United States Supreme Court indicated in *State Farm v. Campbell*[94] that where compensatory damages are substantial, a 1:1 punitive damages ratio might be all that is permissible.[95] Following *Campbell*, a number of courts held that a ratio of 1:1 should be used where millions of dollars in compensatory damages are awarded.[96] Here, it cannot be seriously disputed that an award of $134 million in compensatory damages is "substantial."

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[93]See, e.g., *Chrysler Intern. Corp. v. Chemaly*, 280 F.3d 1358, 1363 (11th Cir. 2002)("The jury's special verdict form indicates that they based their decision on Chrysler's failure to establish that del Marmol and Chemaly dominated and controlled CEC to such an extent that the company was merely their alter ego."); *Mansfield v. Pierce*, 153 F.3d 721 at *1 (4th Cir. 1998)("A jury delivered a verdict in Mansfield's favor, having concluded that COTC-NC was the alter ego of COTC-FL, and that there had been a fraudulent conveyance of the property from COTC-NC to Pierce."); *Hystro Products, Inc. v. MNP Corp.*, 18 F.3d 1384, 1387 (7th Cir. 1994)("The jury returned a special verdict finding that MNP was the alter-ego of American Hydraulics and that Hystro had not waived its claims.").

[94]538 U.S. 408, 416 (2003).

[95]*Id.* at 425 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.")(emphasis supplied).

[96]*Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, (8th Cir. 2005)(1:1 ratio proper in a tobacco suit where compensatory damages of approximately $4 million were awarded); see also *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004)(reducing punitive to a 1:1 ratio of $600,000); *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446, 468 (3rd Cir. 1999)(finding that a compensatory damage award of $48 million was so substantial as to require a 1:1 ratio for punitive damages).

In its order, however, the trial court reasoned, "To be distinguished from *Campbell*, in this case there are over 10,440 Plaintiffs . . . therefor the average (mean) compensatory damages award is $10,000.00 and the average (mean) punitive damages award . . . is approximately $25,000."[97] The number of class members, however, keeps fluctuating. Moreover, even assuming this number is correct, the average compensatory damages award is $12,867.35, and the average punitive damages award is $25,862.07. Finally, neither the Respondents nor the trial court's order identifies any authority for a "class action exception" to *Campbell*.[98]

The Supreme Court has directed that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[99] Thus, the *Gore* Court directed state courts to consider the following in determining the reprehensibility issue: (a) whether the harm caused was physical as opposed to economic; (b) whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (c) whether the target of the conduct had financial vulnerability; (d) whether the conduct involved repeated actions or was an isolated incident; and (e) whether the harm was the result of intentional malice, trickery, or deceit, as opposed to mere accident. The Supreme Court has warned that "the existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive

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[97]Order at 78.

[98]Even $94,077,066, a 1:1 ratio to all compensatory damages other than for the flat-rate leases, would be much more than adequate punishment for the respectfully questionable bases for the imposition of punitive damages upon the Petitioners in the first place – making deductions based upon ambiguous leases, entering into legal business transactions with Mahonia that were publicly reported, and allegedly failing to report the impact of those deductions and business transactions on royalty statements. Thus, if this Court were to hold that *any* punitive damages could be recovered, the Petitioners submit that this Court should reduce the punitive damages in accord with *Campbell*.

[99]*BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).

damages award; and the absence of all of them renders any award suspect."[100] Finally, the Supreme Court has stated that "it should be presumed a plaintiff has been made whole for his injuries by compensatory damages" and that punitive damages are not proper unless defendant's conduct is "so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."[101]

In its punitive damages order, the trial court acknowledged that the Supreme Court has indicated that economic damages do not warrant as much in punitive damages as injury to persons or property, but recited evidence concerning how at least some of the Respondents depended upon the royalty payments. First, the Supreme Court has indicated that whether the target of the conduct had financial vulnerability is a factor, not whether a few of more than 10,000 class action plaintiffs might, coincidentally, have depended upon royalty payments. Second, if as the trial court noted, the average class member is to receive only about $10,000 in compensatory damages for ten years' worth of royalty underpayments, then it is difficult to perceive the depth of the harm in the loss of less than an average of $100 per month, particularly when one considers that those suffering the greatest compensatory damages loss will be large landowners who will likely receive the lion's share of the compensatory damages. Finally, there was absolutely no evidence that any of the Petitioners "targeted" anyone, let alone anyone with financial vulnerability. Even accepting the Respondents' theories of the motivations for the Mahonia transactions, which the Petitioners vehemently dispute, none of those motivations was directed towards the Respondents.[102]

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[100]*Campbell, supra* at 427.

[101]*Id.*

[102]In holding that a 3:1 ratio is justified, the trial court also extensively relied upon the case of *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), where punitive damages were $10 million and compensatory damages were only $19,000. Order at 79. But, the Court's plurality opinion in *TXO* was

With respect to the reprehensibility factor, the trial court found in its punitive damages order that the conduct began in 1993; that "Defendants' highest officers, their presidents, chief financial officers, department heads and boards of directors, were all involved in making the decisions to withhold moneys belonging to Plaintiffs;" and that "they planned the scheme to conceal it from Plaintiffs."[103] There was no evidence, however, that decisions were made to "withhold moneys belonging to the Plaintiffs" or that any "scheme" was involved. With respect to the deductions, the only evidence was that changes were made in deductions based upon changes in the regulatory environment and ambiguous lease language. With respect to the Mahonia transactions, not even the Respondents argued that those decisions were made as part of any "scheme to conceal it from Plaintiffs." Even one of the plaintifs, Mr. Parker, testified that he noticed a difference between the royalty statement price and the market price for gas:

> I noticed that the royalty payments made to my mother from this well are consistently substantially below the market price for gas as reflected in the FERC report and other market publications recognized in the industry, notwithstanding CNR sells this gas to a corporate affiliated purchaser, giving rise to a greater fiduciary obligation to royalty owners to realize the highest and best price reasonably attainable.[104]

Nothing was "concealed" with regard to the Mahonia transactions, and the evidence certainly does not warrant the imposition of $270 million in punitive damages.

The trial court's punitive damages order also places great emphasis on "the decision to pay royalty owners on the artificial $2.82 Mahonia price, when they knew at the time of the Mahonia

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modified three years later in the majority opinion in *BMW of North America v. Gore*, 517 U.S. 559 (1996), where it reaffirmed its holding in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), that anything beyond the outermost common statutory penalty of a 4:1 ratio, except in the most egregious circumstances, would be suspect. 517 U.S. at 581.

[103]Order at 81.

[104]Tr. at 836.

contracts natural gas prices were or would be likely to rise."[105] There was no evidence, however, that the decisions to enter into the Mahonia transactions were made with knowledge that gas prices would increase, let alone knowledge of the amount of any future increase (or decrease). If a company enters into a fixed-priced sales contract for gasoline, can the seller be exposed to punitive damages in a suit by its vendors if gasoline prices increase on the grounds that the seller must have "known that gasoline prices would increase?" Can making financial decisions based upon a contrarian strategy expose the decision-maker to punitive damages?[106] Punitive damages should not be based on "20/20 hindsight" or "second-guessing."[107]

With respect to the concealment factor under *Garnes*, the trial court noted that the decisions to change deductions were made without advising royalty owners.[108] The trial court cited no statutory, regulatory, contractual, or common law duty, however, for lessees to inform lessors when a method of calculating royalty payments is made.[109]

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[105]Order at 81-82. Gas prices are inherently unstable. Every forward sales contract involves one party that will benefit if prices increase and one party that benefits if prices decrease. It is unreasonable for the trial court to pick sides in hindsight and say that prices were likely to rise at the time the Mahonia transactions were completed. Forward sales contracts are also a hedge against volatility, regardless of whether the price ends up above or below the forward sales price.

[106]*In re Lorazepam & Chlorazepate Antitrust Litigation*, 300 F. Supp. 2d 43, 46 (D.D.C. 2004)("The price of a commodity is a function of supply and demand and the price of a stock may be affected by the general demand for stocks as opposed to bonds and other investments. In a bear market, all stock prices are depressed save for those few contrarian stocks that buck the market trend. Knowing that several Mylan insiders bought Mylan stock before the price increases but that other Mylan insiders sold it when the entire market became bearish proves absolutely nothing except the obvious-those who play the market try to buy low and sell high and, on occasion, cut their losses. To derive some conclusion from the economic behavior of Mylan insiders in 1997-1998 compared with their behavior at a later point in time, when so many variables are affecting that behavior, is akin to drawing some vast conclusion about apples and oranges because they are both spherical.").

[107]*Hernadez v. Gates*, 100 F. Supp. 2d 1209, 1225 (C.D. Cal. 2000).

[108]Order at 82.

[109] The trial court also discussed evidence regarding the sale of gas to sister companies who resold the gas at a profit. Order at 83. The evidence, however, was undisputed that the sales to affiliates were made at market prices; thus, the Respondents, according to their own measure of damages, suffered no injury.

With respect to the settlement factor under *Garnes*, the trial court stated, "Defendants never offered to make amends before litigation was filed and . . . on the eve of trial at the pretrial conference, only days before the trial began . . . offered as a gross settlement of $30 million, only 20 percent of the total compensatory damages in the case."[110] The Petitioners' pre-suit position, however, was ultimately rejected only upon a determination of the "ambiguity" of the leases, which was the only claim asserted pre-suit and offers were timely made following remand.

With respect to the criminal statutes factor under *Garnes*, the trial court opined that some of the conduct might constitute wire fraud and a violation of RICO, and that under RICO, treble damages may be awarded, which is the approximate ratio in this case.[111] The trial court cited no cases, however, and the Petitioners are unaware of any where anyone has been prosecutedfor payments made under what are judicially-determined to be "ambiguous" contracts over which "reasonable minds can differ," and for entering into "legal" fixed-priced sales contracts.

With respect to the Petitioners' ambiguity argument under *Wellman*,[112] the trial court reasoned that (1) the language relied upon in *Wellman* was dicta; (2) *Wellman* was decided in 2001 and the conduct began in 1993; and (3) *Wellman* references notice of deductions to royalty owners and no such notice was given.[113]

First, with respect to the argument that language relied upon by the Petitioners was dicta, they note the following from this Court's opinion:

> In view of all this, this Court concludes that <u>if an oil and gas lease provides for a royalty based on proceeds received by the lessee, unless the lease provides</u>

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[110]Order at 84.

[111]Order at 85-86.

[112]210 W. Va. 200, 557 S.E.2d 254 (2001).

[113]Order at 86.

> otherwise, the lessee must bear all costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale.
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> * * *
>
> Although this Court believes that the language of the leases in the present case indicating that the "proceeds" shall be from the "sale of gas as such at the mouth of the well where gas . . . is found" might be language indicating that the parties intended that the Wellmans, as lessors, would bear part of the costs of transporting the gas from the wellhead to the point of sale, whether that was actually the intent and the effect of the language of the lease is moot because Energy Resources, Inc., introduced no evidence whatsoever to show that the costs were actually incurred or that they were reasonable. In the absence of such evidence, this Court believes that the trial court properly granted the Wellmans summary judgment on the cost issue and that Energy Resources, Inc.'s, claims relating to the court's actions on this point are without merit.[114]

Respectfully, the highlighted language is explanatory, not dicta, as it applies the general legal concept discussed to the specific facts of the case before this Court. Plainly, this Court was indicating that if the lessee had introduced evidence to show that it had incurred reasonable post-production costs, the result might well have been different despite the fact that a proceeds lease was involved. Again, this issue was ultimately resolved in *Tawney I*, but it is unfair to simply dismiss the effect of *Wellman* on the issue of punitive damages as "dicta." Second, with respect to the timing of *Wellman*, it merely confirmed that, even for proceeds leases, deduction for reasonable post-production costs might be appropriate under certain circumstances. Finally, with respect to the trial court's observation that it appeared in *Wellman* as if the lessee had given the lessors notice of the deductions, the *Wellman* opinion is actually unclear, stating only that:

> For the gas taken from this well, Energy Resources, Inc., paid the Wellmans one-eighth of $.87 for each thousand cubic feet of gas which it had sold. In arriving at the $.87 per thousand cubic feet base figure, it took the position that it had deducted certain

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[114]*Id.* at 221, 557 S.E.2d at 265 (emphasis supplied).

> expenses which it had paid from the $2.22 per thousand cubic feet of gas which it had actually received.[115]

To the Petitioners, this makes it appear as if the lessee did not provide an explanation for the amount of its per unit royalty payment until after the dispute arose with the lessors. Moreover, the Petitioners did not rely on *Wellman* for the notice issue, but for its interpretation of the subject leases.[116]

With respect to the Petitioners' "absence of profit" argument, the trial court opined that (1) NiSource and CEG benefitted from the $400 million because it facilitated the merger; (2) CNR used the $94 million "to advance its goals from 1998 (when it had little value), to 2003 when it sold for $800 million, to 2005 when it sold for $2.2 billion;" (3) $150 million of the $400 million was used to pay for "golden parachutes;" (4) even though the deductions resulted in no net economic benefit, "Defendants have money to use for other things, like growing their company, drilling wells and

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[115]*Id.* at 204, 557 S.E.2d at 258 (emphasis supplied).

[116]In its punitive damages analysis, the trial court further made what the Petitioners assert is an impermissible negative inference regarding the Petitioners' assertion of attorney/client privilege: "Defendants should not be heard to say: 'we lay people thought the lease language was ambiguous, but we are not telling you what our attorneys told us.'" Order at 87. "[T]he ability to comment upon the failure to elicit testimony from a witness," it has been observed, "is predicated upon the admissibility of that testimony; therefore, where the attorney-client privilege bars the admission of the attorney's testimony about matters covered in a letter written by the attorney to his client, it is improper to allow a negative inference to be drawn from the opposing party's failure to call its attorney to testify." 75A Am. Jur. 2d *Trials* § 602 (2007)(footnote omitted). There can be many reasons for the assertion of attorney/client privilege, some having nothing to do with the matter sought to be inferred. For this reason, it has been observed that, "If comment could be made on the exercise of a privilege and adverse inferences drawn therefrom, a litigant would be under great pressure to forego his claim of privilege and the protection sought to be afforded by the privilege would largely be negated. Moreover, the inferences which might be drawn would, in many instances, be quite unwarranted." Cal. Evid. Code § 913, cmt.; *see also Griffin v. California*, 380 U.S. 609, 614 (1965)(allowing comment upon a claim of privilege "cuts down on the privilege by making its assertion costly"). Upholding a punitive damages award of $270 million based on what the trial court acknowledged was a proper exercise of attorney/client privilege was erroneous. With respect to the Petitioners' "sophisticated plaintiff" argument, the trial court stated that there was no evidence to support the proposition that some of the large landowner Respondents could have discovered the deductions any more readily than others. Order at 88-89. Again, however, the trial court's punitive damages order contains several inferences of the Petitioners' superior knowledge based upon the Petitioners' legal departments of which there was no evidence at trial, but refuses to make similar inferences when some of the Respondents had equal access to knowledgeable counsel. Either the negative inferences applied to the Petitioners without evidentiary support are erroneous, or the Petitioners should have had the benefit of similar inferences applied to the Respondents.

mergers;" and (5) with respect to line loss, "Defendants also profited by not having to spend money to fix or repair lines."[117] In response, the Petitioners submit that (1) facilitating a merger, even if such could be reasonably inferred from the evidence, is not "profit;" (2) if CNR had "little value" in 1998, but began taking improper deductions in 1993, five years earlier, such conduct must not have been "profitable," at least for such time period; (3) the subsequent increase in market value for CNR was related to factors other than the transactions referenced by the trial court; (4) the funding and payment of lawful severance packages is not "profit;" (5) third-party payments for post-production expenses is not "profit;" (6) there was no evidence that the cost of repairing lines exceeded the loss to the Petitioners as a result of any "line loss;" and (7) for every dollar in lost royalties due to line loss or post-production expenses, the Petitioners lost seven dollars, which can hardly be described as "profiting."

With respect to the financial position factor under *Garnes*, the trial court noted that $270 million is only about five percent of the net worth of NiSource,[118] and "an amount sufficient under the circumstances of this case . . . to serve the primary purposes of punitive damages – deterrence and punishment."[119] Several courts have held, however, that punitive damages awards of less than five percent of a defendant's net worth violate due process. In *Denesha v. Farmers Ins. Exchange*,[120] even the plaintiff conceded that an award in excess of punitive damages equal to 3.5 percent of the defendant's net worth was excessive:

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[117]Order at 90.

[118]Again, this was inappropriate. NiSource was never the alleged wrongdoer. NiSource sold CNR in 2003, the year this suit was filed, for $800 million. It was the market value of CNR, not NiSource's net worth, that should have been used. The punitive damages award of $270 million is 33.75 percent of $800 million.

[119]Order at 90.

[120]161 F.3d 491 (8th 1998).

> Denesha concedes that when characterizing the remaining $140 million in 'excess surplus' as 'net worth,' which would yield a punitive damages award equal to 3 1/2 percent of net worth upon the jury's award, may result in an excessive award under the approach taken in *HBE Corp.* In order to avoid the question of whether this constitutes an unreasonable award, Denesha would have us reduce the award to an amount equal to one-half of one percent of Farmers' net worth, understood in terms of excess surplus. While we follow the Supreme Court in rejecting this or any other categorical approach to determining punitive damages, *see BMW*, 517 U.S. at 581-82, 116 S. Ct. 1589, we agree that $700,000 – the product of this calculus -- represents an appropriate award under the circumstances.[121]

Likewise, in *E.E.O.C. v. HBE Corp.*,[122] the Eighth Circuit held that a punitive damages award equal to five percent of the defendant's net worth was excessive:

> A deliberate violation of well-settled law prohibiting racial discrimination and retaliation deserves both punishment and deterrence but a penalty of five percent of the corporate parent's net worth is excessive.

Accordingly, the Eighth Circuit reduced one plaintiff's punitive damages award from $3.8 million to $380,000 and another plaintiff's punitive damages award from $1 million to $100,000.[123] Applying the analysis employed by the Eighth Circuit in *Denesha* and *HBE*, where the defendants' conduct was much more egregious than alleged in the instant case, would result in a reduction of the $270 million in punitive damages awarded in this case to $27 million.[124]

With respect to the litigation cost factor under *Garnes*, the trial court noted that Respondents' expenses "exceed $1 million dollars,"[125] but there is no evidence of this figure in the record.

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[121] *Id.* at 504 (emphasis supplied).

[122] 135 F.3d 543, 557 (8th Cir. 1998) (emphasis supplied).

[123] *Id.*

[124] Although the Eighth Circuit applies a one-half of one percent test, other courts have applied standard of one percent, *see Cash v. Beltmann North American Co.*, 900 F.2d 109, 111 n. 3 (7th Cir. 1990)(after reviewing several punitive damages case, the court concluded "a typical ratio for a punitive damages award to a defendant's net worth may be around one percent); *see also Dunn v. HOVIC*, 1 F.3d 1371 (3rd Cir. 1993)(applying one percent standard). Even applying this one percent standard, however, would result in a reduction of the punitive damages award from $270 million to $54 million.

[125] Order at 91.

Moreover, the Respondents have been awarded compensatory damages of over $134 million; thus, litigation costs of $1 million would be only 0.7 percent of the compensatory damages recovered.[126]

With respect to other civil actions which might also result in the imposition of punitive damages, the trial court incorrectly stated that although Chesapeake has other actions pending against it, NiSource and CEG do not.[127] In a footnote, the trial court stated that Chesapeake has been sued in Kentucky, but failed to note that it already appears in the record that such complaint was amended to state claims against NiSource and CEG.[128] Of course, this is significant because if other suits result in similar awards of punitive damages, the ratio between those awards and net worth will be greater.

With respect to the *Phillip Morris*[129] decision, the trial court concluded that it supported the jury's verdict.[130] The trial court stated that the jury was instructed to limit the award of punitive damages in this case to conduct directed solely towards the Respondents herein and that there was no evidence regarding the Petitioners' conduct to third-parties.[131] In *Phillip Morris*, however, the Court held that the only conduct that is relevant is conduct directed to a "specific plaintiff." Here, because of the variability among leases and Respondents, the Petitioners are being punished for conduct which

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[126]Using this same ratio of 0.7 percent compensatory damages to litigation expenses, if a plaintiff recovered $100,000 in an automobile accident case, litigation expenses of $700 would hardly be support for an award of punitive damages.

[127]Order at 92.

[128]*Defendant's Supplemental Response to Motion for Leave to Intervene for Limited Purpose of Unsealing the Record* at ¶ 1 ("Recently, the movant, John Thacker, recently amended his Kentucky complaint to include as defendants therein, NiSource Inc. and Columbia Energy Group, which are also parties to the instant proceeding.").

[129]*Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

[130]Order at 93-94.

[131]Order at 94.

as to some of the Respondents, would not have been actionable, let alone warrant punitive damages. For example, as previously discussed, one of the representative Respondents was provided accurate information, upon inquiry, regarding the manner in which royalty payments were calculated. Moreover, there are royalty owners who negotiated special lease provisions, royalty owners who might have testified that they never looked at their statements, royalty owners who might have testified that they never relied on their statements, but all will share in the bounty of a $270 million damages award because of the manner in which the proceedings were conducted. This, the Petitioners submit, violates *Phillip Morris*.

B. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THE PETITIONERS HAD VIOLATED WEST VIRGINIA PUBLIC POLICY WITH RESPECT TO FLAT-RATE LEASES.

As discussed herein, numerous rulings by the trial court made it virtually impossible for the Petitioners to defend themselves, including precluding the Petitioners from questioning any witnesses regarding the very leases which are the subject of this suit; instructing the jury that the receipt of anything less than market price at the time of production violated the prudent operator standard; allowing the Respondents to intimate that the indemnification provision of a stock purchase agreement constituted an admission of liability; and permitting an award of punitive damages based upon breach of contract, constructive fraud, and violation of the public policy stated in the flat-rate statute. One especially prejudicial event, however, happened at the very commencement of trial. Immediately prior to opening statements, the trial court instructed the jury as follows:

> In 1982 the West Virginia Legislature declared that a significant portion of the oil and gas underlying this state is subject to development pursuant to leases or other continuing contractual agreements wherein the owners of such oil and gas are paid upon a royalty or rental basis known in the industry as the annual flat well royalty basis, in which the royalty is based solely on the existence of a producing well and thus is not inherently related to the volume of the oil and gas produced or marketed. The legislature also found that continued exploitation of the natural resources of this state in exchange for such wholly inadequate compensation is unfair, oppressive,

works an unjust hardship on the owners of the oil and gas in place and unreasonably deprives the economy of the State of West Virginia of the just benefit of the natural wealth of this state.

The Legislature also found in 1982 that a great portion, if not all, of such leases or other continuing contracts based upon or calling for annual flat rate well royalty has been in existence for a great many years and were entered into at a time when the techniques by which oil and gas are currently extracted, produced or marketed were not known or contemplated by the parties, nor was it contemplated by the parties that oil and gas would be recovered or extracted or produced or marketed from the depths and who [sic] horizons currently being developed by well operators.

The Legislature further found that while being fully cognizant that the provisions of Section 10, Article I of the United States Constitution and Section 4, Article III of the Constitution of West Virginia [sic] proscribed the enactment of any law in impairing the obligation of the contract.

The Legislature further finds that it is a valid exercise of the police powers of this state and in the interest of the State of West Virginia and in furtherance of the welfare of its citizens to discourage, as far as constitutionally possible, the production and marketing of oil and gas located in this state under the type of leases or other continuing contracts described above.

Based on the declared public policy of this state, as provided to us in 1982 by the West Virginia Legislature, this Court declared that the 651 flat-rate royalty leases are converted as a matter of law; and under the circumstances as this case has developed, that those lessors, those royalty owners for the period of time that we're dealing with here, July 1, 1990, through date, are entitled to a one-eight [sic] of the volume produced of those wells.

That's the law of this case, and that is binding on the judge, the lawyers, and the jury.[132]

The Petitioners assert that this statement of public policy, immediately prior to opening statements, which instructed the jury that the Petitioners had engaged in the "exploitation" of the "natural resources of the state" in "exchange for wholly inadequate compensation" that was not only "unfair" and "oppressive" and "unreasonably deprive[d] the economy of the State of West Virginia of the just benefit of the natural wealth of this state," and worked such "an unjust hardship on the owners

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[132]Tr. at 12-14. Immediately thereafter, each side presented its opening statements.

the oil and gas in place," i.e., the Respondents, that based "on the declared public policy of this state" as "provided to us in 1982 by the West Virginia Legislature," the trial court invalidated almost 700 leases, was unfairly and unduly prejudicial, and warrants the award of a new trial.

Not only did the trial court give this instruction immediately prior to opening statement, one of the reasons it gave for overruling the Petitioners' objections was because the flat-rate issue went towards punitive damages:

> MR. MILLER: Your Honor, we want to do [sic] register – just renew our objection to the preliminary instruction on the flat-rate statute to the extent that it does not – and ask the Court if it's going to read part of it, read or instruct the Jury that under that statute, the statute itself did not invalidate the leases. It only prohibited us from getting a well work permit for any wells drilled on or after the date of that statute. I believe that reading only the preamble –
>
> THE COURT: The objection is overruled.
>
> MR. MILLER: Okay. And then we had offered a –
>
> THE COURT: The Jury will know it. I mean, this is a three-week trial. This is the first day after jury selection. They're going to know this because I'm going to let that in on the question of punitive damages. But for today, it's overruled. . . .
>
> MR. MILLER: I'm talking about their state of mind defense on the issue of that. I think the Jury will believe just on reading part of the statute, that the statute prohibited us from doing it, as opposed to only a well work permit being issued.
>
> THE COURT: Your objection is overruled. Your exception is noted.
>
> MR. MILLER: The second item is, we had offered a preliminary instruction too, and I just want to – the Court is not going to give it, correct?
>
> THE COURT: I'm not going to give it.[133]

Thus, even though the Petitioners pleaded with the trial court not to give this instruction, or at the least, to give an instruction that would not have worked such prejudice on the Petitioners, it refused.

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[133]Second Bench Conf. Tr. at 2-3 (Jan. 9, 2007) (emphasis added).

In the instant case, once the trial court entered partial summary judgment on the flat-rate issue, the only issue for the jury was damages, which would be the difference between the flat-rate royalty payments made and the one-eighth royalty retroactively imposed by the trial court. If a trial judge grants summary judgment on liability in a medical malpractice case, the jury does not receive a detailed recitation of the court's reasoning; rather, the trial judge simply instructs the jury that judgment has been entered for the plaintiff on the issue of liability and the jury is to award such damages as the plaintiff has proven, by the applicable standard, to have proximately resulted from the malpractice.[134] The trial judge should not unduly and unfairly elaborate on its rationale for awarding partial summary judgment to the extent that it might be perceived as an advocate for either party. Where a trial court's instructions unfairly work to the prejudice of one of the parties, this Court has held that the award of a new trial is appropriate.[135] Here, the trial court's instructions,

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[134]*Friends v. All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 827-28 (D.C. Cir. 1984)("We have every confidence that the District Court will frame the instructions in terms more artful than those Lockheed pessimistically contemplates so as to minimize any potential prejudice. For instance, an appropriate instruction might state that Lockheed has been found liable for costs of examinations to discover whether a child has been injured and that it is the jury's duty to determine the reasonable cost of such examinations. However, the instructions would also presumably state that the finding with respect to diagnostic examinations does not imply that the accident, in fact, caused any injury.")(emphasis supplied).

[135]In *State v. Keaton*, 215 W. Va. 376, 599 S.E.2d 799 (2004), for example, the trial judge made the following statement in dealing with the issue of a sick juror: "Ms. * * *, we thought we would be through yesterday, we're not. And the Defendant is entitled to a 12-man jury. And we had anticipated that if something like this came up they would go along with eleven. But I think the Defendant is pressing, you know, he wants a 12-man jury. Now, we can do one of several things: I can continue the trial of this case until, say, Friday. Give you time to recover from any surgery you have and come on in Friday morning and have you hear my instructions and argument of counsel and you-all deliberate. Or you can--we can come in tomorrow if you think you're up to it tomorrow. Or you can check with your doctor and see if he can do the surgery tomorrow rather than today. I don't know how painful that is." *Id.* at 380, 599 S.E.2d at 803. On appeal of his conviction, the defendant contended that this unfairly prejudiced him by making it appear that he was acting callously towards the illness of the subject juror. In setting aside the conviction, the Court held as follows:

> As the appellant's brief, quoted supra, suggests, the judge's remarks might well have caused one or more jurors to feel annoyed or angry at the appellant for inconveniencing the juror who had surgery scheduled – or for being willing to cause the jury's deliberation to be delayed by two days.

particularly when considered in light of other rulings that stripped their defenses, utterly and completely eviscerated the Petitioners' right to a fair trial.

C. THE TRIAL COURT ERRED IN CONVERTING THE FLAT-RATE LEASES.

1. The Trial Court's Ruling Violated the Separation of Powers By Engrafting Upon the Statute a Remedy Rejected by the Legislature.

"Legislative power, wherever vested, is sovereign in its nature and belongs to the political department of government; wherefore the courts cannot directly interfere in any way with the exercise thereof."[136] "[T]he courts of this state are forbidden . . . to exercise legislative authority of any kind."[137] Courts "should not . . . control the policy of the Legislature in the valid exercise of the policy power of the State . . . ."[138] This is because "[c]ourts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary."[139] "It is not for this Court," it recently held, "arbitrarily to read into [a statute] something the Legislature purposely omitted."[140] Similarly, "[i]t not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised,

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> Such juror annoyance or anger at a criminal defendant (about an entirely irrelevant matter) has the inherent potential to improperly affect jury deliberations – by making it harder for jurors to view and weigh the evidence impartially, and to scrupulously afford the defendant the benefit of such difficult-to-apply principles as the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt.

Id. at 382-83, 599 S.E.2d at 805-06. Respectfully, in the instant case, in light of the nature and timing of the trial court's comments, as well as the fact that the trial court had "the greatest potential for influencing the jury" by making such comments, the Petitioners submit that, as in *Keaton*, a new trial is warranted.

[136]Syl. pt. 1, *State ex rel. Wells v. City of Charleston*, 92 W. Va. 61, 114 S.E. 382 (1922).

[137]*State ex rel. County Court of Marion County v. Demus*, 148 W. Va. 398, 135 S.E.2d 352 (1964).

[138]Syl. pt. 15, in part, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953).

[139]Syl. pt. 1, in part, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965).

[140]*Bradshaw v. Soulsby*, 210 W. Va. 682, 688, 558 S.E.2d 681, 687 (2001), *quoting Banker v. Banker*, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 475-77 (1996).

amended, distorted, remodeled, or rewritten[.]"[141] Courts "cannot question or review the wisdom of any legislative policy; instead, the Legislature's policy choices can only be subjected to review by the ultimate constitutional reviewing authority: the scrutiny of the people at the ballot box."[142] It has also been said that:

> To be clear, the West Virginia Legislature is the paramount authority for deciding and resolving policy issues . . . . Once the Legislature indicates its preference by the enactment of a statute, the Court's role is limited. Our duty is to interpret the statute, not to expand or enlarge upon it. . . . More significantly, any subsequent policy changes must come from the Legislature itself and, in the absence of constitutional or statutory authority to the contrary, this Court has no blanket power to recast the statute to meet its fancy.[143]

For example, "Courts may not reform statutes to correct perceived inadequacies."[144] Indeed, when trial courts have provided an extra-statutory remedy that was "omitted, either by design or inadvertence, [but] could [have] be[en] included within its scope," such judicial intrusions into the legislative sphere have been reversed.[145]

Despite these clear and consistent prohibitions against judicial intrusion into legislative prerogatives, the trial court in this case relied upon the legislative findings set forth in W. Va. Code

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[141]*Taylor-Hurley v. Mingo Co. Bd. of Educ.*, 209 W. Va. 780, 551 S.E.2d 702 (2001)(*quoting State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 145, 107 S.E.2d 353, 358 (1959)).

[142]*Hartley Hill Hunt Club v. County Comm'n*, 2007 WL 1388189 at *2 (W. Va.).

[143]*State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 126, 464 S.E.2d 763, 768 (1995)(emphasis supplied, footnote and citations omitted).

[144]*State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 630, 474 S.E.2d 554, 560 (1996)(footnote omitted).

[145]*See, id.; see also In re Tiffany Marie S.*, 196 W. Va. 223, 231, 470 S.E.2d 177, 185 (1996)("A circuit court is not at liberty to disregard lawful directives of the Legislature and this Court simply because those directives conflict with the judge's individual notions of efficiency or docket control. In the last analysis, it is crucial to public confidence in the courts that judges be seen as enforcing the law and as obeying it themselves. Exactly so. This is the short of it--and there is no long of it.").

§§ 22-6-8(a)(1), (2), (3) and (4), even though the Legislature refrained from invalidating existing flat-rate leases, and retroactively invalidated all of the Petitioners' flat-rate leases.[146]

In the trial court's order, it framed the issue as follows: "The question thus posed for this court is the enforceability of the flat-rate royalty provisions of the 651 leases . . . that fall outside the operation of the remedial provisions of W. Va. Code 22-6-8."[147] In other words, the trial court expressly recognized that it was considering whether to provide a remedy that the Legislature could have enacted for flat-rate leases, but did not. In order to justify providing a remedy that the Legislature did not provide to address the identical public policy, the trial court concluded, "the Legislature did not enact a legislative remedy for flat-rate royalty leases . . . because the Legislature was of the opinion that to do so would constitute a violation of the constitutional protections providing against impairment of contracts."[148] Certainly, concern about violating the constitutional prohibition against impairment of contracts may have been one reason the Legislature elected a prospective remedy, but the trial court's analysis violated the equally imperative constitutional prohibition against super-legislating:

> "Though we may believe the legislature's actions are harsh or even cruel, or sound economic policy, its policy decisions, under our constitutional framework, are its own, subjecting it to the scrutiny of the electorate in whose hands the constitution vests the ultimate reviewing authority. . . . [W]e are not constitutionally authorized to superlegislate nor decide the social and economic merits of legislative judgments."[149]

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[146]Order at 5, 8-9.

[147]Order at 10.

[148]Order at 15.

[149]*Hartley Hill Hunt Club, supra* at n.7 (*quoting State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 737, 474 S.E.2d 906, 917 (1996)); *see also Bias v. Eastern Associated Coal Corp.*, 220 W. Va. 190, 640 S.E.2d 540 (2006); *Subcarrier Communications, Inc. v. Nield*, 218 W. Va. 292, 624 S.E.2d 729 (2005); *Jones v. West Virginia State Board of Educ.*, 218 W. Va. 52, 622 S.E.2d 289 (2005).

"[T]he freedom to contract is a substantial public policy that should not be lightly dismissed,"[150] this Court recently stated. Indeed, "this State's public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principal of even greater importance to the general public."[151] Courts are to "enforce private agreements between parties, to the extent that such agreements do not conflict with the applicable law."[152] Moreover, this Court has cautioned that courts are

> not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, – that you are not lightly to interfere with this freedom of contract.[153]

In *Wellington Power*, for example, parties to a contract attempted to invalidate provisions which they alleged violated the public policy expressed in the public bond statute. This Court, however, rejected this argument stating:

> The power of this Court to void a contract as contravening public policy should be exercised only in cases free from doubt. In the instant case, we doubt the desirability of declaring pay-if-paid condition precedent clauses like the one at issue unenforceable when applied to actions against a surety. . . . above, we conclude that the public policy of freedom of contract outweighs the public policy found in the public bond statute in cases involving a subcontractor's action on a surety bond. Accordingly, we hold that in a public construction project, a pay-if-paid condition precedent clause in a contract between a subcontractor and a contractor does not violate the public policy of this State found in the public bond statute . . . .[154]

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[150]*Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 38, 614 S.E.2d 680, 685 (2005).

[151]*Id.*

[152]*Rollyson v. Jordan*, 205 W. Va. 368, 376, 518 S.E.2d 372, 380 (1999).

[153]*State v. Memorial Gardens Development Corp.*, 143 W. Va. 182, 191, 101 S.E.2d 425, 430 (1957)(*quoting Baltimore & Ohio Southwestern Railway Co. v. Voigt*, 176 U.S. 498 (1900)).

[154]*Supra* at 40, 614 S.E.2d at 687.

In this case, however, the trial court engaged in no balancing of interests; rather, it simply took the public policy expressed by the Legislature and retroactively invalidated all flat-rate leases.

In its order, the trial court acknowledged admonitions by this Court against expanding or enlarging upon legislation.[155] The trial court, however, justified rendering redundant the legislative remedy by stating, "to declare that the subject flat-rate royalty clauses are void and unenforceable . . . is not expanding or enlarging upon the statute itself,"[156] as if a judicial declaration that the death penalty is the proper punishment for first-degree murder, because of the "public policy" behind a legislative statute prescribing life without parole, would not be "expanding or enlarging" upon the statute. The trial court also cited the equitable powers of courts,[157] but it is well-settled that "equity

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[155]Order at 29-30.

[156]Order at 30.

[157]In its order, the trial court cited *McGinnis v. Cayton*, 173 W. Va. 102, 312 S.E.2d 765 (1984), Order at 30, but *McGinnis* was a case involving mutual mistake. The trial court also dismissed the fact that *McGinnis* was decided after the flat-rate statute was enacted by stating, "it was apparently commenced prior to the effective date of the Flat-Rate Royalty Statute," Order at 30, but it was obviously in litigation after the flat-rate statute was enacted and, accepting the trial court's reasoning that all flat-rate leases in West Virginia became invalid as violation of public policy in 1982, this Court should have invalidated the *McGinnis* lease. The trial court also relied upon a 1912 case, *Buffalo Coal & Coke Co. v. Vance*, 71 W. Va. 148, 76 S.E. 177 (1912), and a 1919 case, *Wellman v. Virginia Railway Co.*, 85 W. Va. 169, 101 S.E.2d 252 (1919), but *Buffalo Coal* and *Wellman* have no application to this case. In Syllabus Point 4 of *Buffalo Coal*, this Court held, "Specific performance is not a matter of right, but lies in the sound discretion of the court, and will not be exercised in favor of one who has slept on his rights, or the circumstances and conditions have so changed that specific performance would result in hardship." Likewise, in the single Syllabus Point of *Wellman*, this Court held, "Where by parol contract a railway company makes sale of the timber on its right of way, not then but soon to be occupied for railway purposes and so understood by the purchaser, and the purchaser with this understanding enters and removes the timber then marketable and vacates, and for more than ten years thereafter makes no further claim to the timber, and the property of the railway company is sold and conveyed to another company, and after loss of evidence and changes of circumstances and conditions respecting the timber, the purchaser by contract undertakes to sell the timber remaining on the land to a third person who sues for a deed, equity on principles of laches and staleness of the demand will deny specific performance." In *Buffalo Coal* and *Wellman*, this Court was simply applying the doctrine of laches to one contracting party's effort to seek specific performance, an equitable remedy, and this Court relied upon a change in circumstances during that party's non-performance of its obligations to refuse to exercise its equitable powers. If anything, *Buffalo Coal* and *Wellman* both undermine what has occurred in this case because even though the trial court clearly applied its equitable authority, it failed to allow the Petitioners to present any of their equitable defenses to the jury.

abhors a forfeiture."[158] Moreover, if the trial court, as it indicated, was applying its powers of equity, then it erred in not presenting to the jury the defenses of laches,[159] waiver,[160] and estoppel,[161] which are available when a claim for rescission is grounded in equity.

The trial court also justified its ruling by stating, "It is the simple, everyday function of the judicial branch to refuse in individual cases to enforce a contract term in violation of the public policy of this state."[162] Although it is not uncommon for courts to prospectively declare contracts void as against public policy that were void at the time they were made, such as a contract to marry, the Petitioners have been unable to find a single case where any court has ever retroactively invalidated hundreds of contracts that were made years earlier based upon a statute enacted years earlier.[163]

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[158]*Bailey v. Savage*, 160 W. Va. 523, 527, 236 S.E.2d 203, 206 (1977)("Equity abhors a forfeiture. 27 Am. Jur. 2d, Equity § 74 (1966).").

[159]*Absure, Inc. v. Huffman*, 213 W. Va. 651, 655, 584 S.E.2d 507, 511 (2003)("The unjust enrichment claim, as previously stated, was equitable in nature, and thus principles of laches rather than the Statute of Limitations govern the bringing of it . . . ."); *Geibel v. Clark*, 185 W. Va. 505, 408 S.E.2d 84 (1991)(laches was question of fact for jury).

[160]*Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998)("the doctrines of waiver and estoppel are both grounded in equity"); *Buckhannon Bank v. O'Brien and Hall*, 116 W. Va. 354, 180 S.E.2d 258, 260 (1935)("whether there has been a waiver or abandonment is generally a question of fact and the sufficiency of the evidence relating thereto is for the jury").

[161]*Ryan v. Rickman*, 213 W. Va. 646, 648, 584 S.E.2d 502, 504 (2003)("the appellee's request that he be declared an heir at law could be barred by the equitable defenses of laches, waiver, or estoppel."); *Barnett v. Wolfork*, 149 W. Va. 246, 255, 140 S.E.2d 466, 472 (1965)(" The defense of equitable estoppel is available at law as well as in equity."); *Tiernan v. Charleston Area Medical Center, Inc.*, 212 W. Va. 859, 866, 575 S.E.2d 618, 625 (2002)(equitable estoppel issue for jury); Syl. pt. 7, *Jolynne Corp. v. Michels*, 191 W. Va. 406, 446 S.E.2d 494 (1994)("'For the lessee in an oil and gas lease to make out a theory of estoppel to prevent defeasance of his estate because of misconduct by the lessor, the lessee is required to use due diligence toward production; however, the lessee's degree of diligence is a factual question.' Syllabus Point 2, *Wilson v. Xander*, 182 W. Va. 342, 387 S.E.2d 809 (1989).").

[162]Order at 30.

[163]And, the trial court not only retroactively invalidated the contracts, but then permitted money damages to be award for the retroactive period.

This Court has consistently held that when the Legislature provides for a remedy to address its expression of the State's public policy, such remedy is "exclusive." As the Court stated in *Bullman v. D&R Lumber Co.*,[164] "when a statute creates a cause of action and provides the remedy, the remedy is exclusive unless the statute states otherwise."[165] If the Legislature had intended its remedy not to be exclusive, it could have so stated, as it has done with other remedial legislation.[166]

In this case, the flat-rate statute proclaims a public policy, then provides a remedy. Such remedy "is exclusive." By relying upon the Legislature's public policy to invalidate contracts after the Legislature provided a different remedy; engaging in a Commerce Clause analysis;[167] ignoring the

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[164]195 W. Va. 129, 134, 464 S.E.2d 771, 775 (1995)(emphasis supplied).

[165]See also *Bias v. Eastern Associated Coal Corp.*, 220 W. Va. 190, 640 S.E.2d 540 (2006)(workers' compensation statute provided exclusive remedies for employee claims of work-related stress disorders); *State ex rel. Sowards v. County Commission of Lincoln Co.*, 196 W. Va. 739, 474 S.E.2d 919 (1996)(statute authorizing petition for removal was exclusive remedy for political activity by deputy sheriff); *Persinger v. Carmazzi*, 190 W. Va. 683, 441 S.E.2d 646 (1994)(shareholders' rights statute provided exclusive remedies); *State ex rel. Paige v. Canady*, 189 W. Va. 650, 434 S.E.2d 10 (1993)(declaratory judgment action inappropriate where tax statute provided exclusive remedies for procuring refund); *G.M. McCrossin, Inc. v. W. Va. Bd. of Regents*, 177 W. Va. 539, 355 S.E.2d 32 (1987)(court of claims provided exclusive remedies for commercial claims against State); *State ex rel. Plymale v. City of Huntington*, 147 W. Va. 728, 131 S.E.2d 160 (1963)(referendum election to repeal municipal ordinance was exclusive remedy under applicable statute).

[166]See, e.g., W. Va. Code § 9-7-8 ("The remedies and penalties provided in this article governing the operation of the medical programs of the department of welfare are in addition to those remedies and penalties provided elsewhere by law."); W. Va. Code § 61-5-27(f)("A person who violates this section is liable in a civil action to any person harmed by the violation for injury or loss to person or property incurred as a result of the commission of the offense and for reasonable attorney's fees, court costs and other expenses incurred as a result of prosecuting a civil action commenced under this subsection, which is not the exclusive remedy of a person who suffers injury or loss to person or property as a result of a violation of this section."); W. Va. Code § 61-5-27a(h)("A person who violates this section is liable in a civil action to any person harmed by the violation for injury or loss to person or property incurred as a result of the commission of the offense and for reasonable attorney's fees, court costs and other expenses incurred as a result of prosecuting the civil action commenced under this subsection, which is not the exclusive remedy of a person who suffers injury or loss to person or property as a result of a violation of this section.").

[167]In its order, the trial court engaged in an extensive analysis of whether the remedy it has judicially prescribed violates the Commerce Clause. Order at 19-21. In conducting its impairment analysis, the trial court erred in several respects. First, the trial court relied upon the opinion in *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400 (1983), but that case involved the state regulation of gas prices, not lease provisions. Ironically, the contracts at issue in *Energy Reserves* were the same type of fixed-priced

countervailing public policy enforcing private contracts, and rendering a nullity an exclusive statutory remedy, the trial court violated separation of powers.

2. The Trial Court's Ruling Violated the Impairment of Contracts Provision of the West Virginia Constitution.

Obviously, the constitutional prohibition against impairment of contracts does not prevent a court from invalidating an invalid or void contract,[168] but where a court's sole justification is the same

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long-term sales contracts as the Mahonia contracts; specifically, "[e]ach contract contains a 'government price escalator clause,' which provides that if any governmental authority fixes a price for any natural gas that is higher than the contract price, the contract price shall be increased to that level . . . ." *Id.* at 401. Later, after a statute was enacted imposing price ceilings on gas, one of the parties challenged the statute on Commerce Clause Grounds. *Id.* Obviously, where the parties, by their own contract, anticipated government regulation of gas prices, the United States Supreme Court held that no Commerce Clause violation occurred: "The very existence of the governmental price escalator clause and the price redetermination clause indicates that the contracts were structured against the background of regulated gas prices." *Id.* at 415. Second, the trial court relied upon the opinion in *U.S. Trust* Co. *of New York v. New Jersey*, 431 U.S. 1 (1977), but that case involved the repeal of a statute that created certain contract rights between the State of New Jersey and private parties: "In this case the obligation was itself created by a statute, the 1962 legislative covenant." *Id.* at 17. Obviously, in the instant case, the Petitioners would be hard-pressed to argue that if the flat-rate leases were created by statute, the Legislature could not amend the statute without violating the Commerce Clause. Third, the trial court's order states, "'One legitimate state interest is the elimination of unforseen windfall profits,'" Order at 22, *quoting U.S. Trust, supra* at 31, n. 30, but this language appears nowhere in the *U.S. Trust* opinion. The actual quotation from the *U.S. Trust, supra* at 31, n. 30, opinion is:

> This Court previously has regarded the elimination of unforeseen windfall benefits as a reasonable basis for sustaining changes in statutory deficiency judgment procedures. These changes were adopted by several States when unexpected reductions in property values during the Depression permitted some mortgagees to recover far more than their legitimate entitlement.

The statutes involved did not invalidate any mortgages, but changed foreclosure procedures. Obviously, where contract remedies are regulated by statute at the time a contract is made, a subsequent amendment to the remedy does not violate the Commerce Clause. Finally, even though the trial court's order cites the three-step test under *Shell v. Metropolitan Life Ins.* Co., 181 W. Va. 16, 380 S.E.2d 183 (1989), it contains no analysis of the third step: "Finally, if a legitimate public purpose is demonstrated, the court must determine whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." Syl. pt. 4, in part, *Shell, supra.* Again, this is the least intrusive remedies test, which the Petitioners submit the Legislature correctly applied in 1982.

[168] 16B Am. Jur. 2d *Constitutional Law* § 736 (2007)("The Contracts Clause of the Federal Constitution is directed only against impairment by legislation, and not against the judgments of courts.")(footnote omitted).

public policy articulated by a Legislature that chose not to prescribe such remedy, an impairment of contracts has occurred. Respectfully, the trial court's order contained not a judicial analysis of the alleged invalidity of the flat-rate provisions of the subject leases, but a legislative one.

First, the trial court's order acknowledged that the Legislature itself expressed concerns about the constitutionality of the retroactive invalidation of flat-rate leases.[169] It is well-settled, however, that the Contracts Clause "does not protect contracts which are . . . contrary to public policy . . . ."[170] The Legislature, moreover, "is presumed to be familiar with 'all existing law', constitutional, statutory or common, applicable to the subject matter."[171] Accordingly, the Legislature is presumed to have known that if it felt strongly enough that flat-rate leases violated public policy to warrant their invalidation, it could have prescribed invalidation.

Second, the trial court's order cited its unquestioned authority to determine "whether a law is in violation of the constitution,"[172] but flat-rate leases are private contracts, not laws, and the power to invalidate an unconstitutional statute provides no source of power to invalidate a private contract as unconstitutional. There is no "state action" in a private contract. Thus, a contract is not "unconstitutional." Because of this fallacious reasoning, the flat-rate ruling should be set aside.

Third, the trial court's order stated, "Accordingly, consistent with the Separation of Powers, the Legislature has recognized its power to declare the public policy of the State and the power of the courts to determine the constitutional boundaries of such public policy."[173] Public policy, however,

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[169]Order at 16-17.

[170]16B Am. Jur. 2d *Constitutional Law* § 718 (2007)(footnote omitted).

[171]*Mt. State Bit Service, Inc. v. Dept. of Tax and Revenue*, 217 W. Va. 141, 149, 617 S.E.2d 491, 499 (2005)(*quoting Hereford v. Meek*, 132 W. Va. 373, 388, 52 S.E.2d 740, 748 (1949)).

[172]Order at 17.

[173]Order at 19.

is neither constitutional nor unconstitutional. Public policy is public policy. What provision of the federal or state constitutions are violated by flat-rate leases, fixed-priced contracts, or any other agreements between private parties involving economic considerations? Even a contract of adhesion is not "unconstitutional." To the extent that the trial court's invalidation of the flat-rate leases was based upon a finding of their "unconstitutionality," it is clearly erroneous and should be set aside.

Fourth, the trial court stated, "The constitutional protection afforded preexisting contractual obligations by the Contract Clause is not absolute."[174] Of course, it is well-recognized, particularly in heavily-regulated industries, that the "Legislature" has the plenary authority to exercise its police power even where such exercise may impact existing contracts.[175] There is absolutely no authority, however, for the trial court's exercise of the Legislature's "police power" to "safeguard the vital interests of its people" in the invalidation of contracts which the Legislature chose not to invalidate based upon its sole and exclusive authority to address the public policy concerns it expressed.

Fifth, the trial court swept aside the argument that the Legislature's election, after hearing the competing arguments of industry and landowners, to craft a remedy that was prospective only, in any manner bound the trial court:

> [W]hat is presented here is not the application of the remedy afforded by the Flat-Rate Statute. It is whether this court will enforce CNR's contract right to pay what has been found to be wholly inadequate compensation for CNR's operations that represent the continued exploitation of this State's natural resources . . . .[176]

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[174]Order at 19.

[175]Syl. pt. 3, *Shell v. Metropolitan Life Ins. Co.*, 181 W. Va. 16, 380 S.E.2d 183 (1989)("Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people.").

[176]Order at 16.

It is one thing for a royalty owner to bring suit against a lessee to prospectively invalidate a lease's flat-rate provision based upon public policy; it is quite another for almost 700 royalty owners to bring suit seeking to retroactively effectuate an industry-wide invalidation of flat-rate leases over a ten year period and recover ten years' worth of damages and pre-judgment interest where the lessee was entitled to rely upon the Legislature's decision to prescribe a purely prospective remedy. The trial court handed royalty owners what their lobbying efforts with the Legislature could not accomplish directly, i.e., invalidation of flat-rate leases. Of course, in the process, the trial court rendered the Legislature's election of remedy a complete nullity.

Finally, in rejecting the Petitioners' argument that invalidation of flat-rate leases would, under the circumstance of this case, violate the Commerce Clause, the trial court noted:

> CNR asserts . . . that the remedy sought by the Plaintiffs . . . would be unconstitutional . . . . Since the Legislature concluded that such application would be unconstitutional, then this court may not declare the subject flat-rate leases void for being in contravention of public policy. However, it has been the law since 1803 that it is for the judicial branch . . . to determine . . . whether a law is in violation of the constitution.[177]

Flat-rate leases are not "laws." Flat-rate leases cannot be "unconstitutional." A conclusion that "the Legislature did not go far enough" is no excuse for prescribing a remedy it rejected.

3. The Trial Court Erred in Prescribing Forfeiture of the Flat-Rate Leases.

In the trial court's flat-rate order,[178] it relied upon W. Va. Code § 22-6-8(f), which states, "[t]he owner of the oil and gas in place shall have a cause of action to enforce the owner's rights established by this section," but ignored an important qualifier: "In light of the foregoing findings, the Legislature hereby declares that it is the public policy of this state, to the extent possible, to prevent

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[177]Order at 18.

[178]Order at 9-10.

the extraction, production or marketing of . . . gas . . . under a lease . . . providing a flat well royalty . . . and toward these ends, the Legislature further declares that it is the obligation of this state to prohibit the issuance of any permit required . . . based upon such leases . . . ."[179] The "rights established by this section" for which a royalty owner was given "a cause of action to enforce" were limited to circumstances involving a new permit. The Legislature gave royalty owners no "right" to sue to invalidate flat-rate leases.

Where a statutory cause of action is created, such action is governed by statute.[180] For example, a wrongful death action is a statutory cause of action and, despite the obvious public policy of making those liable for the death of another subject to damages, not even the constitutional right to a jury trial has any application to this statutory cause of action.[181] To the extent that the trial court relied upon a private cause of action under the flat-rate statute, it violated these principles.

Ultimately, in an apparent mix of contract law, tort law, and equity, the trial court proceeded to declare a forfeiture of the leases:

> In determining the interest of the parties in the enforcement of the flat-rate royalty clause, the court has considered whether any **forfeiture** would result if enforcement of the flat-rate royalty clause is denied.[182] . . . Therefore, the invalidation of the flat-rate royalty clauses of these leases, under traditional contract analysis, must result in rescission of the lease.[183]

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[179]W. Va. Code § 22-6-8(b)(emphasis supplied).

[180]See *Human Rights Comm'n v. Esquire Group, Inc.*, 217 W. Va. 454, 462, 618 S.E.2d 463, 471 (2005)("A private cause of action for housing discrimination is governed by West Virginia Code § 5-11A-14 . . . .").

[181]*Simms v. Dillon*, 119 W. Va. 284, 193 S.E. 331 (1937)(constitutional right to jury trial does not apply to any circumstances at which it did not exist at common law).

[182]Of course, this "enforcement" language is derived from those cases which recognize that public policy is a shield, not a sword, to be used as a defense, not as a cause of action for damages.

[183]Order at 27.

Of course, there is no cause of action for breach of contract resulting in "rescission" or "forfeiture."

"Rescission," this Court has held, "is an equitable remedy."[184] And, "[e]quity will not grant," for example, "rescission on the ground that mining is unprofitable."[185] This is because, "[i]It is of frequent occurrence in the business world that a party to a contract finds that its performance is onerous and unprofitable; nevertheless, good faith and fair dealing call for performance."[186] Nevertheless, expressly based upon a finding that its action was necessary to provide "a mechanism for the owners of oil and gas to receive some measure of fair value for the natural resources extracted,"[187] and refusing to even address the equitable defenses asserted, the trial court rescinded the leases.[188] Respectfully, this was both procedurally and substantively erroneous.

As to "forfeiture," the trial court cited RESTATEMENT (SECOND) OF CONTRACTS § 178, cmt. e (1981),[189] but Section 178 governs "When a Term is Unenforceable on Grounds of Public Policy." It does not deal with remedies. The "forfeiture" referenced in the "unedited" language of Comment e stands for a proposition directly opposite to that adopted by the trial court:

> e. Other factors. A court will be reluctant to frustrate a party's legitimate expectations unless there is a corresponding benefit to be gained in deterring misconduct or avoiding an inappropriate use of the judicial process. See Illustration 17. The promisee's ignorance or inadvertence, even if it does not bring him within the rule stated in § 180, is one factor in determining the weight to be attached to his expectations. See Illustration 4 to § 181. To the extent, however, that he engaged in misconduct that was serious or deliberate, his claim to protection of his expectations

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[184]Syl. pt. 1, in part, *Laurie v. Thomas*, 170 W. Va. 276, 294 S.E.2d 78 (1982); *see also* Syl. pt. 1, *Frasher v. Frasher*, 162 W. Va. 338, 249 S.E.2d 513 (1978).

[185]*Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co.*, 128 W. Va. 676, 682, 37 S.E.2d 519, 522 (1946)(citations omitted).

[186]*Id.*

[187]Order at 26.

[188]Order at 27.

[189]Order at 27.

> fails. The interest in favor of enforcement becomes much stronger after the promisee has relied substantially on those expectations as by preparation or performance. The court will then take into account any enrichment of the promisor and any forfeiture by the promisee if he should lose his right to the agreed exchange after he has relied substantially on those expectations. See Comment b to § 227. The possibility of restitution may be significant in this connection. See Topic 5. In addition to the interest of the promisee, the court will also weigh any interest that the public or third parties may have in the enforcement of the term in question. Such an interest may be particularly evident where the policy involved is designed to protect third parties. See Illustrations 18 and 19.

Where a promissee, such as CNR, "relied substantially on those expectations [arising from a contract] as by preparation or performance," such as the payment of flat-rate royalties, the "interest in favor of enforcement [of the contract's provisions] becomes much stronger." Under these circumstances, Comment e states, the court should "then take into account any enrichment of the promissor," in this case, the Respondents, and "any forfeiture by the promissee," in this case, the Petitioners, "should he lose his right to the agreed exchange after he has relied substantially on those expectations." In a word, the trial court's interpretation of Comment e, was backwards. As this is the only stated legal basis for the trial court's forfeiture decision,[190] the trial court's order as well as the corresponding verdict, should be set aside.

Not only did the trial court give a backwards construction of the RESTATEMENT (SECOND) OF CONTRACTS, it gave a backwards application of the law of forfeiture. First, just last year, this Court restated, "'Equity will not enforce a forfeiture.'"[191] Yet, the trial court's order expressly stated that it was relying upon equitable principles in effectuating a "forfeiture." Second, the reason "equity abhors a forfeiture" is that "forfeiture" involves the extinguishment of a party's contract rights where other remedies, such as money damages, are available. In the instant case, CNR or its predecessors

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[190]"A forfeiture that will accrue to CNR if the flat-rate royalty clauses are deemed to be invalid is disgorgement of windfall profits." Order at 27.

[191]Syl. pt. 1, *Helton v. Reed*, 219 W. Va. 557, 638 S.E.2d 160 (2006).

were the obligors and the royalty owners or their predecessors were the obligees under the flat-rate leases. CNR or its predecessors were obligated to pay and the royalty owners or their predecessors were entitled to receive only a flat-rate royalty. If contractual rights to flat-rate royalty payments were "forfeited," there would be no obligation to pay or right to receive. "Forfeiture" has been defined as "The divestiture of property without compensation. The loss of a right, privilege, or property because of crime, breach of obligation, or neglect of duty."[192] With respect to contracts, "forfeiture" has been defined as a "destruction or deprivation of some estate or right because of the failure to perform some obligation or condition."[193] Plainly, what the trial court did under the label of "forfeiture" was not consistent with the proper application of such remedy and should be set aside.

4. The Trial Court Erred in Using Defensive Rules Applicable to Contract Actions to Offensively Invalidate the Flat-Rate Leases.

A party to a contract may assert its invalidity as unconscionable or contrary to public policy as a "defense" to escape a party's obligations pursuant to such contract, but public policy cannot be used as an offensive weapon to seek damages. Even the trial court's order stated, "To reiterate, what is presented here is not the application of the remedy afforded by the Flat-Rate Statute. It is whether this court will enforce CNR's contract right to pay what has been found to be wholly inadequate compensation . . . ."[194] This statement is correct. "Public policy" is a theory of avoidance, not damages and, for this reason, every one of the eighteen cases cited by the trial court[195] involve not the offensive use of "public policy," "unconscionability," or "adhesion," but their defensive use.

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[192]BLACK'S LAW DICTIONARY (8th ed. 2004).

[193]*Id.*

[194]Order at 16.

[195]Order at 11 n.3.

"[A] contract or a contractual provision that violates public policy is invalid, unenforceable, void, and without legal effect, to the extent of the conflict."[196] Thus, "A court usually, in the case of a contract invalid as contrary to public policy, will dismiss an action seeking enforcement of the contract."[197] One of the reasons that public policy should only be used as a shield, not as a sword,[198] is that public policy is a "will-o'-the-wisp of the law which varies and changes with the interests, habits, needs, sentiments, and fashions of the day."[199] Indeed, this Court has observed, in conjunction with statutes prohibiting remarriage within six months after entry of a divorce decree, or marriage between persons of different races, "The public policy of today may not be the public policy of tomorrow. The notion as to what is injurious to the public welfare at one time may not accord with the notion of a succeeding generation."[200]

Moreover, the prohibition against the use of public policy as a sword to recover damages as opposed to a shield against a contract's enforcement is particularly applicable when forfeiture is sought: "'[F]orfeitures by operation of law are strongly disfavored as a matter of public policy and

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[196]17A Am. Jur. 2d *Contracts* § 237 (2007)(footnotes omitted); *see also id.* at § 242 ("If a contract conforms to the public policy of the state when made, a change of public policy will not avoid it.")(footnote omitted).

[197]*Id.* at § 238 (footnote omitted).

[198]*See Dervin Corp. v. Banco Bilbao Vizcaya Argentaria, S.A.*, 2004 WL 1933624 (S.D. N.Y. 2004)("In balancing the requirements of public policy with the right to recover on a contract, New York law recognizes the principal that 'forfeitures by operation of law are disfavored, particularly where the defaulting party seeks to raise illegality as "sword for personal gain rather than a shield for the public good."'")(citations omitted); *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 178 F. Supp.2d 9, 16 (D. Mass. 2001)("The court rejected both arguments and noted that 'courts are especially skeptical of efforts by clients or customers to use public policy 'as a sword for personal gain rather than a shield for the public good.")(citation omitted).

[199]17A Am. Jur. 2d *Cotracts* at § 239 (2007)(footnote omitted).

[200]*Hall v. Baylous*, 109 W. Va. 1, 153 S.E. 293, 295 (1930); *see also Funk v. United States*, 290 U.S. 371, 381 (1933)("The public policy of one generation may not, under changed conditions, be the public policy of another.").

the Charleboises' efforts to use that concept as a sword for personal gain rather than a shield for the public good should not be countenanced.'"[201]

One example of how "public policy" can be used as a defense to enforcement of a contract is *Wellman v. Energy Resources, Inc.*,[202] where the oil and gas leases at issue contained "right to cure" and "judicial ascertainment" clauses absolving the lessees from liability to the lessors until they had been given notice of a right to cure and determined to be in breach of the leases. "Public policy" was not used offensively in *Wellman* to secure damages, but was used defensively against a claim that the lessors' suit for damages on independent grounds was barred by these provisions: "this Court concludes that the claim of Energy Resources, Inc., that the 'judicial ascertainment' clauses in the leases in question in the present case precluded the circuit court from declaring its leases forfeited is without merit."[203] Again, "public policy" is a "shield for public good," not a "sword for private gain," and the trial court's use of "public policy" as a sword should be set aside.

5. The Trial Court Erred by Invalidating Flat-Rate Leases Which Did Not Violate Public Policy at Their Inception.

"Whether a promise is unenforceable on grounds of public policy," as noted in the RESTATEMENT (SECOND) OF CONTRACTS, "is determined as of the time that the promise is made and is not ordinarily affected by a subsequent change of circumstances, whether of fact or law."[204] It is black-letter law that, "If a contract conforms to the public policy of the state when made, a change of public

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[201] *Marketing Specialists, Inc. v. Bruni*, 129 F.R.D. 35, 44 (W.D. N.Y. 1989)(citation omitted).

[202] 210 W. Va. 200, 557 S.E.2d 254 (2001).

[203] *Id.* at 208, 557 S.E.2d at 262.

[204] RESTATEMENT (SECOND) OF CONTRACTS § 179, cmt. d (2007)

policy will not avoid it . . . ."[205] Even the Uniform Commercial Code section specifically addressing the unconscionability of leases provides:

> If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.[206]

In *Moran v. Harris*,[207] for example, the question was whether a court would enforce a contract for payment of a referral fee to an attorney where the fee became prohibited by the disciplinary rules of the state only after the contract was made. The court rejected a public policy challenge to the contract, succinctly noting that, "In determining whether the subject of a given contract violates public policy, courts must rely on the state of the law as it existed at the time the contract was made."[208]

Likewise, in *Sabine Corp. v. ONG Western, Inc.*,[209] the seller of natural gas sought to invalidate a take-or-pay gas contract arguing that its enforcement would violate public policy as expressed in a statute which post-dated the contract. Rejecting this argument, the court observed:

> [W]hether a contract or term therein is unenforceable on public policy grounds is determined as of the time that the contract was made and 'is not ordinarily affected by a subsequent change of circumstances, whether of fact or law.' Comment d, RESTATEMENT (SECOND) OF CONTRACTS § 179 (1981). Defendant does not assert and submits no evidence that the contract was in contravention of public policy at the time it was made.[210]

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[205] 17A Am. Jur. 2d *Contracts* § 242 (2007)(footnote omitted).

[206] W. Va. Code § 46-2A-108(1)(emphasis supplied).

[207] 131 Cal. App. 3d 913, 182 Cal. Rptr. 519 (1982).

[208] *Id.* at 918, 182 Cal. Rptr. at 521 (emphasis supplied).

[209] 725 F. Supp. 1157 (W.D. Okl. 1989).

[210] *Id.* at 1183 (emphasis supplied).

Indeed, the RESTATEMENT (SECOND) OF CONTRACTS, upon which the trial court itself heavily relied, states that, "Whether a promise is unenforceable on grounds of public policy is determined as of the time that the promise is made and is not ordinarily affected by a subsequent change of circumstances, whether of fact or law."[211] Nowhere in the trial court's order does it reference any precedent to the contrary. Simply stated:

> "The right to contract is recognized as being within the protection of the Fifth and Fourteenth Amendments to the Constitution of the United States . . . ." "Persons . . . have a right to make any contract not contrary to law or public policy." . . . "[W]hen parties are on equal footing, competent to contract, enter into an agreement on a lawful subject, and do so fairly and honorably, the law does not permit inquiry as to whether the contract was good or bad, whether it was wise or foolish."[212]

There is no precedent for invalidating a contract based upon a public policy that did not exist until decades after it was made, and to retroactively invalidate contracts that were lawful at their inception violates the federal and state constitutions. The Respondents do not even argue that these contracts violated public policy when they were made.

6. The Trial Court Erred by Retroactively Reforming Flat-Rate Leases.

Where courts use public policy as a ground for invalidating a statute that will affect "a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified."[213] Moreover, "where . . . substantial public policy issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored."[214] Finally, "the more radically the new decision departs from previous substantive law, the

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[211]Restatement (Second) of Contracts § 179, cmt. d (1981).

[212]*Dysart v. Cummings*, 640 S.E.2d 832, 836 (N.C. Ct. App. 2007)(citations omitted).

[213]Syl. pt. 5, *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979).

[214]*Id.*

greater need for limiting retroactivity."[215] All of these factors, if applied to this case, militate in favor of a prospective application of the trial court's invalidation of the flat-rate leases.

As recently as 1992, this Court held:

> If an oil and gas lease contains a clause to continue the lease for a term "so long thereafter as oil or gas is produced," but also provides for "flat-rate" rental payments, then quantity of production is not relevant to the expiration of the term of the lease if such "flat-rate" rental payments have been made by the lessee. Therefore, in a case involving termination of such an oil and gas lease which provides "flat-rate" rental payments, it is reversible error for a circuit court to instruct the jury that the word "produced" in the lease means "produced in paying quantities."[216]

There was not a hint of any argument by the lessors or comment by the Court in *Bruen* that flat-rate leases were violative of public policy. Indeed, the Court in *Bruen* specifically cited the predecessor to the very statute relied upon by the trial court to invalidate flat-rate leases in observing "a legislative intent to recognize the characteristics of a flat-rate oil and gas lease."[217] Certainly, the Petitioners do not suggest that *Bruen* resolved the validity of flat-rate leases, but submit that they were entitled to rely upon decades of settled law regarding the validity of flat-rate leases, including the enactment of W. Va. Code § 22-6-8, which likewise did not invalidate flat-rate leases.

The idea that the Petitioners were supposed to realize, upon the enactment of W. Va. Code § 22-6-8, that flat-rate leases, which the Legislature expressly decided not to invalidate, immediately became invalid, is absurd. The Legislature conducted hearings and made findings regarding flat-rate leases. At the conclusion of that process, the Legislature prescribed a prospective remedy. Royalty owners had achieved a partial victory in the form of the prospective reformation of flat-rate leases where new permits were necessary for continued operation of the subject wells. Producers had

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[215] *Id.*

[216] Syl., *Bruen v. Columbia Gas Transmission Corp.*, 188 W. Va. 730, 426 S.E.2d 522 (1992).

[217] *Id.* at 734 n.5, 426 S.E.2d at 526 at n.5.

achieved a partial victory in the form of the continued validity of flat-rate leases where new permits were not necessary for the continued operation of the subject wells. The result was the same as with the legislative resolution of many other matters of competing interests between opposing forces – compromise. To now hold that the compromise that resulted from this debate, in actuality, produced the invalidation of all flat-rate leases is to render the legislative process a nullity and violates "the principle of statutory construction that eschews absurd results."[218]

One of the linchpins of the trial court's order invalidating the flat-rate leases was RESTATEMENT (SECOND) OF CONTRACTS § 178 (2007).[219] The Restatement is clear, however, that invalidation can only occur if a contract violated public policy at its inception. When courts render decisions involving the validity of contracts pursuant to statutes, those decisions are prospective, not retroactive. In *Robbins v. McDowell Co. Bd. of Educ.*,[220] for example, a group of teachers sued a board of education challenging contracts which they argued violated state law. This Court determined that the contract provisions in question should have been rescinded almost a decade earlier, in 1984, but refused to retroactively apply its holding, stating as follows:

> Obviously, it would be inequitable to require the teachers who have been receiving the special salary supplement since 1984 to repay it. It would require us to extend our holding retroactively, which is not done where contract rights are involved. See Syllabus Point 5, *Bradley v. Appalachian Power* Co., 163 W. Va. 332, 256 S.E.2d 879 (1979). On remand, the Board should promptly take appropriate steps to assure compliance with the uniform pay provisions of W. Va. Code, 18A-4-5a, in accordance with the principles set forth herein.[221]

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[218]*Mullen v. Div. of Motor Vehicles*, 216 W. Va. 731, 734, 613 S.E.2d 98, 101 (2005).

[219]Order at 24-26.

[220]186 W. Va. 141, 411 S.E.2d 466 (1991).

[221]*Id.* at 147, 411 S.E.2d at 472; *see also* Syl. pt. 3, *Maxwell v. State Compensation Director*, 150 W. Va. 123, 144 S.E.2d 493 (1965), *overruled on other grounds, Sizemore v. State Workmen's Compensation Comm'r*, 159 W. Va. 100, 219 S.E.2d 912 (1975)("Workmen's compensation statutes, or amendments of such statutes, which affect merely the procedure may be construed to have a retroactive operation; but any such

The Court's reliance, of course, on Syllabus Point 5 of *Bradley*, is most instructive.

> In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.

All of these factors, particularly those highlighted, militate in favor of a prospective application of the trial court's ruling, in accordance with the ruling of this Court in *Robbins*. Thus, the Petitioners respectfully submit that this Court should modify the trial court's flat-rate ruling to either (1) reform flat-rate leases to a one-eighth royalty on and from its entry of judgment or (2) limit the Respondents' damages to those accruing on and from the date they first raised as an issue in the case the invalidity of the flat-rate provisions of the subject leases.[222] In addition, the infirmities in the flat-rate rulings

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statute or amendment which affects the substantial rights or obligations of the parties to the contract arising from the employment relationship or which impairs the obligation of such a contract cannot be construed to operate retroactively."); Syl. pt. 4, *Ables v. Mooney*, 164 W. Va. 19, 264 S.E.2d 424 (1979)("Retroactivity is ordinarily denied to a decision which overrules the former construction of a statute where the new construction of the statute would permit prior monetary claims to be asserted.").

[222]In its order, the trial court conceded that this was not expressly raised in the Respondents' complaint. Order at 13. The trial court dismissed this due process argument, which the Petitioners reiterate here, by stating, "The pleadings filed by the Plaintiffs have consistently alleged that CNR failed to pay Plaintiffs rents and royalties due Plaintiffs." Order at 13. Of course, this is equivalent to holding that a complaint alleging that a plaintiff was "injured" by a "defendant" causing the plaintiff "damages" would be sufficient to state a claim for any tort cause of action that the plaintiff might have against the defendant. Even "notice pleading," however, requires some "notice." The trial court further conceded that the Respondents' discovery responses did not reveal this flat-rate issue, but dismissed the impact of this lack of notice by stating, "There is no claim that discovery would have been conducted in a different manner or that CNR is prevented by

call for the reversal of the punitive damages award, which was likely based in large part upon, and therefore tainted by, the trial court's instruction to the jury regarding CNR's purported "exploitation" of West Virginia residents and long-standing "violation" of the public policy of West Virginia in connection with flat-rate leases.

7. The Trial Court's Ruling Improperly Applied the Statute of Limitations.

W. Va. Code § 55-2-6 provides:

> Every action to recover money, which is founded upon an award, or on any contract other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have accrued, that is to say . . . if it be . . . upon a contract in writing, signed by the party to be charged thereby, or by his agent, but not under seal, within ten years . . . .

Thus, when a party sues for "breach of contract," the party has ten years from the date of the "breach" to institute an action. A claim to recover upon a breach of contract accrues "when the breach of the contract occurs or when the act breaching the contract becomes known,"[223] but the Respondents' suit to invalidate the flat-rate provisions of the leases did not involve any alleged "breach" of those leases.[224] The Respondents' suit sought to enforce no rights under the leases. Indeed, it is undisputed that, based upon the language of the subject leases alone, the Petitioners had the contractual "right" to make flat-rate payments to the Respondents.

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surprise in fully presenting its defense to the argument." Order at 13-14. In the footnote to this sentence, however, the trial noted that the Petitioners filed two memoranda on this issue and dismissed as unavailable the defenses of estoppel, waiver, and laches, which are addressed elsewhere in this motion. In any event, the Petitioners submit that if any retroactivity should be afforded, it should extend no earlier than the filing of the Respondents' motion for summary judgment on the flat-rate issue, which is the first time they asserted the arguments upon which the trial court ultimately issued a favorable ruling.

[223] *McKenzie v. Cherry River Coal & Coke Co.*, 195 W. Va. 742, 749, 466 S.E.2d 810, 817 (1995).

[224] Respectfully, it is pure sophistry to suggest that the Petitioners "breached" the leases by not paying more than the leases themselves provided because of a subsequent determination that the leases were contrary to public policy. The Petitioners are unaware of any authority for the proposition that compliance with the clear and unambiguous provisions of a contract later determined to be contrary to public policy constitutes a "breach of contract."

Under West Virginia law, it has been held that a suit for common law fraud and breach of fiduciary duty is subject to the two-year tort statute of limitations even when the causes of action were related to a contract.[225] A malpractice suit against an attorney, if predicated upon breach of some extra-contractual duty, is subject to the two-year tort statute of limitations, not the ten-year contract statute of limitations.[226] A product liability case based, in part, on allegations of breach of contractual warranties, is nevertheless governed by the two-year statute of limitations, not the four-year statute of limitations governing causes of action for breach of warranties.[227] A suit against a health care provider for the unauthorized release of a patient's records, even though the duty arose from a contractual relationship, was held subject to the one-year statute of limitations.[228] Likewise, this Court has held that a policyholder's suit to recover uninsured motorists benefits, although derived from contract, is not predicated upon an allegation of a breach of contract, but upon a tort for which a two-year statute of limitations applies.[229] Moreover, a policyholder's suit against his or her insurance company for violation of the Unfair Trade Practices Act, even though arising from a contractual relationship, is subject to a one-year statute of limitations because the suit is not for breach of contract, but for violation of public policy expressed in the statute.[230] Clearly, where a suit

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[225]*Estate of Dearing v. Dearing*, 646 F. Supp. 903, 911 (S.D. W. Va. 1986)("The Plaintiffs seem to believe that the longer limitations period can be invoked because the causes of action are 'related' to contracts. In many instances of tort, however, a contract or two can be found lurking in the factual picture. The complaint here sounds in tort, not contract. It cannot be described otherwise.").

[226]*Smith v. Stacy*, 198 W. Va. 498, 482 S.E.2d 115 (1996); *Hall v. Nichols*, 184 W. Va. 466, 400 S.E.2d 901 (1990).

[227]*Taylor v. Ford Motor Co.*, 185 W. Va. 518, 408 S.E.2d 270 (1991).

[228]*Allen v. Smith*, 179 W. Va. 360, 368 S.E.2d 924 (1988).

[229]*Dalton v. Doe*, 208 W. Va. 319, 540 S.E.2d 536 (2000).

[230]Syl. pt. 1, *Wilt v. State Auto. Mut. Ins. Co.*, 203 W. Va. 165, 506 S.E.2d 608 (1998).

seeks not to enforce contract provisions, but is predicated upon an alleged breach of public policy, the statute of limitations applicable to contract actions does not apply.

In *Shanholtz v. Monongahela Power Co.*,[231] for example, this Court rejected the plaintiff's argument that retaliatory discharge claims are subject to the contract statute of limitations:

> [H]ere there was no manner in which the alleged contract of employment could be breached by termination thereof. Either party could terminate the at-will employment with or without cause and no cause of action would accrue. Only by a tortious act could a cause of action accrue to the plaintiff. The wrong done, if any, is not the act of discharging the plaintiff (the employer had that right under the alleged at-will employment contract), but the act of contravening public policy in carrying out such discharge.[232]

Similarly, in *Allen v. Smith*,[233] this Court rejected the plaintiff's argument that her suit for breach of medical records confidentiality, which was predicated upon the public policy articulated by the Legislature in W. Va. Code § 27-3-1, was subject to the statute of limitations applicable to contract actions, stating that, "any cause of action for unauthorized release of a patient's medical records would be a tort cause of action governed by the one-year statute of limitations of W. Va. Code, 55-2-12(c) [1959] even though the duty violated arose from a contract." Finally, in *Wilt v. State Auto. Mut. Ins. Co.*,[234] this Court rejected the plaintiffs' argument that their suit for first-party bad faith, which was predicated upon the public policy articulated by the Legislature in the Unfair Trade Practice Act, was subject to the statute of limitations applicable to contract actions, stating that:

> Plaintiffs suggest that because damages available under the Act are narrower than those available under traditional tort causes of action, a claim brought under the Act should be viewed as contractual. In *Jenkins* . . . we identified the type of damages

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[231] 165 W. Va. 305, 270 S.E.2d 178 (1980).

[232] *Id.* at 310, 270 S.E.2d at 182 (emphasis supplied).

[233] 179 W. Va. 360, 363, 368 S.E.2d 924, 928 (1988)(emphasis supplied).

[234] 203 W. Va. 165, 166-171, 506 S.E.2d 608, 609-614 (1998)(emphasis supplied, citations omitted, footnotes omitted).

> recoverable under the Act as including attorney's fees and even punitive damages in an appropriate case. . . . Since punitive damages, as a rule, are not available in contract cases, the damages awarded in connection with a violation of the Act are clearly not typical of damages awarded in contract cases. . . . Thus, Plaintiffs' attempt to characterize an unfair settlement claim as one sounding in contract based on the nature of available damages is untenable. . . . Because the Legislature chose to retain the concept that certain actions did not survive at common law through the language of West Virginia Code § 55-2-12(c) and to simultaneously insert fraud and deceit as additional actions which survive through Code § 55-7-8a(a), survivability – either common law or statutory – still determines the applicable limitations periods for torts that fall outside subsections (a) and (b) of West Virginia Code § 55-2-12. . . . Accordingly, we determine that claims involving unfair settlement practices that arise under the Unfair Trade Practices Act are governed by the one-year statute of limitations set forth in West Virginia Code § 55-2-12(c).

Likewise, in the instant case, the flat-rate claims were not based upon either contractual duties or common law duties, but were governed by the one-year statute of limitations. The flat-rate claims, as in *Shanholtz* and *Allen*, may have arisen under contract, but they were not derived from the provisions of a contract and, because their flat-rate claims were neither for personal injury nor for property damage, they were subject to the one-year statute of limitations.[235]

8. The Trial Court Erroneously Deprived the Petitioners of the Defenses of Laches, Estoppel, and Waiver.

It is clear from the trial court's extensive discussion of its equitable authority in the flat-rate order that it was applying, at least in part, its equitable power to declare a contract void as contrary to public policy. Even assuming such power existed under the circumstances of this case, which the Petitioners dispute, this authority would be subject to the equitable defenses of laches, estoppel, and

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[235]See, e.g., *United Bank, Inc. v. Stone Gate Homeowners' Ass'n, Inc.*, 2007 WL 13885201 (W. Va.)(suit challenging delinquent homeowners' assessment barred by one-year statute of limitations); Syl. pt. 5, *McCammon v. Oldaker*, 205 W. Va. 24, 516 S.E.2d 38 (1999)(malicious prosecution action subject to one-year statute of limitations); Syl. pt. 8, *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 488 S.E.2d 901 (1997)(nuisance action to remediate pollution subject to one-year statute of limitations); *Thompson v. Branches-Domestic Violence Shelter of Huntington*, 207 W. Va. 479, 534 S.E.2d 33 (2000)(action against physician for breach of confidentiality subject to one-year statute of limitations).

waiver, as previously discussed. The trial court, however, never substantively addressed these defenses and refused to allow the Petitioners to present them to the jury.[236]

It is clear that an action seeking invalidation of a contract as contrary to public policy, as opposed to its illegality, is an action in equity.[237] Consequently, the contracting party against which relief is sought has the right to present its equitable defenses. In *McGinnis v. Cayton*,[238] for example, lessors instituted an action to reform or void an oil and gas lease on the grounds that it was no longer commercially reasonable. Under substantially similar circumstances, this Court held that the cause of action sounded in equity, not in contract, and was subject to the equitable defense of estoppel: "They are estopped from relying on equitable principles because they are not the original parties to the contract, but entered into a deal when the value of natural gas was known."[239] Plainly, when attempting to invalidate or reform a gas lease on the grounds of mutual mistake, commercial impracticability, unjust enrichment, unconscionability, or public policy, the cause of action lies in equity, not at law, and the equitable defenses of laches, waiver, and estoppel are available.

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[236]The trial court referenced the case of *Harding v. Heritage Products* Co., 98 P.3d 945 (Colo. Ct. App. 2004), in support of the proposition that, "equitable defenses – estoppel, waiver, laches – are not applicable to a contract that is unenforceable as being in violation of public policy." Order at 14, n.4. *Harding*, however, did not involve the invalidation of a contract on the ground of public policy, but the declaration that a corporate by-law was contrary to statute and, therefore, illegal. Thus, the trial court's reliance upon *Harding* was misplaced.

[237]*Hartman v. Butterfield Lumber* Co., 199 U.S. 335, 340 (1905)("'Such a contract is against public policy, and will not be enforced in a court of equity.'")(citation omitted).

[238]173 W. Va. 102, 103, 312 S.E.2d 765, 767 (1984).

[239]*Id.* at 107, 312 S.E.2d at 770. In a concurring opinion, Justice Harshbarger discussed a number of options for the invalidation or reformation of a flat-rate gas lease, such as the ones which are the subject of the instant case. *Id.* at 107-118, 312 S.E.2d at 770-782. All of the remedies suggested by Justice Harshbarger, mutual mistake, commercial impracticality, unjust enrichment, and unconscionability, are equitable remedies to which equitable defenses, including laches, estoppel, and waiver, would apply. Indeed, in Justice Harshbarger's conclusion, after specifically citing the very same statute relied upon by the Respondents in this case, as well as the 1979 Pennsylvania statute in which its legislature invalidated flat-rate leases, he stated, "The McGinnises are entitled to a hearing on the merits of their claim in circuit court, but upon much more equitable bases than the majority seems to allow." *Id.* at 118, 312 S.E.2d at 782.

With respect to the equitable defense of laches, it has been observed that, "The elements of laches consist of (1) unreasonable delay and (2) prejudice."[240] "'Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right.'"[241] Because "[l]aches is an equitable defense," it has been held, "its application depends upon the particular facts of each case."[242]

Even where an action seeks both declaratory and equitable relief, a claim for damages may nevertheless be barred by laches. In *Maynard v. Bd. of Educ.*, for example, school service personnel filed suit seeking declaratory relief and damages arising from employment contracts they alleged violated state law. Although the Court applied a ten-year statute of limitations to the claims for declaratory relief, it applied the doctrine of laches to bar the claims for monetary relief, stating that, "the plaintiffs' claims for retroactive monetary relief in the underlying declaratory judgment action against the county board of education are barred by laches. Such relief was sought nearly five years after the last fiscal year in question and nearly nine years after the first fiscal year in question."[243]

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[240]*Ryan v. Rickman*, 213 W. Va. 646, 649, 584 S.E.2d 502, 505 (2003)(citation omitted).

[241]*Supcoe v. Shearer*, 204 W. Va. 326, 332, 512 S.E.2d 583, 589 (1998)(citation omitted).

[242]*State ex rel. Webb v. Bd. of Medicine*, 203 W. Va. 234, 237, 506 S.E.2d 830, 833 (1998)(citation omitted). Moreover, "With respect to claims for equitable relief, a court of equity will normally invoke the maxim of equity which states that 'equity follows the law' and will generally look first to what the statute of limitations would be for any analogous right or remedy at law. However, a court of equity, in examining the delay in asserting a claim for equitable relief, is not bound by any analogous statute of limitations. In a given case involving equitable relief which is alleged to be barred by laches, the analogy of the statute of limitations may be applied; or a longer period than that prescribed by the statute may be required; or a shorter time may be sufficient to bar the claim for equitable relief." *Maynard v. Bd. of Educ.*, 178 W. Va. 53, 60, 357 S.E.2d 246, 254 (1987).

[243]*Id.* at 62, 357 S.E.2d at 256.

Likewise, in the instant case, where the relief sought by the Respondents was, at least in part, equitable, the trial court should have permitted the jury to address the defense of laches, particularly where (1) the statute upon which the trial court invalidated the leases was a matter of public record; (2) there were communications between some of the Respondents and the Petitioners regarding this issue; and (3) some of the Respondents are commercially-sophisticated land companies who either knew or should have known of the flat-rate statute, as well as its implications for the validity of the flat-rate leases. Moreover, the prejudice to the Petitioners, i.e., reliance upon the limited nature of the remedy provided in the flat-rate statute, is palpable. Respectfully, it was error to procedurally disregard laches as an available defense either individually, on a class basis, or on a sub-class basis.

With respect to the equitable defense of estoppel, it has been noted that, "[e]stoppel is properly invoked to prevent a litigant from asserting a claim . . . against a party who has detrimentally changed its position in reliance upon the litigant's misrepresentation or failure to disclose a material fact."[244] "'Estoppel is the doctrine by which a "party is prevented by his own acts from claiming a right to [the] detriment of [the] other party who was entitled to rely on such conduct and has acted accordingly."'"[245] Of particular relevance in this case, "estoppel by contract" has been defined as "[a] bar against a person denying a term, fact, or performance arising from a contract that the person has entered into."[246] Finally, genuine issues of material fact regarding the equitable defense of estoppel, such as those in the instant case, preclude the award of summary judgment.

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[244]*Marlin v. Wetzel Co. Bd. of Educ.*, 212 W. Va. 215, 569 S.E.2d 462 (2002)(citation omitted).

[245]*Antco, Inc. v. Dodge Fuel Corp.*, 209 W. Va. 644, 658, 550 S.E.2d 622, 635 (2001)(citations omitted).

[246]*Id.* (citations omitted).

In *Blais v. Allied Exterminating Co.*,[247] for example, this Court reversed an award of summary judgment in a suit instituted after the relevant statute of limitations had expired where the plaintiffs claimed that the defendant should have been equitably estopped from asserting the statute based upon its conduct. As in the instant case, the trial judge in *Blais* refused to even consider the issue of estoppel, ruling that it did not apply, as did the trial court in this case. In reversing the refusal to consider the equitable defense of estoppel, the Court held:

> When we extrapolate the standards of equitable estoppel as formulated by the Virginia courts to the appellant's contention, it is apparent that the circuit court should consider the appellee's alleged misrepresentations concerning the safety of the insecticides, and the appellant's reliance upon those misrepresentations, when she was considering the causes of her various illnesses, to determine whether or not there is a fit between the factual contentions of the appellant as it relates to the application of the Doctrine of Equitable Estoppel under Virginia law. Because the trial court did not consider any aspect of the equitable estoppel argument, we have no other choice than to remand this case so that a full and correct legal determination can be made in regard to the application of the Doctrine of Equitable Estoppel to the facts of this case based upon a full and adequate record.[248]

Likewise, in the instant case, the Petitioners submit that the trial court erred by simply dismissing, as inapplicable, the equitable defense of estoppel.

There were certainly sufficient facts adduced in the record to create a genuine issue of material fact as to whether some or all of the class representatives or members should be barred by estoppel from recovering damages after receiving the benefits of their leases. In *State ex rel. Barbara Jean S. v. Stephen Leo S.*,[249] for example, this Court held that estoppel by contract prevented a mother, who had entered into an agreement with her ex-husband to absolve him of any obligation to provide support to her children, but to provide for the support for the children of his second wife,

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[247] 198 W. Va. 674, 482 S.E.2d 659 (1996).

[248] *Id.* at 677-78, 482 S.E.2d at 662-63 (emphasis supplied).

[249] 198 W. Va. 234, 479 S.E.2d 895 (1996).

from seeking child support where her ex-husband had detrimentally relied upon the terms of their agreement. Similarly, in *Guffey Oil & Gas Royalties v. Marshall,*[250] where the Court ruled the recipients of oil and gas royalty payments were estopped from subsequently attacking leases under which such payments were made, it held that, "Parties assuming existence of fact in negotiating a contract are estopped to deny fact while contract stands, absent fraud, accident, or mistake."[251] Respectfully, in the instant case, it was error to procedurally disregard estoppel as an available defense either individually, on a class basis, or on a sub-class basis.

With respect to the equitable defense of waiver, it has been noted, "When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined."[252] The "two doctrines" of estoppel and waiver "are distinct and are to be applied separately."[253] "To effect a waiver, there must be evidence which demonstrates that a party has intentionally relinquished a known right."[254] Unlike the doctrine of estoppel, "[t]here is no requirement of prejudice or detrimental reliance by the party asserting waiver."[255] Although intent is an element of waiver, such intent may be express or implied.[256] Whether there has been an express or implied waiver of rights depends upon the circumstances of each case. Waiver or quasi-estoppel can be predicated upon "election,

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[250]109 W. Va. 180, 153 S.E.2d 291 (1930).

[251]*Id.*, Syl. pt. 1.

[252]*State v. Johnson*, 201 W. Va. 404, 411, 557 S.E.2d 811, 818 (2001).

[253]*Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998).

[254]Syl. pt. 2, in part, *Ara v. Erie Ins. Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989).

[255]*Potesta, supra* at 316, 504 S.E.2d at 143 (footnote omitted).

[256]*Id.* ("Implied waiver has been found to occur in various circumstances.").

waiver, ratification, affirmance, acquiescence, or acceptance of benefits."[257] Accordingly, this Court has noted, "the question of whether waiver has occurred is answered by the trier of fact."[258]

In the instant case, there was sufficient evidence to present a question as to whether some of the class members' election, waiver, ratification, affirmance, acquiescence, or acceptance of royalty payments, particularly for those who consulted with attorneys[259] or who communicated with the Petitioners regarding lease issues.

9. The Trial Court Erred by Not Only Invalidating the Flat-Rate Releases, But Also by Invalidating the Legislative Remedy.

With respect to the legislative remedy of conversion, the Legislature provided:

> To avoid the permit prohibition of subsection (d), the applicant may file with such application an affidavit which certifies that the affiant is authorized by the owner of the working interest in the well to state that it shall tender to the owner of the oil or gas in place not less than one eighth of the total amount paid to or received by or allowed to the owner of the working interest at the wellhead for the oil or gas so extracted, produced or marketed before deducting the amount to be paid to or set aside for the owner of the oil or gas in place, on all such oil or gas to be extracted, produced or marketed from the well. If such affidavit be filed with such application, then such application for permit shall be treated as if such lease or leases or other continuing contract or contracts comply with the provisions of this section.[260]

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[257]*Petition of Shiflett*, 200 W. Va. 813, 821 n. 26, 490 S.E.2d 902, 908 n. 26 (1997).

[258]*Potesta, supra* at 318, 504 S.E.2d at 145 (citation omitted).

[259]Richard Snowden, president of Tigaco, Inc., the managing general partner of Cotiga Development Company, a "land company" that "holds lands that have coal, timber, and gas properties," testified at trial. Tr. at 1407-08. He testified that Cotiga "owns 27,500 acres of fee lands and 4,400 acres of mineral and gas lands" in West Virginia. Tr. at 1409. He testified as follows: " Q. If Cotiga had known that these rates or volumes were reduced, what, if anything, would you have done? A. We would have immediately called our legal counsel. Probably would have checked with Columbia first, actually, and then pursued other means. Q. Your share of production charges, 0.00? A. That is correct. Q. Have you ever seen a check stub received by Cotiga that had anything other than 0.00? A. No. It's always been lore in our family that the leases with Columbia were to be one-eighth leases, one-eighth royalty leases with no charges." Tr. at 1427. Plainly, the large landowners, as indicated by Mr. Snowden's testimony, were not relying on their royalty statements; rather, if they had any questions, they would first contact CNR and then contact their own attorneys. Moreover, Mr. Snowden did not testify that he relied upon the statements regarding the absence of deduction, but he relied upon "family lore."

[260]W. Va. Code § 22-6-8(e) (emphasis supplied).

The language "shall tender to the owner of the oil or gas in place not less than one eighth of the total amount paid to or received by or allowed to the owner of the working interest at the wellhead for the oil or gas so extracted, produced or marketed," clearly allows the deduction of post-production expenses prior to payment of the statutory one-eighth royalty. What the trial court did, however, was find that the "at the wellhead" language in the statute was "ambiguous" and apply the rule applicable to construing "contracts." In other words, after judicially decreeing a legislative remedy, the trial court proceeded to find that remedy to be "ambiguous" and then construed it in favor of the Respondents. The Petitioners submit that this was erroneous.

In Syllabus Point 7 of *Tawney I*,[261] this Court held, "'The general rule as to oil and gas leases is that such contracts will generally be liberally construed in favor of the lessor, and strictly as against the lessee.'" "It is a cardinal rule of statutory construction," however, "that a statute should be construed as a whole, so as to give effect, if possible, to every word, phrase, paragraph and provision thereof . . . ."[262] Moreover, "'A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.'"[263] Again, the Legislature specifically stated, "extracted, produced or marketed." With respect to the instruction's use of the term "or," this Court recently noted:

> This Court has previously observed that "the word 'or' is 'a conjunction which indicate[s] the various objects with which it is associated are to be treated separately.'" *Holsten v. Massey*, 200 W. Va. 775, 790, 490 S.E.2d 864, 879 (1997)(*quoting State v. Carter*, 168 W. Va. 90, 92 n. 2, 282 S.E.2d 277, 279 n. 2 (1981)). Moreover, the use of this term "ordinarily connotes an alternative between the two clauses it connects." *Albrecht v. State*, 173 W. Va. 268, 271, 314 S.E.2d 859,

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[261]*Supra*, Syl. pt. 7, *quoting* Syl. pt. 1, *Martin v. Consolidated Coal & Oil Corp.*, 101 W. Va. 721, 133 S.E. 626 (1926).

[262]Syl. pt. 9, in part, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953).

[263]Syl. pt. 3, *Antolini v. Div. of Natural Resources*, 2007 WL 1059961 (W. Va.)(citations omitted).

862 (1984)(*citing State v. Elder*, 152 W. Va. 571, 577, 165 S.E.2d 108, 112 (1968)).[264]

By placing the disjunctive "or" between the words, "extracted," "produced," or "marketed," the Legislature has permitted post-production deductions by the "owner of the working interest." Thus, the trial court erred in construing what it perceived to be a statutory ambiguity against the lessees.

10. The Manner in Which the Trial Court Effectuated its Flat Rate Ruling Deprived the Petitioners of Their Rights to Due Process and a Jury Trial.

"Both the United States and West Virginia Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV; W. Va. Const. art. 3, § 10."[265] These federal and state constitutional provisions have two components – the right to due process where property interests are involved and the right to a jury trial. The Petitioners submit that both were violated by the manner in which the trial court effectuated its flat-rate ruling.

"The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest."[266] "A 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings."[267] Obviously, a contracting party who has acted in accordance with the existing rules governing the terms of the subject contract has a "property

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[264]*State v. Saunders*, 2006 WL 2861783 at *2 (W. Va.) (*quoting Tennant v. Smallwood*, 211 W. Va. 703, 712, 568 S.E.2d 10, 19 (2002)); *accord Carper v. Kanawha Banking & Trust* Co., 157 W. Va. 477, 517, 207 S.E.2d 897, 921 (1974)("Recognizing the obvious, the normal use of the disjunctive 'or' in a statute connotes an alternative or option to select"); *see also Smith v. Godby*, 154 W. Va. 190, 199, 174 S.E.2d 165, 171 (1970)(stating that "[i]t is significant that the statute uses the words 'fail' or 'refuse' in the disjunctive and manifestly attaches a different meaning to each word").

[265]*Don S. Co., Inc. v. Roach*, 168 W. Va. 605, 610, 285 S.E.2d 491, 494 (1981).

[266]Syl. pt. 1, *Waite v. Civil Service Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977).

[267]Syl. pt. 3, *id.*

interest" to which the constitutional right of due process attaches. Indeed, this Court has observed, "a 'property interest' protected by due process must derive from a private contract or state law."[268]

In this case, this Court will look in vain for any language in any of the complaints filed for any allegation that the flat-rate leases were invalid due to anything, let alone the public policy expressed in the flat-rate statute. Moreover, a reader will look in vain for any reference to such claim in any of the Respondents' discovery responses. The Petitioners have already addressed the trial court's justifications for rejecting their challenge to the constitutional adequacy of the notice of the Respondents' belated flat-rate claims, but reiterate their due process objections.[269]

D. THE TRIAL COURT ERRED IN REGARD TO THE MAHONIA TRANSACTIONS.

1. The Trial Court Erred in Allowing the Respondents to Assert a Claim of Fraudulent Concealment Based Upon the Mahonia Transactions.

First, the Respondents' fraudulent concealment theory on the Mahonia transactions remains a mystery. Even the Respondents had difficulty articulating any Mahonia conduct as "fraudulent":

> MR. MASTERS: I think we counted up the times that either the one of the Plaintiffs' lawyers has explained to the Defendants that it wasn't enter[ing] into this contract in and of itself between them is what we're complaining about.

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[268]*Kessell v. Monongalia County General Hospital*, 215 W. Va. 609, 616, 600 S.E.2d 321, 328 (2004)(citation omitted).

[269]As to the Petitioners' prejudice, this suit was originally filed in 2003. By the time the Respondents finally asserted this flat-rate claim, issues of class certification had already been resolved and substantial discovery had already been completed. This is the very reason that, as noted in the trial court's order, the first defense raised to this issue was the inadequacy of notice. Order at 13. Even with respect to something so minor as a magistrate court civil complaint, where the jurisdictional limit is nominal, this Court has held, "Under fundamental concepts of due process the defendant in a civil action is entitled to be apprised from the outset of the nature of the claim against him with such definiteness that a person of reasonable intelligence is able to understand the allegations and respond to the complaint. A magistrate court complaint, filed by one with whom the defendant has never done business, which seeks recovery of amounts due several of the defendants' creditors and which does not set forth specific and detailed allegations of fact which clearly and definitely inform the defendant of the specific nature of each separate, overdue account, does not satisfy the notice requirements of due process." Syl. pt. 2, *State ex rel. Frieson v. Isner*, 168 W. Va. 758, 285 S.E.2d 641 (1981)(emphasis supplied).

> We're complaining about the fact that the Mahonia contract affected the Plaintiffs, because it was their gas. That's number one. It was their gas that they were negotiating with, in the ground.[270]

In other words, the Respondents did not allege they had a cause of action because CNR entered into long-term, fixed-price sales contracts, but because the market price of gas later increased above the Mahonia contract price. To this day, the Petitioners are befuddled as to how they can be held liable to the Respondents for $44.2 million in compensatory damages and $270 million in punitive damages because the market price of gas, which is unpredictable, subsequently increased. It would be one thing if the contract price was not the market price at the time the contract was made, but the evidence was undisputed that the contract price was the market price at the time of the transactions.

Second, the Respondents did not place the Petitioners on adequate notice of their claim for "fraudulent concealment" arising out of the Mahonia transactions until far too late for the Petitioners to fairly defend against it. Even on the second day of trial, the trial court described its understanding of the Respondents' fraudulent concealment claim as follows: "The only issue on the fraudulent concealment is the accounting stages [statements] that comes with the royalty payment."[271] Of course, the amounts on the royalty statements accurately reflected the actual amounts received by CNR for gas sold to Mahonia; thus, the Petitioners justifiably assumed, based upon the pleadings and discovery responses, that there was no fraudulent concealment claim related to the Mahonia transactions.

With regard to the adequacy of claims for fraud, the Rules of Civil Procedure require that "[i]n all averments of fraud . . . , the circumstances constituting fraud or mistake shall be stated with

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[270]Tr. at 3052.

[271]Unofficial Tr. at 199.

particularity."[272] This requirement, like its identical federal counterpart, is an exception to the more liberal "notice pleading" practice of Rule 8(a), and provides:

> [n]ot only must fraud or mistake be pleaded, the circumstances creating the fraud or mistake must be set out in the pleadings with particularity. The charge of fraud is of such gravity that the strict requirements of Rule 9(b)[] have been included in the procedural rules as an exception to the principles of brevity and simplicity in pleading called for in Rule 8(e)(1). The rationale for these requirements is to permit the party charged with fraud the opportunity to prepare a defense.[273]

Even "general" allegations of fraud regarding the Mahonia transactions would not have satisfied R. Civ. P. 9.[274] Here, the Respondents did not assert their "fraudulent concealment" theory regarding Mahonia until trial, far too late to give Petitioners fair notice. Allowing this claim to be presented violated Rule 9 and its due process underpinnings.[275]

Third, because of the manner in which the trial court allowed the Respondents to shoe-horn as many claims as they could conceive into a class action, the Petitioners face $44.2 million in compensatory damages and $270 in punitive damages even though some of those leases contained "sole discretion" marketing clauses. Even the trial court initially expressed concern as to the impact of such clauses on the Mahonia claims:

> This is where the time and the method of marketing is in the sole discretion of the lessee. CNR cited cases that said that where the parties speak to an issue in the lease a covenant will not be implied. So the question is whether the parties by that

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[272]W. Va. R. Civ. P. 9(b).

[273]*Hager v. Exxon Corp.*, 161 W. Va. 278, 283, 241 S.E.2d 920, 923 (1978)(emphasis added); *see also* Syl. pt. 1, in part, *id.* ("[F]raud . . . must be alleged in the appropriate pleading with particularity[,] and the failure to do so precludes the offer of proof thereof during the trial."); *Pocahontas Min. Co. Ltd. P'ship v. Oxy USA, Inc.*, 202 W. Va. 169, 171, 503 S.E.2d 258, 260 (1998) (Workman, J., concurring); *Chamberlaine & Flowers, Inc. v. McBee*, 177 W. Va. 755, 356 S.E.2d 626 (1987);

[274]*See Croston v. Emax Oil Co.*, 195 W. Va. 86, 91, 464 S.E.2d 728, 733 (1995).

[275]*Marcus v. Holley*, 217 W. Va. 508, 521, 618 S.E.2d 517, 536 (2005)("Procedural due process rights entitle an individual to representation by counsel, notice, an opportunity to be heard, and the right to present evidence.").

> expressed covenant have spoken to the question of marketing. I don't think that the term "sole discretion" is ambiguous. And I know there's lots of cases that say it's not ambiguous. But it seems to me the scope and extent of what the clause does say, that is, the time and method of marketing will be in the discretion of lessee.[276]

Thus, the relevant leases expressly abrogated the prudent operator rule in favor of a "discretion of lessee" clause. Therefore, even if the breach of such a rule could serve as a claim for fraud (which, of course, it cannot), it was inapplicable to this case.

Finally, the Mahonia transactions did not constitute a "fraudulent concealment" as West Virginia law defines that term.[277] As previously noted, the Mahonia transactions were publicly disclosed and reported in filings with the Securities and Exchange Commission. Indeed, the Respondents themselves used those public records – and particularly SEC filings – in order to allegedly trace the proceeds from the Mahonia transactions: "And you will not dispute that they [the jury] could rely upon the evidence that was presented through the official SEC filings, which said that in the year 2000 $155.9 million was paid to the executives as a result of the merger? Do you want to see the SEC document?"[278] Again, the Mahonia transactions were publicly reported in the 10-Ks that were filed with the SEC.[279] It is impossible to claim that something publicly reported was also

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[276]Tr. at 2315-16.

[277]See, e.g., *Gerver v. Benavides*, 207 W. Va. 228, 232, 530 S.E.2d 701, 705 (1999) ("Actual fraud is intentional, and consists of an intentional deception or misrepresentation to 'induce another to part with property or to surrender some legal right . . . .'" (emphasis added) (citation omitted) (quoting *Stanley v. Sewell Coal Co.*, 169 W. Va. 72, 76, 285 S.E.2d 679, 683 (1981))); *Arnoldt v. Ashland Oil, Inc.*, 186 W. Va. 394, 404, 412 S.E.2d 795, 805 (1991) ("'Fraud means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff.'")(emphasis added) (citation omitted)).

[278]Tr. at 2975.

[279]See Tr. at 481 ("The Mahonia transactions were disclosed in the Form 10-Ks, yes."); Ex. D-178 (related SEC filing); Tr. at 482 ("Again, this is following the amendment during 2001, again, the reporting in the annual report from the Form 10-K Mahonia forward sales? . . . That's correct."); Ex. D-211 (related SEC filing). Finally, all of the Respondents and class members had ready access to these SEC filings: "Other than the Securities and Exchange Commission, who has access to the document? . . . Well, everyone has access to it through the SEC files. It's a publicly available document, so anyone can get in touch with the SEC and get

concealed, fraudulently or otherwise, from anyone.[280] The market prices of gas were publicly available. Finally, the only evidence is that royalty owners who inquired were accurately informed of the reasons for the difference between the price appearing on their statements and market prices. Business judgment that turns out to be wrong in hindsight cannot constitute fraud.[281]

Instead of directing judgment for the Petitioners, however, the trial court effectively directed judgment for Respondents in contradiction to clear law on the issue:

> [t]he law requires the gas producer to diligently seek the best price obtainable at the time of production . . . . The jury is further instructed that the gas producer cannot modify this duty simply by making a contract to deliver gas at some future time at some negotiated price, such as the Mahonia and related contracts.[282]

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a copy. In fact, on the SEC web site, through what's called the Edgar process, E-d-g-a-r, people can go to into the Web site and get their own copies of documents filed with the SEC." Tr. at 483.

[280]*Exeter Bancorporation, Inc. v. Kemper Securities Group, Inc.*, 58 F.3d 1306, 1316 (8th Cir. 1995) ("Finally, Exeter argues that BEL concealed from it the fact that the price for a similar BEL stock-offering for First Federal Bank had declined precipitously after the initial offer. Exeter argues that a jury could reasonably find that such information was material to Exeter's decision to hire BEL. Moreover, Exeter argues that the district court erred in finding no evidence of concealment. Even though the stock price of the other offering was publicly available information, Exeter contends that it did not know the name of the company and therefore could not have looked up the information. . . . Exeter has failed to provide any evidence of concealment. 'Where information is not within the special knowledge of the defendant, there can be no concealment.' *Carlock v. Pillsbury Co.*, 719 F. Supp. 791, 842 (D. Minn.1989). The information about the stock price was publicly available in any newspaper.") (emphasis supplied); *Sain v. Nagel*, 997 F. Supp. 1002 (N.D. Ill. 1998) ("Plaintiffs had constructive and actual notice that MMT was a new corporation from the Option Contract which reveals that MMT had '$1,000,000 of initial equity capital,' Def. Ex. 3 at ¶ 1, and from the Harris Press Release which states 'Harris & Harris Group, Inc. announced today that its wholly-owned subsidiary, . . . has formed a new wholly-owned subsidiary, Molten Metal Technology, Inc.' Def. Ex. 23. Plaintiffs also had constructive notice of MMT's date of incorporation from the articles of incorporation which are public documents on file with the Secretary of State in Delaware, MMT's place of incorporation. *Eckstein*, 58 F.3d at 1168 (investors had constructive notice of allegedly omitted facts from the registration statement, a public document filed with the Securities and Exchange Commission). The totality of publicly available information negates a finding that the Inventors intentionally omitted the fact that MMT was newly incorporated or the date of incorporation.") (emphasis supplied).

[281]See, e.g., *Fadem v. Ford Motor Co.*, 352 F. Supp. 2d 501 (S.D.N.Y. 2005) (denying with prejudice investors' claim that Ford's ill-fated decision to lock in future price of precious metal constitute anything but wrong business judgment), *aff'd*, 157 Fed. Appx. 398 (2d Cir. 2005).

[282]Jury Instructions (emphasis supplied).

Of course, a "fixed price" is almost never the "best price obtainable at the time of production."[283] The trial court thus entered a judgment as a matter of law for the Respondents to the effect that, regardless of the circumstances and regardless of a lessee's obligations to its own shareholders, fixed-price, long-term contracts are invalid as a basis for calculating royalties under "proceeds leases" if the fixed-price is ever subsequently exceeded by the market price.[284]

Respectfully, "[t]his State'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."[285] Here, the private interest of the Respondents is all that is involved; there are no "public policy" issues at stake. Citizens, whether individual or corporate, have the right to enter into contracts without the fear that third-parties to those contracts – like the Respondents – will claim some breach of common law duty[286] to them arising from such contracts.[287]

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[283]It would only be coincidence that the fixed price for any commodity for which prices fluctuate would be identical to the market price at the time of future production, delivery, or sale.

[284]The Court so concluded even in the face of specific contract language providing that the "time and method" of "marketing" was within CNR's "sole discretion."

[285]Syl. pt. 3, *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 614 S.E.2d 680 (2005).

[286]Again, it is important to note that even if the Mahonia and related transactions violated the Respondents' "contractual rights" under their leases, such violation could not serve as a predicate for the award of punitive damages.

[287]This has long been recognized by West Virginia law. W. Va. Code § 55-8-12 provides, "If a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." On the other hand, if, as here, a contract is not for a third-party's "sole benefit," then that party has no standing to institute a suit arising under such contract. *E. Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 403, 549 S.E.2d 266, 277 (2001)("The foregoing statute expressly allows a person who is not a party to a contract to maintain a cause of action arising from that contract only if it was made for his or her 'sole benefit.' We have repeatedly applied this statute and have consistently given force to the 'sole benefit' requirement."). Thus, the Respondents have no standing to assert a claim, at least in the manner in which they have been permitted to do so, arising from the Mahonia and related transactions.

Interference with the right to contract is particularly troublesome in this case where the Respondents were allowed to adduce evidence regarding how the proceeds of the Mahonia transactions were allegedly used. Evidence of "golden parachutes," "French islands," and "Enron," which the trial court allowed the Respondents to present to the jury, had no relevance to whether the Respondents were somehow "deceived."[288] Rather, these references were used to advance a *psuedo*-shareholders' derivative suit by *non*-shareholders in order to secure $270 million in punitive damages which, not coincidentally, when added to the compensatory damages award of approximately $130 million, equals the same $400 million involved in the Mahonia transactions. Other companies have entered into similar transactions.[289] There was no "fraud." If gas prices had fallen, would

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[288]At its core, the Respondents' complaint regarding the Mahonia transactions was that, in the absence of the fixed prices, they would have received royalties based upon market prices rather than fixed prices. Their cause of action was based upon the theory that a "prudent operator" would not have entered into the Mahonia transactions. The "prudent operator" rule establishes the test for breach of a mineral lease due to the lessee's failure to conduct operations. Syl. pt. 4, *Grass v. Big Creek Development* Co., 75 W. Va. 719, 84 S.E. 750 (1915). It is an implied covenant in a mineral lease, and it has never been used, as in this case, to second-guess the decision to enter into a fixed-price, long-term sales contract. Evidence relevant to whether these transactions were "prudent" would be historical gas prices, regulatory environment, liquidity, and other economic factors bearing upon the transaction. The "motives" of the parties are irrelevant to whether the transaction was "prudent."

[289]Tr. at 2791 ("Not only was it an increasingly normal practice when the Mahonia contracts were entered, it has become more and more an ever-increasing form of transaction in the natural gas industry . . . ."); Tr. at 2781-82 ("This type of contract became popular initially in 1991 when the Municipal Gas Association of Georgia decided to enter into a ten-year prepaid fixed-priced natural gas contract to purchase natural gas for $23.2 million."); Tr. at 2782 ("From 1991 until 1996, that same association . . . entered into eight more of these types of agreements . . . . They spent a total on those eight additional contracts of $414 million and are still receiving some of that gas."); Tr. at 2782 ("[A]n entity called the American Public Energy Association . . . at first made a ten-year contract in 1997 where they purchased gas again on a pre-paid fixed-price basis . . . and then continued the practice . . . buying a total . . . of over one billion dollars in transactions."); Tr. at 2783 ("[A]ll of the school districts in Ohio . . . entered into a 12-year contract in 1999 to purchase natural gas on a fixed-priced basis, and they are still doing that."); Tr. at 2784 ("[I]n 2003, the . . . Internal Revenue Service agency, put out regulations that, in fact, endorsed this form of transaction . . . ."); Tr. at 2785 ("Subsequent to the IRS regulations, British Petroleum, otherwise known as BP, entered into four different deals that are like that."); Tr. at 2797 ("In fact, besides CNR, during the same period of time, two large natural gas production companies entered into very similar types of agreements. One was Equitable, which is actually reasonably local. They entered into a long-term prepaid contract with the American Public Energy Association. In addition to that, Aquila, which is a midwest natural gas production company, also entered into a similar long-term, prepaid contract, again, with members of the American Public

Respondents still claim "fraudulent concealment" based on the allegedly improper motives for the transactions? Would evidence of "golden parachutes," "hostile takeovers," and the like even have been mentioned if everyone had profited from the Mahonia transactions? Actual "fraud" exists independently of outcome; actual "fraud" is a state of mind that exists at its inception;[290] actual "fraud" is not a convenient label to affixed to opportunity costs that are attendant to any business decision that would never have been made with the benefit of hindsight.

2. The Trial Court Erred in Allowing the Respondents to Present Evidence as to the Use of the Proceeds of the Mahonia Transactions.

Even in a case of "real" fraudulent concealment, the plaintiff must prove each of the elements of his or her case. How a defendant spends its allegedly ill-gotten gains is irrelevant and wholly prejudicial. In this case, however, the Respondents were allowed to poison the jury by adducing evidence regarding how the proceeds of the publicly-disclosed, governmentally-approved Mahonia transactions were allegedly used. Evidence of "golden parachutes," "French islands," and "Enron," had no relevance as to whether the Respondents were somehow "deceived" at the hands of the Petitioners. The rule is well-settled: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," and "[e]vidence which is not relevant is not admissible."[291] Furthermore, even where relevant, evidence should be kept from the jury if, as here, "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or

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Energy agency.").

[290]There was no evidence upon which a rational mind could conclude that the participants had "fraud" on their minds at the time of the Mahonia transactions.

[291]R. Evid. 401 & 402.

needless presentation of cumulative evidence."[292] The Respondents' repeated references throughout the trial of "Enron" and "golden parachutes"was intended to and did prejudice the jury.

3. The Trial Court Erred in Allowing the Respondents and Their Witnesses to Refer to the Mahonia Transactions as a "Loan."

Allowing the Respondents to refer to the Mahonia transactions as "loans" was factually wrong, lacked any relevance, and was substantially more prejudicial than probative. A fixed-price future purchase, prepaid or not, does not constitute a loan. Instead, it is a common commercial transaction used to lock in existing or predicted favorable prices.[293] A loan, on the other hand, is an obligation for the payment of money.[294] And, it is undisputed that *many* goods and services, both consumer and commercial, for a fixed price over a certain period are prepaid. That does not, however, make them loans. A person who prepays for a cemetery plot, a magazine subscription, or internet service, for example, would certainly not consider himself to have "loaned" money to the cemetery, the publisher, or the internet provider. Likewise, the entities that pre-paid CNR the future fixed price for the Respondents' gas did not "loan" CNR any money. Nevertheless, the Respondents were allowed to lead the jury into believing that CNR had been loaned money, when it was, no different than any other entity, simply prepaying money pursuant to a fixed future price contract for the sale of gas. Instead of helping the jury, this error further compounded an already grave series of errors in allowing the Respondents to proceed with their erroneous "fraud" theory in the first place, which was

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[292]R. Evid. 403.

[293]See, e.g., *Hess Energy, Inc. v. Lightning Oil Co. Ltd.*, 338 F.3d 357 (4th Cir. 2003) (describing future speculating in gas contracts).

[294]See, e.g., *Noguchi v. Comm'r*, 992 F.2d 226, 227 (1993).

made worse by allowing the Respondents to confuse the jury with evidence of how CNR spent the money prepaid to it, which was made worse by calling the money a "loan."[295]

E. THE TRIAL COURT ERRED BY REFUSING TO ALLOW THE PETITIONERS TO INTRODUCE THE SUBJECT LEASES UNTIL AFTER THE CONCLUSION OF THE TESTIMONY.

Incredibly, even though the Petitioners now stand liable for a verdict in excess of $400 million in a case involving gas leases, the trial court refused to allow them to question any witness regarding the leases which are the subject of this suit. Over their repeated and strenuous objections, the Petitioners were not allowed to question any of the Respondents, any of the Respondents' fact witnesses, any of the Respondents' expert witnesses, any of the Petitioners' fact witness, or any of the Petitioners' expert witnesses about the leases. The trial court's ruling rendered the Petitioners completely defenseless to the Respondents' charges that the Petitioners' conduct not only constituted a breach of contract, but warranted punitive damages.

The Petitioners were not allowed to question any of the witnesses regarding the different royalty provisions in the various leases,[296] e.g., whether the leases were "proceeds" versus "market" leases. They were not allowed to question any of the witnesses regarding discretionary clauses in some of the leases giving CNR the discretion in how and when to market the gas. They were not allowed to question any of the Respondents concerning the fact that they were represented by

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[295]Certainly, instead of entering into a fixed-price, long-term sales contract, CNR could have borrowed the $400 million. Such alternative, however, no more turns the sales contracts into a loan than does the fact that a purchaser could have made the alternative choice turns a Honda into a Chevy. The Respondents obviously wanted to call the sales contracts "loans" in order to further their argument that the "collateral" for the "loans" was their gas. There was no evidence, however, upon which any rational juror could have concluded that these sales contracts were "loans." Respectfully, because the trial court repeatedly allowed the Respondents to do so, over the Petitioners' objections, a new trial should be awarded.

[296]See *Robinson v. Milam*, 125 W. Va. 218, 24 S.E.2d 236, 240 (1942)("'A royalty is an agreed return paid for the oil, gas, and minerals, or either of them, reduced to possession and taken from the leased premises.' *Dixon v. Mapes*, 181 Okl. 376, 73 P.2d 1131, 1132.").

counsel in negotiations for some of the leases.[297] They were not allowed to question any of the witnesses regarding the good faith basis for CNR's belief that royalty owners were entitled to be paid as they were under the leases. They were not allowed to question any of the witnesses regarding the Respondents' good faith interpretation of lease language. This was clearly reversible and prejudicial error warranting a new trial.

First, recovery may be had only for losses that are reasonably certain in character and are the proximate result of tort or breach of contract, and, thus, proof must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of loss can be reasonably drawn.[298] Second, extrinsic or parol evidence may not be admitted to contradict, add to, detract from, vary or explain the terms of unambiguous written contracts, but such evidence is certainly admissible to resolve ambiguities in written contracts, for which the parties' intent must be ascertained,[299] as well as to prove or disprove a claim of illegality, fraud, duress, mistake or insufficiency of consideration.[300] Third, the Respondents were allowed to present evidence through their expert regarding the reasonably prudent operator standard, but the Petitioners were not allowed to counter such evidence where such implied duty does not apply because lease language states that marketing is within the "sole discretion" of the lessee.[301] This Court has properly held, "An implied contract and an express one covering the identical subject-matter cannot exist at the same

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[297]*See, e.g. Capitol Chrysler-Plymouth, Inc. v. Megginson*, 207 W. Va. 325, 532 S.E.2d 43 (2000).

[298]*Water Engineering Consultants, Inc. v. Allied Corp.*, 674 F. Supp. 1221 (S.D. W. Va. 1987).

[299]*See, e.g., Harris v. Harris*, 212 W. Va. 705, 709, 575 S.E.2d 315, 319 (2002).

[300]*See, e.g., Capitol Chrystler-Plymouth, Inc.*, 207 W. Va. at 331, 532 S.E.2d at 49.

[301]*See, e.g., Frederick Business Properties Co. v. Peoples Drug Stores, Inc.*, 191 W. Va. 235, 445 S.E.2d 176 (1994).

time. If the latter exists, the former is precluded."[302] Where some of the leases expressly granted "sole discretion" to the lessee, it was improper for the trial court to permit damages to be awarded based upon a theory of implied contract. Finally, even a wrongful act does not constitute a basis for punitive damages if it is done under a bona fide claim of right and without malice.[303] The trial court prejudiced the Petitioners, however, by refusing to allow them to present any such evidence in their defense, including cross-examination of the Respondents[304] or their expert witnesses.[305]

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[302]Syl. pt. 3, *Rosenbaum v. Price Const. Co.*, 117 W. Va. 160, 184 S.E. 261 (1936).

[303]*Warden*, 176 W. Va. at 65, 341 S.E.2d at 679. *See also, e.g., Capitol Chrysler-Plymouth, Inc.*, 207 W. Va. at 329, 532 S.E.2d at 47.

[304]Specifically, on the sixth day of trial, January 16, 2007, the trial court erred by precluding the Petitioners from admitting leases into evidence and cross-examining one of the Respondents, Larry Parker, about the payment provisions and discretion clause in his lease or about having his lawyer review the lease:

> THE COURT: Well, I have a problem with -- you're going to question this man about whether or not he had Mr. Brumbaugh negotiate this lease for him, aren't you, and I have a problem with that. I don't think that's relevant. I think the Supreme Court's cases decided that, where that argument was rejected. That's my opinion and that's going to be my ruling.
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> * * *
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> MR. BEESON: Well, your Honor, what I was going to say is, what I had intended to do with the lease is with Mr. Parker was to simply ask him about the provision for payment, not the one-eighth deductions, nothing about that, but the provision that says that he gets whatever we receive for the gas sold and marketed, because that issue has not been determined.
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> THE COURT: Now, what now?
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> MR. BEESON: The issue of proceeds lease versus market value, and there is language in the lease that covers that. There's also language in the lease that gives us the discretion in how and when we market the gas. How do I get that evidence --
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> THE COURT: Not unfettered discretion, though, and that's another issue in --
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> MR. BEESON: I understand that, but how do I get that testimony from him if I can't show him the lease and ask him --
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> * * *
>
> THE COURT: Well, if the lease is admissible, the lease speaks for itself. For Larry Parker to say what he believes he's entitled to under the lease seems, to me, to be of very little probative value.

Whether there has been a breach of the terms of a contract, whether any particular breach is material, whether performance under a contract was in good faith or reasonable in light of the parties' intentions as expressed in the contract, and damages for any material breach are all issues

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Tr. at 786-91.

[305] For example, the trial court precluded the Petitioners from admitting the leases into evidence and cross-examining Mr. Reineke about the payment provisions and discretion clause as they related to liability as well as compensatory and punitive damages:

> MR. SEGAL: Your Honor, Mr. Lawrence has told me that in the next few moments here, that he's wrapping up his cross and that one of the things he's going to do is he's going to show this witness a lease. And rather than make the jury go back out, I just wanted you to know that I object to that. The Supreme Court has ruled that the only person in this case who may interpret leases is Your Honor. Showing this witness a lease violates that ruling of the Supreme Court. And I object.
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> THE COURT: What is the relevancy of the line of questioning to be undertaken by the Defense?
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> MR. LAWRENCE: Two areas, Your Honor. One relates to the payment provision in the -- I'm using Mr. Garrison Tawney's lease. The payment provision indicates that the payment would be one-eighth of the price received by lessee. He is implying, as I understand his testimony, the royalty to be paid is either one-eighth of the index price or one-eighth of the pool price, whichever is greater. I just want to establish the lease doesn't say that. Correct, that's an issue the Court has to rule on.
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> THE COURT: What's the effect of the fact that Mr. O'Donnell testified to basically exactly the same thing this man testified to?
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> MR. LAWRENCE: I don't believe that was his testimony.
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> THE COURT: I believe it was.
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> MR. LAWRENCE: He testified that the reasonable and prudent operator had an obligation to obtain the best price reasonably available, something to that effect, but that doesn't -- that is different from what's in the lease. Certainly the lease is what controls the case.
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> THE COURT: Objection is sustained. That's a matter of law. The lease says what it says, and whether or not that's a legal effect of what it says is a question of law, it seems to me.

Tr. at 1347-49.

of fact for a jury to decide when the evidence is disputed.[306] Moreover, where this Court had already ruled that the leases were ambiguous, extrinsic or parole evidence was admissible to ascertain the parties' intent to resolve the ambiguities[307] as well as to disprove the Respondents' claim of fraud.[308] Thus, the trial court erred by excluding any evidence on lease language.

F. THE TRIAL COURT ERRED IN GRANTING CLASS CERTIFICATION.

1. Under the Circumstances of this Case, the Trial Court's Ruling Was Contrary to the Rules of Civil Procedure Applicable to Class Certification.

In Syllabus Point 8 of *In re Rezulin*, this Court held:

> Before certifying a class under Rule 23 of the *West Virginia Rules of Civil Procedure* [(1998)], a circuit court must determine that the party seeking class certification has satisfied all four prerequisites contained in Rule 23(a)-numerosity, commonality, typicality, and adequacy of representation-and has satisfied one of the three subdivisions of Rule 23(b). As long as these prerequisites to class certification are met, a case should be allowed to proceed on behalf of the class proposed by the party.[309]

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[306]See, e.g., 23 WILLISTON ON CONTRACTS § 63:15 (4th ed.) ("While in some rare cases where there is no controversy over the facts, the issue of whether a party to a contract has breached a contractual provision is also a question of law, generally whether there was a breach of the terms of a contract is a question of fact. The issue of whether a particular breach is material or not is generally a question of fact. There can be many factual issues in a breach of contract action. For example, . . . [g]ood faith is usually a factual question, especially well-suited for a jury's determination; thus, what will constitute reasonable efforts under a contract expressly or impliedly calling for them is largely a question of fact, and entails a showing of activity reasonably calculated to obtain the results intended by the parties. . . . The issue whether there is a defense that justifies or excuses a breach is typically a question of fact.") (footnotes and citations omitted) (emphasis added).

[307]See, e.g., *Harris v. Harris*, 212 W. Va. 705, 709, 575 S.E.2d 315, 319 (2002) ("In order to resolve ambiguity in a contract, the intent of the parties must be ascertained."); *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 468 S.E.2d 712 (1996) (if inquiring court concludes that ambiguity exists in contract, ultimate resolution of it typically will turn on parties' intent); *Energy Development Corp. v. Moss*, 214 W. Va. 577, 591 S.E.2d 135 (2003)(having determined that a document is ambiguous, a court must embark upon a search for the intent of the parties).

[308]See, e.g., *Capitol Chrystler-Plymouth, Inc.*, 207 W. Va. at 331, 532 S.E.2d at 49 (extrinsic evidence admissible to show that mutual mistake occurred in formulating automobile lease agreement that rendered contract voidable; lessee thought term "balance owed" in contract referred to amount she was obligated to pay dealership after dealership paid remaining debt on car; dealership maintained that term referred to amount it owed to lienholder of lessee's trade-in vehicle).

[309]Syl. pt. 8, *In re Rezulin*, 214 W. Va. 52, 585 S.E.2d 52 (2003).

"Under Rule 23(b)(3), a class action may be certified to proceed on behalf of a class if the trial court finds 'that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members[.]"[310] A "class action may only be certified if the trial court is satisfied, after a thorough analysis, that the prerequisites of Rule 23(a) of the West Virginia Rules of Civil Procedure have been satisfied."[311] A thorough analysis discloses that the Respondents failed to satisfy their burden and that this action should not have proceeded as a class action.

2. The Trial Court Erred in Certifying a Class Where One of the Claims Was Predicated Upon Common Law Fraud and Where There were Material Differences Among Class Members and Among Leases.

"'The typicality and commonality requirements . . . ensure that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class.'"[312] Applying this analysis demonstrates that the case *sub judice* is one of those "frequent[ ] cases in which it appears that the particular class a party seeks to represent does not have a sufficient homogeneity of interests to warrant certification."[313] There are a number of differences in this case, among class members, among leases, and among claims, as well as the issue of common law fraud, that should have been deemed so material as to defeat class certification.

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[310] *Id.* at 71, 585 S.E.2d at 71. Because the Respondents sought monetary damages, Rule 23(b)(3) was the only appropriate rule. *See generally La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973).

[311] *State of West Virginia ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 454, 607 S.E.2d 772, 783 (2004).

[312] *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 341 (7th Cir.1997)). In application, the concepts of typicality and commonality tend to merge. *Stott v. Haworth*, 916 F.2d 134, 143 (4th Cir. 1990).

[313] *Sosna v. Iowa*, 419 U.S. 393, 403 n.13 (1975).

In *State ex rel. Chemtall v. Madden*,[314] this Court set forth the standards for class certification pursuant to R. Civ. P. 23(a). A suit for common law fraud, which requires particularized pleading and individualized proof, does not satisfy these standards. In *Kidd v. Mull*,[315] this Court stated:

> The essential elements in an action for fraud are: "(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it." *Horton v. Tyree*, 104 W. Va. 238, 242, 139 S.E. 737 (1927).[316]

Thus, one of the essential elements of a common law fraud claim is "reliance," without which there can be no action for common law fraud. Recently, for example, in *Legg*,[317] this Court stated:

> In examining the amended complaint, as well as the other papers in the present case, it appears that the appellant believes that because what he characterizes as false statements of monies owed were provided to him, or that monies due were not paid to him, fraud was committed. As indicated in *Lengyel v. Lint, id.*, more than a false statement is required to establish fraud. It is necessary that a plaintiff relies upon the statement and that he is damaged because of his reliance. In most of the paragraphs of the appellant's complaint relating to statement of money due or paid, the appellant does not allege that he relied upon the statements to his detriment. To the contrary, the overall evidence in this case, as well as the fact that he brought the present action to collect monies which he believed were due, shows that he challenged, rather than relied upon, the statements and rather plainly did not rely upon the statements to his detriment.

Without "reliance," which is by necessity an individualized inquiry, there can be no cause of action for common law fraud. In this case, for example, even the trial court's punitive damages order

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[314]216 W. Va. 443, 607 S.E.2d 772 (2004).

[315]215 W. Va. 151, 156, 595 S.E.2d 308, 313 (2004).

[316]*See also State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 475 n.2, 583 S.E.2d 80, 98 n.2 (2003)(Davis, J., concurring); *Legg v. Johnson, Simmerman & Broughton, L.C.*, 213 W. Va. 53, 60, 576 S.E.2d 532, 539 (2002).

[317]213 W. Va. at 60, 576 S.E.2d at 539 (emphasis added); *see also Cobb v. E.I. duPont deNemours & Co.*, 209 W. Va. 463, 467, 549 S.E.2d 657, 661 (1999)("Despite the circuit court's repeated request that Ms. Cobb identify some evidence that Ms. Parsons relied upon anything other than the medical evidence submitted by Ms. Cobb, or that Ms. Parsons had not truthfully testified, Ms. Cobb could identify no such evidence. Therefore, Judge Berger properly ruled that no dispute existed on the issue.").

conceded that one of the representative Respondents was provided accurate information regarding the challenged deductions,[318] and there was other evidence at trial regarding correspondence between CNR's attorney and royalty owners or their attorneys that included accurate information about the deductions. The evidence in this very case belies the argument that the "reliance" of different royalty owners with different leases was the same for all of the class members.

It was inherently unfair and, indeed, a violation of the Petitioners' due process rights, to deny them the right to present an individualized defense to any of their royalty owners' claims of common law fraud. Who knows how many would have testified, under oath, that they do not remember receiving their royalty statements; that they did not rely upon the accuracy of their royalty statements; that they sought and received legal advice regarding any potential dispute over royalty payments; or that they affirmatively disbelieved the accuracy of their royalty statements? Where but a handful of thousands of royalty owners were hand-picked as class representatives in a common law fraud case, the Petitioners were denied any opportunity to develop their individualized defenses.

In addition to the heightened pleading requirement under R. Civ. P. 9(b), the common law cause of action for fraud requires heightened proof. Unlike most common law causes of action, which require only proof by a preponderance of the evidence, common law fraud requires proof by clear and convincing evidence.[319] Again, this type of proof is simply not available when one attempts to

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[318]Moreover, because this case was allowed to proceed as a class action, the Petitioners have no way of knowing how many others, possible hundreds or thousands, who likewise would testify as to the absence of any reliance.

[319] *See Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W. Va. 468, 472, 425 S.E.2d 144, 148 (1992)("These elements must be proved by clear and convincing evidence. *See C.W. Dev., Inc. v. Structures, Inc., of W. Va.*, 185 W. Va. 462, 408 S.E.2d 41 (1991); *Cardinal State Bank Nat'l Ass'n v. Crook*, 184 W. Va. 152, 399 S.E.2d 863 (1990); *Muzelak v. King Chevrolet, Inc., supra; Romano v. New England Mut. Life Ins. Co.*, 178 W. Va. 523, 362 S.E.2d 334 (1987); *Brown v. Crozer Coal & Land Co.*, 144 W. Va. 296, 107 S.E.2d 777 (1959).").

extrapolate individualized claims of common law fraud at different times under differing circumstances to an entire class of plaintiffs.

The Fourth Circuit has repeatedly rejected the assertion that a claim for common law fraud is subject to class action relief. In *Broussard v. Meineke Discount Muffler Shops, Inc.*,[320] it denied class certification in a case involving claims of common law fraud. Specifically, the plaintiffs were franchisees who claimed to have relied, to their detriment, on allegedly fraudulent representations regarding the terms of their franchise agreements. The Fourth Circuit held that there was a need to examine the communications between each franchisee and the defendant, particularly where, as in the instant case, the specific terms of each franchise agreement varied from year to year and from franchisee to franchisee. Similarly, in *Gunnels v. Healthplan Services, Inc.*,[321] it decertified a class action against a group of insurance agents for common law fraud. The *Gunnels* plaintiffs alleged that the agents engaged in common law fraud by misrepresenting the various attributes of a health insurance plan. The Fourth Circuit reversed class certification for these common law fraud claims, holding that because of the need to inquire into the specific statements made by each agent and each policyholder's reliance upon those statements, the case was inappropriate for class certification:

> Indisputably, negligent misrepresentation and fraud require proof of reliance. . . . As we held in *Broussard*, "the reliance element of . . . fraud and negligent misrepresentation claims [is] not readily susceptible to class-wide proof," rather, "proof of reasonable reliance depends upon a fact-intensive inquiry into what information each [plaintiff] actually had." Nor are we alone in so holding.[322]

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[320] 155 F.3d 331 (4th Cir. 1998).

[321] 348 F.3d 417 (4th Cir. 2003).

[322] *Id.* at 435, *quoting Broussard, supra* at 431 (citations omitted).

Finally, in *Gariety v. Advanta Mortgage Corp.*,[323] the Fourth Circuit recently stated, in a case in which investors attempted to assert common law fraud claims after the First National Bank of Keystone became insolvent, "Because proof of reliance is generally individualized to each plaintiff allegedly defrauded . . . fraud and negligent misrepresentation claims are not readily susceptible to class action treatment, precluding certification of such actions as class actions."

This Court cited the Fourth Circuit's decision in *Broussard* in *Ways v. Imation Enterprises Corp.*[324] In *Ways*, a group of employees attempted to institute a class action contending that their employer had broken its promises regarding their continued employment. Specifically, the employees alleged that they were told that, if they perfected a new type of lithographic plate, "their jobs were assured and the Middleway plant would continue as an operational unit."[325] As in the instant case, the issue of reliance was essential to the plaintiffs' claims:

> The appellants' contract claims essentially are based on the allegation that several members of Imation management verbally promised continued employment if the employees perfected a negative no process plate. A significant problem with the appellants' contract claims is that the alleged oral promises of continued employment apparently were made by different members of management at different times to different employees. In addition, the appellants' recollections of the nature of the alleged oral promises differ.[326]

For these reasons, this Court held:

> [W]e agree with the circuit court that individualized evidence as to the specific circumstances surrounding the alleged promises is required. Accordingly, we conclude that the circuit court did not abuse its discretion when it ruled that the appellants'

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[323]368 F.3d 356, 2004 U.S. App. 9305, *13 (4th Cir.).

[324]214 W. Va. 305, 313, 589 S.E.2d 36, 44 (2003).

[325]*Id.* at 310, 589 S.E.2d at 41.

[326]*Id.* at 313, 589 S.E.2d at 44 (footnote omitted).

> breach of contract claims do not meet the commonality and typicality requirements of Rule 23(a).[327]

Where the alleged representations, such as those here, are not uniform to each class member, there is no typicality or commonality.[328] Moreover, the varying levels of sophistication of the class members defeats typicality and commonality as the law holds sophisticated parties to a higher standard.[329]

One of the other major differences in the leases among class members in this case was that some were "proceeds" leases, i.e., leases providing that the royalty owner is to receive a percentage of the "proceeds" of the sale of gas, while others were "market value" leases, i.e., leases providing that the royalty owner is to receive the "market value" of gas sold.[330] When confronted with similar claims that a producer violated the implied covenant to market by selling the gas to its subsidiaries at prices less than it sold the same gas to third-parties, the Fifth Circuit held that class certification was improper because of the differences between proceeds leases and market value leases:

> The plaintiffs allege that Exxon engaged in a similar course of conduct with respect to each of them, i.e. the underpayment of royalties based on breach of an implied

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[327] *Id.* at 313-14, 589 S.E.2d at 44-45.

[328] See, e.g., *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986); *Lukenas v. Bryce's Mountain Resort*, 538 F.2d 594, 596 (4th Cir. 1976); *Tipton v. Secretary of Ed.*, 1993 WL 545724, *10-11 (S.D. W. Va.).

[329] See, e.g., *Berardi v. Meadowbrook Mall Co.*, 212 W. Va. 377, 383, 572 S.E.2d 900, 906 (2002)(sophistication of plaintiff taken into account in claim of economic duress). This rule has particular application to fraud claims. See, e.g., *Emergent Capital Inv. Mgt., LLC v. Stonepath Grp, Inc.* 343 F.3d 189, 195 (2d Cir. 2003) (applying both federal and New York law–"In assessing the reasonableness of a plaintiff's alleged reliance, we consider the entire context of the transaction, including factors such as its complexity and magnitude, the sophistication of the parties, and the content of any agreements between them."); *Kaufman v. Guest Capital, L.L.C.* 386 F. Supp.2d 256, 265-66 (S.D.N.Y. 2005) (Colorado law); *Water Craft Mgt., L.L.C. v. Mercury Marine*, 361 F. Supp.2d 518, 562 (M.D. La. 2004) (Louisiana law); *Nuveen Premium Income Municipal Fund 4, Inc. v. Morgan Keegan & Co., Inc.*, 200 F. Supp.2d 1313, 1321 (W.D. Okla. 2002) (cited as general rule), *vacated as a result of settlement*, 2005 WL 857002 (W.D. Okla.); *Greenberg v. Tomlin*, 816 F. Supp. 1039, 1056 (E.D. Pa. 1993) (Pennsylvania and Maryland law).

[330] The flat rate leases are yet another entirely separate type of lease, further balkanizing the class as certified. The differences between metered and unmetered wells also add to lack of commonality and typicality inside the class. The trial court's rulings, if approved, will also lead to additional costs, which may render some wells non-viable, establishing conflicts inside the class.

> duty to market. Hunter's royalty agreements provide for payments based on both market value and actual proceeds bases. The Texas Supreme Court has recently held that there is no implied covenant to market in market value leases, as these have their own express covenant, though there is such an implied covenant in proceeds leases. See *Yzaguirre v. KCS Resources, Inc.*, 53 S.W.3d 368, 373 (Tex.2001). Therefore, in a class action based on alleged breach of an implied covenant to market, there cannot be typicality where there are both market-value and proceeds leases included in the class, at least under Texas law. Other states take different views of the implied covenant to market, and some have not addressed whether such a covenant exists (see Part III). Plaintiffs seem to rely on the fact that Hunter, owning both market-value and proceeds-basis leaseholds, is typical of the class. But the test is whether her *claims* are typical, not whether she is.[331]

In Syllabus Point 3 of *Wellman*,[332] this Court also noted the distinction between proceeds leases, which have an implied covenant to market, and market value leases, which have no implied covenant because an express covenant exists. Thus, as in *Stirman*, the trial court erred in certifying a class.

3. The Trial Court Erred in Allowing the "Large Landowners" to be Included Where No Class Representative Was Appointed.

The trial court erred in allowing large landowners to be placed in a unitary class when no large landowner class representative was appointed.[333] As noted above, there is a significant and substantial number of differences between the class members here, one difference being large versus small landowners. Here, the trial court did not name a large landowner class representative. In essence, the large, sophisticated landowners were able to ride the coattails of the smaller, less sophisticated landowners, and, thereby, prejudice the rights of the Petitioners.

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[331] *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002); *see also Hunter v. Exxon Corp.*, 2005 WL 357682 at *4 (W.D. Tex.)("Whether the implied covenant to market applies to each individual class member depends on whether the lease language falls within the class definition.").

[332] 210 W. Va. 200, 557 S.E.2d 254 (2001).

[333] "Rule 23 tries to minimize the potential abuses of the class action device . . . insisting that the class be reasonably homogeneous[.]" *Culver v. City of Milwaukee*, 277 F.3d 908, 910 (7th Cir. 2002). *See also Rosenbaum v. MacAllister*, 64 F.3d 1439, 1442 (10th Cir. 1995) ("The purpose of Rule 23, and class actions generally, is to unify and render manageable litigation in which there are many members of a homogeneous class with common claims against a defendant.").

4. The Trial Court Erred in Certifying a Class Where Some of the Leases Contained Arbitration Provisions.

Furthermore, some of the leases of the class members contained arbitration provisions. Where some class members are subject to arbitration clauses, but others are not, courts have held that it is inappropriate to certify a class or, in the alternative, that it is mandatory that a subclass be created of those members subject to arbitration clauses.[334] Accordingly, the trial court erred by certifying a class where some of the leases had arbitration clauses.

G. THE TRIAL COURT ERRED BY ASSERTING JURISDICTION OVER NISOURCE INC. AND COLUMBIA ENERGY GROUP.

In order to dig into deeper pockets, the Respondents argued that CNR was the "alter ego" of NiSource and CEG, and that the companies were all engaged in a "joint venture." Doing so was erroneous, because the Respondents never produced evidence sufficient to sustain either finding.[335]

1. The Trial Court Erred in Allowing the Case to Proceed Against NiSource and CEG Predicated Upon a Theory of "Joint Venture."

In this case, neither the allegations nor the evidence satisfy the requirements for application of the doctrine of "joint venture" as a matter of law. There was no association of separate corporate entities for purposes of carrying out a single business enterprise for profit arising from a contractual relationship in which those separate entities combined their property, money, effects, skill, and

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[334]See *Sanders v. Robinson Humphrey/American Express, Inc.*, 1986 WL 10096 at *6 (N.D. Ga.)("the court is satisfied for purposes of class certification that each of the defendants is able to substantiate arbitration claims with some potential class members which could greatly disrupt these proceedings should class certification be granted").

[335]With respect to the Mahonia transactions, the Respondents made two, inconsistent arguments. First, they argued that the first Mahonia contract was entered into by CNR in order to assist CEG in its fight against NiSource's hostile takeover. Second, they argued that CEG and NiSource forced CNR to enter into the second Mahonia contract to generate cash needed to secure SEC approval. Obviously, with respect to the first argument, it is absurd to suggest that CNR was acting as the "alter ego" of its opponent in a hostile takeover. Moreover, with respect to the second argument, the cash generated had no impact on SEC approval.

knowledge.[336] The parties to the Mahonia agreements were CNR and Mahonia. The fact that another corporate entity, such as CEG or NiSource, might have issued guarantees is insufficient because a guarantor is not a joint venturer.[337] An agreement to guarantee performance upon the failure of another party obviously does not constitute "an agreement to share in both the profits and the losses." Thus, the argument that "CEG and NiSource agreed to stand behind the deal,"[338] is simply insufficient, as a matter of law, to establish "joint venture."[339]

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[336]This Court has defined "joint venture" as follows: "A joint venture or, as it is sometimes referred to, a joint adventure, is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge. It arises out of a contractual relationship between the parties. The contract may be oral or written, express or implied." Syl. pt. 2, *Price v. Halstead*, 177 W. Va. 592, 355 S.E.2d 380 (1987).

[337]In *Armor v. Lantz*, 207 W. Va. 672, 678, 535 S.E.2d 737, 743 (2000), for example, this Court rejected an attempt to impose joint venture liability on a West Virginia attorney serving as local counsel stating as follows:

> This Court has never formulated any broad analytical test by which to determine the existence of a joint venture. In *Pownall v. Cearfoss*, 129 W. Va. 487, 40 S.E.2d 886 (1946), however, the Court did note the existence of certain "distinguishing elements or features" essential to the creation of a joint venture: . . . There must, however, be some contribution by each party of something promotive of the enterprise. . . . An agreement, express or implied, for the sharing of profits is generally considered essential to the creation of a joint adventure, and it has been held that, at common law, in order to constitute a joint adventure, there must be an agreement to share in both the profits and the losses. It has also been held, however, that the sharing of losses is not essential, or at least that there need not be a specific agreement to share the losses, and that, if the nature of the undertaking is such that no losses, other than those of time and labor in carrying out the enterprise, are likely to occur, an agreement to divide the profits may suffice to make it a joint adventure, even in the absence of a provision to share the losses. Id. at 497-98, 40 S.E.2d at 893-94 (citations omitted)(footnote added). *See also Lilly v. Munsey*, 135 W. Va. at 254, 63 S.E.2d at 523 ("to constitute a joint adventure there must be an agreement to combine property or efforts and to share in profits.").

[338]Tr. at 3025.

[339]Ultimately, for reasons not apparent on the record, the trial court never instructed the jury on the Respondents' theory of joint venture and, of course, there was nothing in the verdict form asking the jury to make a finding on joint venture.

2. The Trial Court Erred in Allowing the Case to Proceed Against NiSource and CEG Predicated Upon a Theory of "Alter Ego"

The undisputed evidence was that CNR is a former NiSource subsidiary that has been owned by Chesapeake since November 14, 2005.[340] CNR was converted to Columbia Natural Resources, LLC, in 2003, and then later merged into Chesapeake Appalachia, LLC. Indeed, the trial court instructed the jury that "the defendant, Chesapeake Appalachia, LLC, referred to as 'CNR' in this case, is a limited liability company and is liable for the wrongs committed by its supervising agents or employees within the scope of their employment."[341]

At the conclusion of trial, the Respondents moved for judgment as a matter of law on their claim of "alter ego," but the trial court stated, "I think there are questions of fact on alter ego, joint venture."[342] Thereafter, the Respondents requested and were given a jury instruction on "alter ego." The instruction stated, in part, that "[I]f you believe by a preponderance of the evidence that NiSource Inc. and Columbia Energy Group operates [sic] and controls [sic] Columbia Natural Resources, such that they are really one entity, then you may find NiSource Inc. and Columbia Energy Group to be liable for the acts of Columbia Natural Resources . . . ."[343] Whatever "questions of fact"

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[340]In February 2006, CNR and Chesapeake Appalachia merged and now CNR is Chesapeake Appalachia.

[341]Jury Instructions.

[342]Tr. at 3070.

[343]With respect to the predicates for the compensatory damages awarded, only the following seven questions were asked of the jury:

> (1) "do you find . . . that the plaintiffs are entitled to recover for gathering and processing fees deducted by CNR?;"
>
> (2) "[w]hat amount do you find . . . that plaintiffs are entitled to recover [from CNR] for under reported volume . . . ?;"
>
> (3) "[d]o you find . . . that CNR breached its lease agreements . . . and breached the

the trial court perceived could have satisfied the elements of a theory of "alter ego," neither the trial court nor Respondents ever asked the jury to answer them.[344] Indeed, none of the Respondents' four proposed verdict forms included a question on either alter ego or joint venture.[345] In response to the absence of any verdict on the "alter ego" theory, the trial court responded with two theories.

The first theory excused the Respondents' failure to have the jury resolve this element of their claims by shifting the burden to the Petitioners to have placed the question on the verdict form. But this theory, of course, turns the well-settled burden in civil trials upside down. Rule 49 makes perfectly

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prudent operator rule . . . ?;"

(4) "[d]o you find . . . that CNR improperly failed to pay royalty for the total volume of natural gas between the well and the meter on 1/8th royalty wells?;"

(5) "[t]he Court has ruled that the plaintiffs are entitled to recover a 1/8th royalty payment for the unmetered wells where a flat rate royalty was paid by CNR. What amount do you find . . . .?;"

(6) "[t]he Court has ruled that the plaintiffs are entitled to recover a 1/8th royalty payment for the metered wells where a flat rate royalty was paid by CNR. What amount do you find . . . .?;" and

(7) "[d]o you find by a preponderance of the evidence that CNR improperly failed to pay royalty on the total volume of natural gas between the well and the meter on flat rate royalty wells?"

None of these questions was directed to NiSource or CEG; instead, they were all directed to CNR. Thus, there is nothing in the jury's answers to these questions to indicate that it was finding NiSource or CEG to be the "alter ego" of CNR. Likewise, with respect to punitive damages, the jury was asked, "Do you find by clear and convincing evidence that CNR's acts . . . with regard to taking deductions . . . ?" and, "Do you find by clear and convincing evidence that the defendants' acts . . . with regard to sales to affiliates and forward sales . . . and basing royalties thereon . . . ?" Only the latter referenced "defendants" and NiSource was not a party to the Mahonia or subsidiary agreements.

[344]*When there are facts sufficient to support such a finding,* "the question of whether or not a joint venture exists is to be answered by the jury." *Bowers v. Wurzburg*, 207 W. Va. 28, 37, 528 S.E.2d 475, 484 (1999). Here, however, no such facts existed, and NiSource and CEG were entitled to judgment. But in any event, the jury was *not* asked to answer the question of fact regarding whether a joint venture existed.

[345]Verdict form.

clear that the Respondents at all times bore the burden of having the jury resolve their claims, and if the Respondents failed to ask the jury to do so, the Respondents, not the Petitioners, bear the consequences:

> If in [instructing the jury] so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted . . . . As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.[346]

Here, the special verdict imposed liability only on CNR, and the law is clear: the Respondents' claims against the other Petitioners – not those Petitioners' defenses – were thereby waived.[347] Indeed, at the end of the trial, the trial court looked to the Respondents, not to the Petitioners, with respect to the absence of any finding on the verdict form for alter ego.[348] The trial court, as is required, gave

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[346]R. Civ. P. 49(a).

[347]Recently, in Syllabus Point 3 of *State ex rel. Valley Radiology, Inc. v. Gaughan*, 220 W. Va. 73, 640 S.E.2d 136 (2006), the Court reiterated, "'Absent extenuating circumstances, the failure to timely object to a defect or irregularity in the verdict form when the jury returns the verdict and prior to the jury's discharge, constitutes a waiver of the defect or irregularity in the verdict form.' Syl. Pt. 2, *Combs v. Hahn*, 205 W. Va. 102, 516 S.E.2d 506 (1999)."

[348]After the jury returned its verdict, the following transpired:

> THE COURT: Okay. Ladies and Gentlemen, I need to take something up with the lawyers here before I go any further . . . I don't have the damage charts with me. Is there going to be an objection to the filing of this verdict and the discharge of the Jury?
>
> MR. MASTERS: The numbers are right off of there, with interest. . . .
>
> THE COURT: I'm sorry. Okay. Would you bring the Jury back, please? None of the alter ego questions are here, are they?
>
> MR. MASTERS: (Nodded negatively.)
>
> THE COURT: What does that mean, Mr. Masters?
>
> MR. MASTERS: Oh, I'm sorry.
>
> THE COURT: They're not on here.

the Respondents the opportunity to ask that the verdict be corrected or clarified to address the issue of alter ego and, for whatever reason, the Respondents declined and cannot be heard now to complain about the absence of a jury finding.[349]

The second theory advanced by Respondents is that the plural possessive form of the word "defendant" appears in the verdict form ("do you find . . . that the defendants' acts . . .") rather than the singular possessive form ("do you find . . . that the defendant's acts . . .") is sufficient to support liability against NiSource and CNR, despite the fact that all other references on the form are to CNR by itself. Not only is the misplaced apostrophe likely a typographical error, but there is no authority to support this assertion, which flies in the face of R. Civ. P. 49(a).

3. The Trial Court Erred in Applying R. Civ. P. 17(a) and an Indemnification Agreement in Asserting Subject Matter Jurisdiction Over NiSource Inc. and Columbia Energy Group.

R. Civ. P. 17(a) provides, "a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by law may sue in that person's own name without

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> MR. MASTERS: No, there's no interrogatory for them.
>
> (The Jury entered the courtroom.)
>
> THE COURT: Okay. I'm sorry. Go ahead and be seated. I'll tell you, last night just about wiped me out. I guess I'm getting a little too old to stay up that late.
>
> Anyway, actually, at this stage of the case, the next thing that happens is the Court discharges the Jury and files the verdict. . . . Counsel, is there any reason why this panel should not be discharged?
>
> MR. MASTERS: No, your Honor.

Tr. at 229-30.

[349]Elsewhere in the trial court's punitive damages order, it makes various references to the Petitioners' supposed "waiver" of other issues, such as the absence of a separate verdict on fraud or the submission of the issue of punitive damages on claims for punitive damages that were never asserted in pleadings or discovery responses, Order at 13, 17, and 64, but the same rules apply to those assertions of waiver as apply to the alter ego issue.

joining the party for whose benefit the action is brought."[350] In this case, there was no contract made for the Respondents' benefit. The indemnity provisions at issue were instead made for CNR's benefit. Respectfully, the trial court erred in applying Rule 17(a) as a basis to find jurisdiction over, and assign liability to, NiSource and CEG.

The dicta in *State ex rel. Copley v. Carey*,[351] relied upon by the Respondents, is inapplicable here.[352] *Copley* involved a public employee's bond, entered into for the benefit of the plaintiff. This Court's discussion of the difference between a liability indemnity contract and a damages indemnity contract merely discussed when these two contracts oblige the indemnitor to perform (in the former case, as soon as the threat of liability is imposed; in the latter, not until damages are assessed).[353] But all along, it was always assumed (and never discussed) that the contract ran to the benefit of the plaintiff. The subsequent discussion had nothing to do with *who* could sue, only *when*. To infer from *Copley* that an indemnitor may be sued directly by a defendant-indemnitee's plaintiff is to misconstrue both the factual circumstances and the legal conclusions.

Nowhere has this Court ever held that an indemnitor may be sued directly by an indemnitee's plaintiff. W. Va. Code § 55-8-12, which states, "If a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person

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[350]R. Civ. P. 17(a) (emphasis added).

[351]141 W. Va. 540, 91 S.E.2d 461 (1956).

[352]Likewise, reliance on other surety cases is equally misplaced. *See, e.g.*, Syl. pt. 4, *Petty v. Warren*, 90 W. Va. 397, 110 S.E. 826 (1922) ("Where one agrees with another to become primarily liable for a debt due from that other to a third person so that as between the parties to the agreement the first becomes the principal and the second the surety, the creditor may in equity, upon the doctrine of subrogation, maintain a suit to recover the amount of such debt from the person so assuming to pay the same.") (emphasis added).

[353]See 141 W. Va. at 545, 91 S.E.2d at 465 (noting that relevant question was "[w]hether the plaintiff may maintain an action of covenant against a surety as defendant upon a sealed instrument, signed only by such surety, which by its terms indemnifies the sheriff against loss caused to him by his deputy before such loss has been sustained by the sheriff and his deputy or either of them").

may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise," and the cases interpreting it make this perfectly clear. Moreover, contrary to the trial court's conclusions, it is clear from their terms that the indemnity provisions here were not surety bonds or "assumptions of liability" by NiSource or CEG running even indirectly to the benefit of the Respondents. Rather, they were common commercial indemnity agreements, nothing more.[354]

With respect to the Respondents' "real party in interest" argument, this Court has clearly explained Rule 17(a)'s proper application:

> The purpose of West Virginia Rule of Civil Procedure Rule 17(a) is to ensure that the party who asserts a cause of action possesses, under substantive law, the right sought to be enforced. Rule 17(a) allows circuit courts to hear only those suits brought by persons who possess the right to enforce a claim and who have a significant interest in the litigation. The requirement that claims be prosecuted only by a real party in interest enables a responding party to avail himself of evidence and defenses that he has against the real party in interest, to assure him of finality of judgment, and to protect him from another suit later brought by the real party in interest on the same matter. In its modern formulation, Rule 17(a) protects a responding party against the harassment of lawsuits by persons who do not have the power to make final and binding decisions concerning the prosecution, compromise, and settlement of a claim.[355]

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[354]See, e.g., *First Virginia Bank-Colonial v. Baker*, 301 S.E.2d 8, 11 (Va. 1983)("Typically, a contract of indemnity is a bilateral agreement between an indemnitor and an indemnitee in which the indemnitor promises to reimburse his indemnitee for loss suffered or to save him harmless from liability. But the indemnitor makes no promise to perform the obligation undertaken by his indemnitee. And, although a stranger to the contract may have some consequential interest in the subject matter of the indemnity, he is not in privity with the indemnitor and has no standing to sue directly on the contract. See *generally* 41 Am. Jur. 2d *Indemnity* § 41 (1968).").

[355]Syl. pt. 5, *Keesecker v. Bird*, 200 W. Va. 667, 490 S.E.2d 754 (1997) (emphasis added); see also *Simons v. Tri-State Const. Co.*, 655 P.2d 703, 708 (Wash Ct. App. 1982) ("In general, only an indemnitee or someone in his right is entitled to sue on a contract of indemnity. Thus, a third party is not entitled to sue on an indemnity contract unless [unlike here] he is able to prove the contract is not 'merely for indemnity, but also creates a direct obligation in his favor.' 42 C.J.S., *Indemnity* § 29 (1944)."") (emphasis added); *Clark County v. Bonanza No. 1*, 615 P.2d 939, 943 (Nev. 1980) ("However, the only party entitled to sue on an indemnity contract is the indemnitee, his assignee, or a third party beneficiary. Although Clark County may have a right of action against Jacobson pursuant to the . . . agreement, it cannot sue Jacobson's indemnitor . . . because the . . . agreement did not create a direct obligation in the county's favor [and t]he county was not a third-party

Rule 17(a) was not designed to haul an indemnitor into court and create a cause of action against him in favor of the indemnitee's plaintiff. The status of NiSource or CEG as CNR's indemnitor provided absolutely no legal basis whatsoever for the assertion of personal jurisdiction over them.

H. THE TRIAL COURT ERRED BY FAILING TO GRANT JUDGMENT AS A MATTER OF LAW ON SEVERAL CLAIMS AND ISSUES.

1. The Respondents Presented No Clear and Convincing Evidence Upon Which a Rational Jury Could Have Concluded that the Elements of a Cause of Action for Fraudulent Concealment Had Been Satisfied.

One of the issues upon which the Petitioners moved for judgment as a matter of law was the Respondents' claim for fraudulent concealment, upon which the jury ultimately returned no verdict because there was no line on the verdict form for fraudulent concealment. In any event, as discussed elsewhere in this petition, the evidence that was adduced at trial was insufficient, even construed in a light most favorable to the Respondents, to support a finding of fraudulent concealment.

2. The Trial Court Erred by Allowing Respondents with Proceeds Leases with Sole Discretion Clauses to Recover Damages for the Failure to Pay Market Prices.

Some of the Respondents' leases gave the lessees "discretion" or "sole discretion" in the marketing of gas. Respectfully, the words "discretion" and "sole discretion" with respect to a lessee's right to market gas are without ambiguity. Yet, not only did the trial court allow the Respondents with proceeds leases with sole discretion clauses to participate as class members, but it precluded the Petitioners from even asking witnesses about such provisions.[356] Accordingly, the Petitioners, who were being exposed to what was ultimately $270 million in punitive damages, based upon their failure to anticipate that ambiguous lease provisions over which reasonable minds could differ would

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beneficiary.").

[356]See note 299.

be construed against them were precluded, for example, from asking Mr. Parker, one of the representative Respondents, about the provision in his lease, which was executed not in the 1920s or 1930s, but was executed on June 20, 1990, that stated as follows:

> ***PRODUCTION ROYALTY: . . .***
>
> (2) GAS. To pay Lessor an amount equal to one-eighth of the price, net all costs beyond the well head, received by Lessee for all gas and the constituents thereof produced and marketed from the Leasehold during the proceeding month, but no royalty will be paid for stored gas and gas produced from storage horizons. The time and method of marketing gas produced from any well on the Leasehold and the amount thereof that shall be used or marketed shall be within the sole discretion of the Lessee.[357]

The jury ostensibly returned a verdict for compensatory and punitive damages for breach of contract in this case, if any inference is to be made from the ten-year statute of limitations that was applied. The Petitioners have been unable to find any authority excluding the contract upon which a suit for damages is based as evidence at trial.

The trial court never held that the phrase "sole discretion" was ambiguous;[358] thus, under the law of contracts, it should have entered judgment for the Petitioners on whether, for example, they breached this particular lease by selling gas for below index price. Moreover, even if this Court rules that the phrase "sole discretion" is ambiguous, it must set aside the entire verdict because once a contract is deemed ambiguous, parol evidence is admissible. Even in *Tawney I*,[359] this Court held:

> In Syllabus Point 4 of *Watson v. Buckhannon River Coal Co.*, 95 W. Va. 164, 120 S.E. 390 (1923), this Court held,
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> > While the general rule is that the construction of a writing is for the court, yet where the meaning is uncertain and ambiguous, parol

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[357]Tr. Ex. 64 (emphasis supplied).

[358]Indeed, the trial court stated just the opposite. Tr. at 2315-16.

[359]*Tawney, supra* at 274 n. 5, 633 S.E.2d at 30 n.5 (emphasis supplied).

> evidence is admissible to show the situation of the parties, the surrounding circumstances when the writing was made, and the practical construction given to the contract by the parties themselves either contemporaneously or subsequently. If the parol evidence be not in conflict, the court must construe the writing; but, if it be conflicting on a material point necessary to interpretation of the writing, then the question of its meaning should be left to the jury under proper hypothetical instructions.

Repeatedly, throughout the trial, the Petitioners sought to apply the simple, straightforward rules regarding contract litigation, i.e., if a contract is ambiguous, parol evidence is admissible as to the meanings given by the parties to the contract. Repeatedly, the Respondents objected on the grounds that parol evidence was inadmissible because it constituted inadmissible "opinion" testimony. This was wrong. The Petitioners should have been permitted to question the other parties to the subject leases about their interpretation of the disputed language.

3. The Trial Court Erred by Ruling that the Standard Under All Leases Was Best Price Available When Some Leases Were "Proceeds" Leases and Even the Respondents' Expert Conceded that the Failure to Obtain Index Price is not Imprudent in All Circumstances.

There is no authority for the proposition that a lessee violates the prudent operator standard in every instance the operator sells for less than "index." Indeed, the very idea is completely inconsistent with the very nature of an "index," which is an average of prices, some higher and some lower, negotiated between buyers and sellers in a free market system.[360] As the expert explained:

> It's between a buyer not obligated to buy from that person and a seller not obligated to sell to that -- to the other party. They are not related. They have opposing

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[360]Even the Respondents' expert on the issue, testified as follows: "And the index that is nearest to West Virginia is known as the Columbia Gas Transmission Appalachia, which is located right here on the Columbia Gas system's interstate pipeline here in West Virginia. So at the end of every month, it's called bid week where that there are buyers and sellers that buy and sell gas in the open market and establish the value, the market value, for the gas for the next month at that location. So the last five business days of January, they will enter into negotiations, kind of like an auction, or open negotiations of buying and selling gas. And then that will establish what's called the index price at that location for February." Tr. at 1032-33.

economic interests. You know, one is trying to get it at the lowest, and one is trying to get it at the highest. Kind of like at an auction. They're making a deal.[361]

Therefore, as negotiated prices are what ultimately result in the publication of an "index" price, the Respondents' expert conceded that selling gas for below market index price is not always imprudent.[362] Where the Respondents' own expert conceded that sales at prices other than index, under certain circumstances, would not violate the prudent operator rule, it was error for the trial court to refuse to grant judgment to the Petitioners on the Respondents' claim that any deviation from index price automatically constitutes a violation of the prudent operator rule.

4. The Trial Court Erred by Failing to Award Judgment as a Matter of Law on the Respondents' "Alter Ego" Claims Where There was No Evidence Upon Which a Rational Jury Could Have Concluded that the Elements Required for Establishing "Alter Ego" Had Been Satisfied.

Despite a multiplicity of factors in determining whether a subsidiary is the alter ego of its parent, the ultimate test is whether "the parent and subsidiary operate as one entity."[363] There was insufficient evidence in this case, even construing it in a light most favorable to the Respondents, for a rational jury to conclude that CNR and NiSource or CEG "operated as one entity." Certainly, as with any parent/subsidiary relationship, there was a good deal of supervision by the parent over the subsidiary. In order to exercise a parent's proper supervision of its subsidiary, information was exchanged, employees occasionally moved between entities, guidance was given as to corporate direction, budgets were reviewed and approved, and there was coordination of the activities of the parent, subsidiary, and other subsidiaries. To conclude that the "operate as one entity" standard was

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[361]Tr. at 1033-34.

[362]Tr. at 1357-58.

[363]Syl. pt. 2, in part, *Norfolk Southern Ry. Co. v. Maynard*, 190 W. Va. 113, 437 S.E.2d 277 (1993).

satisfied in this case would be to conclude that every corporate subsidiary doing business in West Virginia with responsible supervision by its corporate parent is the alter ego of such parent.

5. The Trial Court Erred by Failing to Award Judgment Compelling Arbitration for Those Leases Containing Binding Arbitration Clauses.

Some of the leases in this case have arbitration provisions requiring any dispute arising thereunder to be resolved, not by litigation, but by arbitration. Under the Federal Arbitration Act,[364] Congress has expressed a policy favoring the arbitration of disputes involving interstate commerce, and it certainly cannot be contended that the gas industry does not involve interstate commerce. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,*[365] a case involving enforcement of an arbitration clause in a construction contract, the Supreme Court observed, "[S]ection 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[366] The Court further held that the enforcement provisions of the FAA applied equally to state and federal courts.[367] In one of the representative leases in this case, executed in 1990, both parties agreed as follows:

> **ARBITRATION.** In the event that Lessor and Lessee are in disagreement concerning the lease, performance thereunder, or damages cause by Lessee's operations, a settlement shall be determined by a panel of three disinterested arbitrators. Lessor and Lessee shall appoint and pay the fee of one each, and the two so appointed shall appoint the third. The fee for the third arbitrator shall be bourne equally by Lessor and Lessee. The award shall be by unanimous decision of the arbitrators and shall be final.[368]

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[364]9 U.S.C. § 1.

[365]460 U.S. 1 (1983).

[366]*Id.* at 24.

[367]*Id.* at 26, n.34.

[368]Def. Ex. 64.

There is no any ambiguity in this language. If the Lessors, the Parkers and the Shafers, and the Lessee, Columbia Natural Resources, Inc., had a "disagreement concerning the lease" or "performance thereunder," they agreed on June 20, 1990, that they would settle such disagreement by "arbitration." Under this lease, the Parkers and the Shafers got a one-eighth royalty and free gas, and they negotiated the deletion of "extension of term" and "conversion to storage" provisions.[369] They also negotiated a custom provision which stated, "Lessee will not assign this lease, other than working interests in wells, except with the permission of the Lessor, P. Clyde Parker."[370] This was hardly a contract of adhesion; rather, it was clearly the product of arms-length negotiations at the conclusion of which both sides compromised their positions. The Parkers and the Shafers certainly could have refused to sign a lease with an arbitration provision, but they did not. In the instant case, however, the trial court brushed aside language in the leases where the parties clearly agreed to arbitrate.

6. The Trial Court Erred by Failing to Award Judgment as a Matter of Law Where There Was No Competent Scientific or Technical Evidence that the "One-Minute Pickup" Test is Not Valid and Reliable.

One of the many items on the Respondents' smorgasbord of claims involved the validity of the "one-minute pickup" test. Some of the wells in this case were un-metered. In order to determine volume for these meters for purposes of payment, a "one-minute pickup" test was used.[371] The Respondents were permitted, despite no legal authority, to argue to the jury that "they [the wells]

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[369] *Id.*

[370] *Id.*

[371] With respect to the "one-minute pickup" test, the Respondents' own expert acknowledged, "Well, it's been around for a long time, from what I understand and the testimony that I have read in this case. What it has to do with, that you have a flowing well, and you shut the well in and measure the pressure. And then you wait a certain period of time and you measure the pressure again. And then you divide the differential pressure by the minutes and you come up with a number." Tr. at 1004.

should have meters."[372] Alternatively, without any competent scientific or technical evidence, the Respondents argued that the "one-minute pickup" test was invalid.[373] But, as recently reiterated by this Court, "[s]tatements made by lawyers do not constitute evidence in a case,"[374] and "self-serving assertions without factual support in the record will not defeat a motion for summary judgment."[375] Where a scientific issue is involved, the standard of proof is a "reasonable degree of scientific certainty."[376] Any proof less than to a "reasonable degree of scientific certainty," such as the invalidity of a scientific test for the measurement of gas flow, is inadequate as a matter of law.

7. The Trial Court Erred by Failing to Enter Judgment as a Matter of Law on the Correction Factor.

One of the issues at trial involved a mathematical calculation of the volume of production from un-metered wells. Where both metered and un-metered wells feed gas to a metered pipeline, a procedure has to be employed to ascertain how much gas came from each un-metered well. By subtracting the volumes from the metered wells, a number remains that represents the collective production from the un-metered wells feeding the pipeline. For decades, the volume among these un-metered wells has been calculated by measuring the volume at each un-metered well through the use of the one-minute pickup test. In order to adjust for differences in the well bore space among

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[372]Un. Tr. at 42.

[373]Indeed, the Respondents' own expert conceded its validity: "Well, I think that it is not as accurate as I would like to see a measurement, but if it's the only thing you've got, it's the only thing you've got." Tr. at 1047.

[374]*Barbina v. Curry*, 2007 WL 506154 (2007) (*quoting West Virginia Fire & Cas. Co. v. Mathews*, 209 W. Va. 107, 112 n. 5, 543 S.E.2d 664, 669 n. 5 (2001)).

[375]*Id.* (*quoting Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61 n. 14, 459 S.E.2d 329, 338 n. 14 (1995)).

[376]*See, e.g., Bower v. Westinghouse Electric Corp.*, 206 W. Va. 133, 140, 522 S.E.2d 424, 431 (1999)(a plaintiff must show that "medical monitoring is, to a reasonable degree of medical certainty, necessary in order to diagnose properly the warning signs of disease")(emphasis supplied).

those un-metered wells, a correction factor is applied. In order to calculate the correction factor, data from field test wells are compared with the data from the un-metered wells to adjust for degradation of the un-metered wells. The Respondents' own expert admitted that the correction factor, which the Respondents' attorneys were permitted to argue to the jury was the same thing as line loss, was scientifically based.[377] There was no competent expert testimony to refute evidence that the correction factor was scientifically-based. Indeed, as is readily apparent from the Respondents' expert's own testimony: (1) he lacked the expertise to offer any qualified opinion regarding its validity and (2) he never refuted its accuracy to a reasonable degree of certainty.

8. The Trial Court Erred by Failing to Exclude the Testimony of the Respondents' Expert, Julia Bodamer, Whose Opinions Were Not Offered to the Requisite Reasonable Degree of Certainty.

Julia Bodamer was permitted to offer financial testimony despite the fact that she is neither an accountant nor an economist nor a financial analyst.[378] She admitted that she is not an expert in the established standards in the accounting industry.[379] When she was employed in the gas industry, other persons served as chief financial officer.[380] She had no experience in complying with SEC regulations, gas sales, forward gas sales, or calculating royalties.[381] More importantly, none of Ms. Bodamer's testimony was offered to a reasonable degree of professional certainty. Thus, at its conclusion, the Petitioners moved to strike her opinions as not having been offered to the requisite

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[377]Tr. at 1047 ("And then the volume factor is a number that takes those other two numbers and creates a volume for the month. And that number, from what I understand and what I read in depositions and testimony is that that number has been used by CNR for many years. It has to do with the depth of the well. It has to do with the size of the tubing. It has some scientific background to it. I don't know what that is, but I know that it has some scientific background to it.").

[378]Tr. at 1593.

[379]Tr. at 1593.

[380]Tr. at 1594.

[381]Tr. at 1596, 1652-53.

degree of certainty.[382] The Respondents did not dispute that Ms. Bodamer's opinions were not offered to a reasonable degree of professional certainty. Rather, in response to the trial court's question, "What about Mrs. Bodamer?," the Respondents stated as follows:

> Ms. Bodamer testified that everything – let me sort of take the Court through this.
>
> Each of the Defendants' witnesses testified that the databases that they provided to the Plaintiffs were true and accurate and that you cold take those and add up the deductions, et cetera, et cetera, right off of it.
>
> Ms. Bodamer testified what she did was take those databases and compute them and that she computed them accurately.
>
> That's one hundred percent. That's not to a reasonable degree of front [sic]. She's not offering opinions about it. She did computations, based upon her ability to do that. It's not an opinion. It's at [sic] fact that she did those calculations. That's what it came to.[383]

Of course, Ms. Bodamer testified to much more than mere computations, including gas measurement issues, the correction factor, and the prudence of the Mahonia transactions. Where Respondents' witness was allowed to give expert opinions, the failure of the witness to offer such opinions to a reasonable degree of certainty was fatal to her testimony.[384]

9. The Trial Court Erred by Failing to Enter Judgment Against the Large Landowners When No Class Representative Was Appointed.

On January 7, 2006, the trial court entered an order stating:

> it is hereby ORDERED that there is hereby created a subclass of the class heretofore certified and that the subclass shall be known as "The Large Landowner/Negotiated Lease Subclass."

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[382]Unoff Tr. at 3031.

[383]Tr. at 3051-52.

[384]See, e.g., *Perdomo v. Stephens*, 197 W. Va. 552, 556, 476 S.E.2d 223, 227 (1996)("Despite the appellant's best efforts, her treating dentist and chiropractor failed to provide testimony that her dental and lower back injuries were permanent to a reasonable degree of medical certainty.").

The order further appointed class counsel for the subclass and directed that "a list of lessors and leases designated for inclusion in the subclass" be submitted to the trial court. Despite the fact that a subclass was created, however, the Respondents simply failed to have a representative appointed.

The failure of the Respondents to secure appointment of a subclass representative is fatal to their class action with respect to the claims of that subclass. In *Roby v. St. Louis Southwestern Ry. Co.*,[385] for example, the Eighth Circuit affirmed decertification of a class because the plaintiffs violated the rule that "[a] fundamental requirement of representatives in a class action is that they must be members of the subclasses they seek to represent."[386] Indeed, in *State ex rel. Chemtall, Inc. v. Madden*,[387] this Court noted, "'[a] final prerequisite to certification of any subclass is a finding that the subclass representative is a member of the subclass that he seeks to represent.'"

10. The Trial Court Erred by Failing to Enter Judgment as a Matter of Law De-Certifying the Class.

Both prior to trial and at the close of all of the evidence, the Petitioners moved to decertify the class because of the failure of the Respondents, after the development of all of the evidence, to satisfy the requirements for the maintenance of a class action. Each of the four leases ultimately admitted as evidence were widely divergent in their terms.

Defendants' Exhibit No. 58 is a lease executed on September 3, 1912.[388] This lease provides for the "Lessee to deliver to Lessor in tanks or pipe line a royalty of one-eighth (1/8) of all oil produced and saved from the premises, and to pay for each gas well while the gas is sold therefrom

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[385]775 F.2d 959 (8th Cir. 1985).

[386]*Id.* at 961 (citations omitted).

[387]216 W. Va. 443, 456, 607 S.E.2d 772, 785 (2004)(*quoting Burka v. New York City Transit Authority*, 110 F.R.D. 595, 601 (S.D.N.Y. 1986)(citation omitted).

[388]Def. Ex. No. 58.

the sum of Seventy-Five Dollars ($75.00) each three months." The lease also provides, "Lessee shall be entitled to gas free of cost for heat and light for one dwelling on said premises . . . ." The lease further provides, "Lessee agrees to drill a well on said premises by March 13 - 1913 . . . ." Finally, the parties to this lease agreed, "This grant and demise, with all of its terms and conditions shall extend to and bind their respective heirs, executors, administrators, successors and assigns of the parties hereto." Although the lease was a form lease, it is apparent on its face that the parties negotiated a number of different terms that appeared on the form, including the duration of the initial lease term and when drilling would take place.

Defendants' Exhibit No. 61 is a lease executed on June 18, 1923.[389] The lease provides for the "Lessee . . . [t]o deliver to the credit of the Lessor . . . a royalty of the equal of one-eighth (1/8) part of all oil produced and saved from the leased premises; and . . . a royalty of Seventy-Five Dollars ($75.00) each there [sic] months in advance from each and every gas well drilled on said premises . . . ." The lease further provides, "The said Lessee covenants and agrees to pay a rental at a rate of Two Hundred and Twenty-Five ($225.00) Dollars, quarterly in advance, beginning May 20, 1924, until but not after a well yielding royalty to the Lessor is drilled . . . ." The lease also provides, "Lessor may lay a line to any gas well on said land and take gas produced from said well for their own use for heat and light in one dwelling house . . . ." Finally, the lease provides, "All terms, conditions, limitations and covenants between the parties hereto shall extend to their respective heirs, successors, personal representatives, and assigns." Again, although the lease was a form lease, it is apparent on its face that the parties negotiated some of its terms through insertion and strikethrough.

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[389]Def. Ex. No. 61.

Defendants' Exhibit No. 63 is a lease executed on October 27, 1989.[390] The lease provides:

> Lessee covenants to pay Lessor . . . less all taxes, assessments and adjustments on all production associated with the Leasehold, as follows: . . . (2) GAS: To pay Lessor an amount to one-eighth of the price, net all costs beyond the wellhead, received by the Lessee for all gas . . . produced and marketed from the Leasehold during the preceding month. The time and method of marketing shall be within the sole discretion of the Lessee . . . .

The lease further provides, "In the event that Lessee does not market producible gas . . . Lessee shall pay DELAY RENTAL until such time as gas is marketed." The lease also provides, "In the event that Lessor and Lessee are in disagreement concerning the lease, performance thereunder . . . a settlement shall be determined by a panel of three disinterested arbitrators." The lease states, "Once a well, capable of producing natural gas in commercial quantities, is physically located on the leasehold, one person or family . . . is thereafter eligible for free gas service as hereafter provided . . . ." Like the other two leases, it was a form lease, but contained a number of negotiated changes including deletion of conversion to storage, unitization, and storage rental provisions, as well as a hand-written provision stating, "Lessor excepts and reserves all oil and gas to a depth of 2,200 feet, with all necessary rights to lease and/or produce same."

Defendants' Exhibit No. 64 is a lease executed on June 20, 1990.[391] Although most of its provisions are the same as Defendants' Exhibit No. 63, the parties negotiated the deletion of a different provision, governing extensions of the term of the lease and storage rental, and left in place the provision deleted from Defendants' Exhibit 63, governing unitization. The parties also negotiated a different delay rental formula, and the lessors, unlike the lessors in Defendants' Exhibit No. 63, reserved none of the oil and gas to themselves, to any depth, but did negotiate a provision which

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[390]Def. Ex. No. 63.

[391]Def. Ex. No. 64.

states, "Lessee will not assign this lease, other than working interests in wells, except with the written provision of the Lessor, P. Clyde Parker."

No large landowner leases were admitted into evidence. Many of those leases contained individually negotiated terms and conditions. The terms of those and the other leases that were produced in the discovery and are in the record vary considerably.

I. THE TRIAL COURT ERRED IN VARIOUS EVIDENTIARY RULINGS.

1. The Trial Court Erred by Allowing the Respondents to Present Evidence Regarding the Indemnification Agreement.

Following the initiation of this lawsuit, CEG sold CNR to Triana Energy Holdings, Inc. with CEG as the indemnitor and NiSource as the guarantor. As part of the sale, CEG agreed to undertake certain indemnification obligations, including for a significant portion of the claims made in this lawsuit. The Respondents continued to suggest throughout litigation that inclusion of the indemnification provision in the Stock Purchase Agreement somehow amounted to an admission of wrongdoing as to underpayment of gas royalties as well as joint venture.

Evidence of indemnification should have been excluded under R. Evid. 401 because it had no relevance to the determination of whether the Respondents were underpaid for their gas royalties or whether the Petitioners were engaged in a joint venture. It merely involved the issue of who, as between CEG, the seller of Columbia Energy Resources, and Triana, the buyer, would incur the liability and financial responsibility for any royalty underpayments in the event of an eventual determination that royalties had been underpaid (a claim which Petitioners always disputed). Accordingly, evidence of an indemnification provision in a stock purchase agreement should have

been excluded under R. Evid. 403 because it is not an admission of liability[392] or evidence of joint venture[393] and, thus, had no probative value and served only to unfairly prejudice the Petitioners, confuse the issues, and mislead the jury into presuming fault or joint liability.

Although the trial court initially granted the Petitioners' motion to prohibit evidence of the indemnification agreement,[394] the trial court changed its mind on grounds that it was admissible on the issue of the credibility of NiSource CFO, Mike O'Donnell, because his employer had a stake in the outcome of the case.[395] Although credibility of witnesses was clearly not the purpose such evidence was being offered by Respondents, the trial court allowed the Respondents to presume fault and joint liability in questions to Mr. O'Donnell about the indemnification agreement.[396] The questions called for a legal conclusion for which Mr. O'Donnell was not qualified and should not have been asked, as a fact witness, to give. The trial court compounded the error with a limiting instruction that

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[392]See, e.g., *First Virginia Bank-Colonial v. Baker*, 301 S.E.2d 8, 11 (Va. 1983) ("Typically, a contract of indemnity is a bilateral agreement between an indemnitor and an indemnitee in which the indemnitor promises to reimburse his indemnitee for loss suffered or to save him harmless from liability. But the indemnitor makes no promise to perform the obligation undertaken by his indemnitee. And, although a stranger to the contract may have some consequential interest in the subject matter of the indemnity, he is not in privity with the indemnitor and has no standing to sue directly on the contract. See *generally* 41 AM. JUR. 2D *Indemnity* § 41 (1968).");*Oakes v. Monongahela Power Co.*, 158 W. Va. 18, 207 S.E.2d 191 (1974)(issue of whether injury was caused by act or omission of indemnitor must be properly adjudicated before liability can be imposed under indemnification agreement).

[393]See *Armor v. Lantz*, 207 W. Va. 672, 535 S.E.2d 737, 743-44 (2000) ("Our most recent cases have concentrated primarily upon the presence or absence of an agreement to share in the profits and losses of an enterprise."); see also *State ex rel. Copley v. Carey*, 141 W. Va. 540, 549, 91 S.E.2d 461, 467 (1956) ("There is a vital distinction between a contract of suretyship and a contract of indemnity. In a contract of suretyship the obligation of the principal and his surety is original, primary and direct and the surety is liable for the debt, default or miscarriage of his principal. A contract of indemnity is likewise an original undertaking and creates a primary obligation, but the promise of the indemnitor, in a contract of indemnity against loss sustained by the person indemnified, is not to answer for the debt, default or miscarriage of another person but is to make good the loss which results to the person indemnified from such debt, default, or miscarriage.").

[394]Tr. at 337.

[395]Tr. at 383-89.

[396]Tr. 545-56.

states, "Lessee will not assign this lease, other than working interests in wells, except with the written provision of the Lessor, P. Clyde Parker."

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Although the trial court initially granted the Petitioners' motion to prohibit evidence of the indemnification agreement,[394] the trial court changed its mind on grounds that it was admissible on the issue of the credibility of NiSource CFO, Mike O'Donnell, because his employer had a stake in the outcome of the case.[395] Although credibility of witnesses was clearly not the purpose such evidence was being offered by Respondents, the trial court allowed the Respondents to presume fault and joint liability in questions to Mr. O'Donnell about the indemnification agreement.[396] The questions called for a legal conclusion for which Mr. O'Donnell was not qualified and should not have been asked, as a fact witness, to give. The trial court compounded the error with a limiting instruction that

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[392]See, e.g., *First Virginia Bank-Colonial v. Baker*, 301 S.E.2d 8, 11 (Va. 1983) ("Typically, a contract of indemnity is a bilateral agreement between an indemnitor and an indemnitee in which the indemnitor promises to reimburse his indemnitee for loss suffered or to save him harmless from liability. But the indemnitor makes no promise to perform the obligation undertaken by his indemnitee. And, although a stranger to the contract may have some consequential interest in the subject matter of the indemnity, he is not in privity with the indemnitor and has no standing to sue directly on the contract. See *generally* 41 AM. JUR. 2D *Indemnity* § 41 (1968).");*Oakes v. Monongahela Power Co.*, 158 W. Va. 18, 207 S.E.2d 191 (1974)(issue of whether injury was caused by act or omission of indemnitor must be properly adjudicated before liability can be imposed under indemnification agreement).

[393]See *Armor v. Lantz*, 207 W. Va. 672, 535 S.E.2d 737, 743-44 (2000) ("Our most recent cases have concentrated primarily upon the presence or absence of an agreement to share in the profits and losses of an enterprise."); *see also State ex rel. Copley v. Carey*, 141 W. Va. 540, 549, 91 S.E.2d 461, 467 (1956) ("There is a vital distinction between a contract of suretyship and a contract of indemnity. In a contract of suretyship the obligation of the principal and his surety is original, primary and direct and the surety is liable for the debt, default or miscarriage of his principal. A contract of indemnity is likewise an original undertaking and creates a primary obligation, but the promise of the indemnitor, in a contract of indemnity against loss sustained by the person indemnified, is not to answer for the debt, default or miscarriage of another person but is to make good the loss which results to the person indemnified from such debt, default, or miscarriage.").

[394]Tr. at 337.

[395]Tr. at 383-89.

[396]Tr. 545-56.

not only failed to explain to the jury that indemnification agreements are in no way admissions of liability or evidence of joint liability[397] but repeated and reinforced the Respondents' legally unsupportable presumption of fault and joint liability as well as suggested that Mr. O'Donnell's credibility was somehow affected.[398] Thereafter, the Petitioners were severely prejudiced when Respondents were allowed to read the indemnity language to the jury and interrogate witnesses, including Henry Harmon,[399] Charles Hollands,[400] and Stephen Warnick,[401] intimating that such language was an admission of joint liability.

2. The Trial Court Erred by Refusing to Exclude Testimony by Respondents' Expert, Julia Bodamer, Regarding Gas Measurement Issues When She Admitted That She Had No Education or Experience Regarding Such Issues.

The trial court allowed Julia Bodamer to testify as an expert witness on damages based upon her opinion that "correction factors" were improperly used by CNR to estimate gas volumes for unmetered wells. Ms. Bodamer's education and experience did not give her any specialized knowledge with regard to accounting, gas sales, gas pricing, calculation of royalties or damages, or

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[397]*See, e.g., Lacy v. CSX Transp. Inc.*, 205 W. Va. 630, 642-43, 520 S.E.2d 418, 430-31 (1999) ("To inform the jury about the potential effects of joint and several liability without otherwise misleading it, trial courts could conceivably be required to instruct and/or permit evidence on such complex and often proscribed subjects as contribution, indemnity, bankruptcy, the effect of statutory and common-law immunities, the extent of defendants' financial resources, and the existence of insurance coverage--just to name a few. Our discussion in *Riggle v. Allied Chem. Corp.*, 180 W. Va. 561, 378 S.E.2d 282 (1989), illustrates the potentially unwieldy consequences that might flow from . . . instruction on the post-judgment effects of a jury's findings. . . . In concluding that the trial court did not abuse its discretion in refusing to instruct on the [existence and effect of the] indemnity agreement, the Court in *Riggle* stated that '[t]he problem with instructing the jury on the indemnity agreement ... is that such an instruction would have been misleading without also instructing the jury on the settlement agreement and the insurance coverage of appellant. Comment to a jury concerning a party's insurance coverage usually constitutes reversible error.' [*Riggle*, 180 W. Va. at 568, 378 S.E.2d at 289] (citation omitted).").

[398]Tr. at 547.

[399]Tr. at 565.

[400]Tr. at 2014-15.

[401]Tr. at 2455-56.

gas measurement issues, including the propriety of one-minute pickup tests which are performed on unmetered wells or the use of a "correction factor" to assist CNR in determining the volume of gas produced from unmetered wells.[402] Based on Bodamer's own testimony, she had no education, knowledge, or experience that qualified her to render an expert opinion regarding gas measurement issues or to calculate damages.[403] Indeed, Ms. Bodamer admitted that she was not a gas measurement expert and that in the only other cases in which she had testified, determinations regarding gas measurements were left to "experts."[404] Her experience in the oil and gas industry was essentially customer service for those who shipped gas to her employers.[405] In its Order dated January 25, 2007, the trial court found "that Ms. Bodamer is not qualified by education, training or experience to testify about engineering and scientific matters, including the one-minute pickup test and its corresponding correction factor used by the defendant Columbia Natural Resources, LLC," but that "Ms. Bodamer may testify to her calculation of damages based on the one-minute pickup test, relying on the testimony of expert witness petroleum engineer Daniel Reineke." As addressed

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[402]Plaintiffs' Expert Witness Disclosures dated April 18, 2005. According to Bodamer's curriculum vitae, she has an associate degree in legal studies from Marshall University and a business and finance degree from the London College of Business in London, England.

[403]Bodamer admitted in her deposition that she has had no university training on gas measurement or operations; rather, Bodamer was relying solely on her experience working at Columbia Gas Transmission Corporation ("TCO") and the "concentrated one and two and three-day programs" TCO held for employees to acquaint them "generally" with gas measurement issues. [Bodamer Depo. at 25-26]. Bodamer has worked in the oil and gas industry for a number of years, including for several years at TCO, where she answered customer questions regarding gas volumes. [*Id.* at 47-49]. Bodamer admitted she had no scientific basis for her opinion regarding the reliability of applying a "correction factor" when determining the volumes upon which royalty owners should be paid for unmetered wells. [*Id.* at 93]. Bodamer admitted that her full understanding of how a one-minute pickup test is conducted was gleaned from reading the deposition transcript of another witness, Charlotte Cullifer, and that she had never herself seen a one-minute pickup test performed. [*Id.* at 122]. Bodamer further admitted she had no scientific basis or experience with regard to the propriety or reliability of applying the correction factor to determine the production volumes of unmetered wells. [*Id.* at 113-14].

[404]Bodamer Depo. at 66, 90.

[405]Tr. at 1718-19.

elsewhere in this petition, however, Mr. Reineke merely testified that "I personally do not believe that [the one-minute pickup test] is an accurate way to measure the amount of gas that is being produced from [an unmetered] well."[406] Mr. Reineke could not refute that the one-minute pickup test and correction factor, which have been used for decades to calculate the volume of gas and adjust for degradation of un-metered wells, are scientifically based nor offer any scientific analysis of why they were not applied in a correct manner in this case.[407] Accordingly, the trial court should have excluded Ms. Bodamer's testimony as an expert.

3. The Trial Court Erred by Allowing Respondents' Expert, Julia Bodamer, to Testify Regarding the Prudence of the Mahonia Transactions When She Was Not Qualified to Offer Such Opinions and Had Not Been Disclosed as an Expert Witness Regarding Such Matter.

The trial court allowed Ms. Bodamer to testify as an expert witness on damages based upon her opinion, never disclosed before trial,[408] that royalty payments should have been calculated at market price available rather than the Mahonia contract price.[409] Not only was Ms. Bodamer not qualified to render any opinion regarding accounting, gas sales, gas pricing, calculation of royalties or damages, or gas measurement issues, the error was compounded by unfair and prejudicial surprise when the trial court allowed Ms. Bodamer to testify on the prudence of the Mahonia transaction,[410]

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[406]Tr. at 1004.

[407]Tr. at 1047 ("Q. But there is a scientific basis to do a minute test, and if you don't have a meter, that's an okay way to account for it? A. Well, I think it is not as accurate as I would like to see a measurement, but if it's the only thing you've got, it's the only thing you've got."); Tr. at 1047 ("And then the volume factor is a number that takes those other two numbers and creates a volume for the month. And that number, from what I understand and what I read in depositions and testimony is that that number has been used by CNR for many years. It has to do with the depth of the well. It has to do with the size of the tubing. It has some scientific background to it. I don't know what that is, but I know that it has some scientific background to it.").

[408]See Plaintiffs' Expert Witness Disclosures dated April 18, 2005.

[409]Tr. at 1648-51.

[410]Tr. at 1643.

for which she was never disclosed as an expert before trial. In *Graham v. Wallace*,[411] this Court reversed and remanded a case for a new trial because the plaintiff failed to fully disclose the substance of his expert witness's expected testimony prior to trial. Likewise, in this case, it was error for the trial court to ignore the Petitioners' objection on January 19, 2007, to Ms. Bodamer's testimony on the prudence of the Mahonia transaction,[412] especially since the trial court ruled by Order dated January 26, 2007, that "Ms. Bodamer is not qualified by education, training or experience to express an opinion as to whether the Mahonia transactions at issue in this case constituted sales or loans."

4. The Trial Court Erred by Allowing the Respondents to Question Mr. O'Donnell Regarding Whether CNR Had a Duty to Communicate the Aspects of Gas Sales to Royalty Owners, But Not Allowing Mr. O'Donnell and Other Defense Witnesses to Give Their Interpretations of the Language of the Subject Leases.

On the fourth day of trial, January 11, 2007, the trial court erred by overruling the Petitioners' objection to a question to Michael O'Donnell regarding whether CNR had a duty to communicate the aspects of gas sales to royalty owners[413] as calling for a legal conclusion,[414]

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[411]214 W. Va. 178, 588 S.E.2d 167 (2003).

[412]Tr. at 1643. It appears from the transcript that the Court never made a ruling on the Petitioners' objection.

[413]Tr. at 491-92 ("Q. Okay. The other thing that you said in answer to Mr. Lawrence's question was that the operator -- I thought you said the operator does have a duty to communicate with the royalty owners, not NiSource or CEG, correct? I thought that's what I understood you to say. A. I don't recall saying that. Q. You do agree with that, though? MR. MILLER: Objection, Your Honor. Calls for a legal conclusion. MR. MASTERS: I'm not talking about -- I'm talking about his understanding of the practices that he has already, I thought, testified to here. THE COURT: You're saying a duty under his company policy? MR. MASTERS: Yes, his policies, his procedures. THE COURT: I'll allow it. Do you understand the question? THE WITNESS: I think I understand the question, but I'm struggling with it a little bit because it's a little bit removed from my area, direct area of responsibility.... Q. You just don't know whether there's a duty, on behalf of the operator, to communicate to the royalty owners what they're doing with the gas? A. That's not what I'm trying to communicate. In response to your question, I'm trying to communicate that I'm in the finance area day to day. That's what I do. I don't work in the royalty owner relations area day to day. So I don't know what the practices are in terms of disclosure, how much information is shared and how. It's not my area of expertise.

especially since the trial court refused, on the same basis, to allow the Petitioners to admit the various leases into evidence until the very end of trial, when it was too late to show the leases to any witnesses or to cross-examine the Respondents' witnesses on such leases. There was no legal basis for the Respondents to infer that CNR had any duty to tell royalty owners about any gas sales contracts with third parties, let alone the Mahonia transactions. Moreover, whether CNR had any such duty was a legal issue upon which Mr. O'Donnell could not and should not have been asked to opine.

5. The Trial Court Erred by Allowing the Respondents to Question Mr. Jones Regarding His Opinions Concerning FERC Reports and Market Publications on Prices When He Was Not Identified as an Expert, and Was Offering Legal Opinions, Particularly When Defense Witnesses Were Precluded from Giving Their Interpretations of Lease Language.

On the sixth day of trial, the trial court erred by overruling the Petitioners' objection to a question to Orton Jones regarding an opinion in a letter he wrote on his mother's behalf that her royalty payments were consistently substantially below the market price for gas as reflected in FERC reports and market publications on prices[415] as calling for a legal conclusion, especially since the trial

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So I'm reluctant to answer that question on that basis.").

[414] *Jackson v. State Farm Mut. Auto Ins.* Co., 215 W. Va. 634, 644, 600 S.E.2d 346 (2004)("testimony on the applicable law does not assist the jury in determining a *fact* in issue nor does it assist the jury in understanding the evidence.").

[415] Tr. 835-38 ("Q. Now, this letter is written to James Abcouwer, CEO of CNR; is that correct? A. Yes. Q. And if we can look at the first paragraph here. I am the attorney in fact for my mother, Myrtle Jones, who is a lessor of the above-referenced lease. And then goes on to describe the leases. Is that correct? A. Yes. Q. And then in the next paragraph, you state, I notice that the royalty payments made to my mother from this well are consistently substantially below the market price for gas as reflected in the FERC report and other market publications recognized in the industry, notwithstanding CNR sells this gas to a corporate affiliated purchaser, giving rise to a greater fiduciary obligation to royalty owners to realize the highest and best price reasonably attainable. Who advised you about the FERC report and the market publications? A. Well – MR. BEESON: Objection, Your Honor. MR. CAREY: It's not being offered for the truth of the matter asserted. It's being offered to show why he included it in the document. THE COURT: Overruled. A. First of all, I have never read a FERC report, but I believe it was George Scott who told me about that. And I did -- I was generally aware that there are publications from which the market price is determined as it changes from time to time. I also had friends who would -- I think about this time, and it's been back there, what, five, six years ago, but they would meet for coffee on Saturday mornings and shoot the breeze at McDonalds. I got in the habit of walking up there for exercise on Saturday, and they would

court refused, on the same basis, to allow the Petitioners to admit the various leases into evidence until the very end of trial, when it was too late to show the leases to any witnesses as well or to cross-examine the Respondents' witnesses on such leases.[416] The witness admitted that his opinion was not the result of his own independent investigation or analysis, but rather a product of Saturday morning discussions at McDonald's with counsel.[417] Moreover, not only was Mr. Jones never disclosed as an expert witness and not qualified to render any opinion regarding FERC reports and market publications on prices, the trial court erred by allowing Mr. Jones to testify to opinions for which he was never disclosed as an expert before trial.[418]

6. The Trial Court Erred by Admitting Respondents' Exhibit No. 468 Over the Petitioners' Objections.

It was error for the trial court not to sustain the Petitioners' objection on January 19, 2007, to Plaintiffs' Exhibit No. 468, the business code of ethics for NiSource, because it had no relevance under R. Evid. 401 and 402 as to the manner in which deductions and royalties were calculated or

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talk about the price of gas and what it was doing. And all of that, whether that was before or after -- but nonetheless, I got this thing about the FERC report, I think, from Mr. Scott. In any event, I did feel I should cite that here to give myself some -- so it would be known that I sort of knew what I was asking about. But I did know generally, just from those indirect things, that price was considerably more on the market than what I was seeing on these check stubs.").

[416] *Jackson v. State Farm Mut. Auto Ins.* Co., 215 W. Va. 634, 643, 600 S.E.2d 346 (2004)("an expert may not testify as to such questions of law as the interpretation of a statute . . . or case law . . . or the meaning of terms in a statute . . . or the legality of conduct."); *Id.* at 644 ("testimony on the applicable law does not assist the jury in determining a *fact* in issue nor does it assist the jury in understanding the evidence.").

[417] R. Evid. 701 (a witness must be "qualified as an expert by knowledge, skill, experience, training, or education . . . ."); *id.* (Otherwise, a lay witness may only give opinions or inferences which are "(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.").

[418] *Graham v. Wallace*, 214 W. Va. 178, 588 S.E.2d 167 (2003) (reversing and remanding case for new trial because plaintiff failed to fully disclose substance of his expert witness's expected testimony prior to trial).

the decision to enter into long-term sales contracts at a fixed price.[419] And it was prejudicial, confusing, misleading, and inflammatory under R. Evid. 403 because it was merely another one of Respondents' blatant attempts to suggest to the jury, without any factual or legal basis, that the Petitioners had somehow engaged in unethical business deals.

7. The Trial Court Erred by Allowing the Respondents to Question Mr. Grossman Regarding Severance Payments and Golden Parachutes of Executives as Either Irrelevant or More Prejudicial Than Probative.

On the eleventh day of trial, January 23, 2003, the trial court overruled the Petitioners' objection to questions to Jeff Grossman relating to the severance payments and golden parachutes of executives as irrelevant,[420] after which Respondents' counsel proceeded to ask the witness about specific amounts various executives received under employment, change-of-control, or severance

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[419]The Court never made a specific ruling on the Petitioners' objection to Exhibit No, 468. See Tr. at 1640-42 ("MR. LAWRENCE: . . . That would leave 468, the code of ethics, as one on which we do not -- we object to introduction of the code of ethics. . . . THE COURT: Okay. What other than 468? MR. LAWRENCE: There are two of them that we did not show as being tendered, 25 and 31. MR. CAREY: We're not tendering those. MR. LAWRENCE: That would leave 468, Your Honor . . . . But other than that, the other exhibits that were identified, with the exception of 468, Defendants have no objection to the admission. THE COURT: Well, when you get it all straightened out, we'll have this hearing. I thought it was straightened out. It's obviously not. MR. LAWRENCE: Sorry, Your Honor. I recognize it is complicated. THE COURT: Well, it's not straightened out either. You don't know what the exhibit is, No. 173-A and 174-A, you don't know what it is. You can't speak to it. So when you do, we'll come back to it. MR. MASTERS: The rest of them are coming in? THE COURT: Yes. The rest will be admitted without objection, with the understanding that 25 and 31 are withdrawn. MR. MASTERS: Correct, Your Honor. THE COURT: Okay.").

[420]Tr. at 2177-78 ("Q. Once again, it says, at the top here, In interest of officers and directors in mergers, in consideration of recommendations of NiSource's board, you should be aware that the officers -- once again, this is just one of these disclosures that's saying to the public, to the shareholders that you should be aware of our position in terms of the fact that we're recommending this deal? A. Correct. Q. It then goes on to say, as part of this disclosure, stock options, all of the executive officers and key employees of Columbia and its subsidiaries and Columbia's non-employee directors are eligible to participate in Columbia's 1996 amended and restated long-term incentive plan. And it goes onto explain how the plan works and how you cash out; right? A. Correct. Q. In addition to that, they go on to say, Severance benefits provided under the agreement include the following. And there's a payment equal to two, or some officers, including executives, three times the individual's base salary, a prorated portion of the annual bonus. And they even, if you go down to the bottom here, they even pay their taxes based upon something called Internal Revenue Code Form 999. Am I right about that? MR. LAWRENCE: Your Honor, I'm going to object on the relevance of this. May we approach? THE COURT: Yes. (Bench conference.)"). The Petitioners' objection was overruled at a bench conference which is not in the "unofficial" transcript.

agreements when CEG and NiSource merged in November 2000.[421] The trial court erred and severely prejudiced the Petitioners where such evidence was irrelevant under R. Evid 401 and 402 as to the manner in which deductions and royalties were calculated or the decision to enter into long-term sales contracts. This evidence was also unfairly prejudicial, confusing, misleading, and inflammatory under R. Evid. 403, particularly as it was used by the Respondents to infer that since former executives made sizable profits when CEG and NiSource merged, the Petitioners could "afford" to pay a sizable judgment. It was also a violation of the trial court's Order dated January 12, 2007, that "the plaintiffs, by agreement, shall not introduce any evidence of the current financial position of any defendant, until such time as the court has heard all the evidence, the plaintiff and defendant have rested, rebuttal is completed, and the Court has had the opportunity to rule upon Defendants' motion for directed verdict on the issue of punitive damages."

8. The Trial Court Erred by Precluding the Petitioners from Examining Mr. O'Brien as to the Practices of the Public Service Commission.

On the fourteenth day of trial, January 26, 2007, the trial court erred by sustaining the Respondents' objection to a question to John O'Brien about the position taken with respect to forward gas sales at a fixed price by the West Virginia Public Service Commission as irrelevant.[422] If it was

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[421]Tr. at 2178-89.

[422]Tr. at 2899-2900 ("Q. . . . Yesterday we spoke quite a bit about hedging. One thing I was wondering is whether in your work you found whether the West Virginia Public Service Commission has taken any position with respect to the subject of hedging by gas companies? MR. CAREY: Your Honor, may we approach? I can state my objection. THE COURT: State your identification [sic]. MR. CAREY: The anticipated testimony goes to about whether the Public Service Commission in reviewing and approving rates for local distribution companies like Mountaineer Gas can engage in hedging to protect the price for the end users. That is not relevant to whether the duties of the producer to its royalty owners is reasonable and the way they handled it is reasonable and prudent. THE COURT: Why wasn't the same objection made yesterday. MR. CAREY: Because he went through it real quickly and brought it out, the details of it I think are inappropriate at this point. THE COURT: If that is the purported testimony, I believe this I believe the objection is well taken and should be sustained.").

appropriate for the trial court to instruct the jury, at the beginning of trial, that the Petitioners had been violating a statute's public policy for more than twenty years, the Petitioners should have been able to present evidence of State regulatory policy to refute the Respondents' erroneous contention that forward gas sales were improper.

9. The Trial Court Erred by Allowing the Respondents to Question Mr. O'Brien on the Duty to Communicate to Royalty Owners Which Called for a Legal Conclusion, Were Beyond Matters as to Which Mr. O'Brien Had Been Called to Testify as an Expert on Natural Gas Marketing, Sales Practices, and Pricing, and Exceeded the Scope of Direct Examination.

The trial court erred by overruling the Petitioners' objection to questions to John O'Brien on the accuracy of communications to royalty owners[423] as a legal conclusion,[424] even after Mr. O'Brien testified that he was not familiar with the duties of communication to royalty owners in West Virginia. Thereafter, the trial court itself recognized that Respondents' counsel's questions were calling for a legal conclusion, were beyond matters the witness had been called to testify as an expert on natural gas marketing, sales practices, and pricing, and exceeded the scope of direct examination and yet still allowed the Respondents to keep asking such questions because Mr. O'Brien had testified that

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[423]Tr. 2919-20 ("Q. And you would agree, do you not, that if a producer chooses to communicate with its royalty owners that it should do it in an honest and forthright manner? A. I can't testify to that because I am not familiar with the duties, in this state, and I believe some of them are still unclear, of communication between a lessee and a lessor. Q. Let's take it out of the context of a communication between a lessee and a lessor. If you undertook to communicate with your partners in business, did you not hold it as a standard that if you choose to communicate that you should do so in an honest and forthright manner? That's just a matter of common business ethics, is it not? A. I believe that if there is willful misconduct then may be an issue of a dishonest. However, in my life, and all of us have had plenty of relationships based on trust, so that if my business partner trusts me and I trust my business partner, we don't need to communicate about everything. But there is that standard of honesty and trust that we would maintain. Q. I don't believe you answered my question. My question is, if you choose to communicate, that is, you affirmatively send information to someone whom you have a special relationship with, that you should do so honestly and forthright? MS. PROCTOR: Objection, Your Honor. He's asking for legal conclusions. MR. CAREY: I'm asking for his experience in the industry. THE COURT: Overruled.").

[424]*Jackson v. State Farm Mut. Auto Ins. Co.*, 215 W. Va. 634, 644, 600 S.E.2d 346 (2004)("testimony on the applicable law does not assist the jury in determining a *fact* in issue nor does it assist the jury in understanding the evidence.").

the Mahonia transactions were reasonable and prudent in the natural gas industry.[425] There was no legal basis for the Respondents to infer that CNR had any duty to tell royalty owners about any gas sales contracts, let alone the Mahonia transactions. Whether CNR had any such duty was a legal issue upon which Mr. O'Brien could not and should not have been asked to opine. Nor was the issue relevant as it did not make the assertion that the Mahonia transactions were reasonable and prudent in the natural gas industry any more or less probable. It was simply the same unfairly prejudicial, confusing, misleading, and inflammatory line of questioning that Respondents were allowed to conduct with another witness, Michael O'Donnell, even though it called for a legal conclusion and after Mr. O'Donnell also testified that his area of expertise was financing, not royalty owner relations.[426]

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[425]Tr. at 2923-24 ("MR. MILLER: Your Honor, the witness was not called on any issues related to fraudulent concealment. He had been offered for a very limited purpose and a natural gas marketing and sales practices and pricing. I don't see how – THE COURT: Well, really, purchasing practices. We haven't heard a whole a lot about sales practices by producers. MR. MILLER: The other side of purchase is. THE COURT: Indeed, and his experience and is from the purchasing aspect of it. But he did say the transactions were attributable and prudent, and I'm going to allow it. Narrow it down. Get right to the point. MR. CAREY: I mean, if he answers the question, I'm moving on. THE COURT: Because I didn't make the connection here. MR. CAREY: That's where I was headed. THE COURT: The man testified it was a reasonable and prudent transaction. So I'm going to allow this on cross. Limited. Okay. MR. CAREY: I will move on. MS. PROCTOR: Note our objection.").

[426]Tr. at 491-92 ("Q. Okay. The other thing that you said in answer to Mr. Lawrence's question was that the operator -- I thought you said the operator does have a duty to communicate with the royalty owners, not NiSource or CEG, correct? I thought that's what I understood you to say. A. I don't recall saying that. Q. You do agree with that, though? MR. MILLER: Objection, Your Honor. Calls for a legal conclusion. MR. MASTERS: I'm not talking about -- I'm talking about his understanding of the practices that he has already, I thought, testified to here. THE COURT: You're saying a duty under his company policy? MR. MASTERS: Yes, his policies, his procedures. THE COURT: I'll allow it. Do you understand the question? THE WITNESS: I think I understand the question, but I'm struggling with it a little bit because it's a little bit removed from my area, direct area of responsibility. . . . Q. You just don't know whether there's a duty, on behalf of the operator, to communicate to the royalty owners what they're doing with the gas? A. That's not what I'm trying to communicate. In response to your question, I'm trying to communicate that I'm in the finance area day to day. That's what I do. I don't work in the royalty owner relations area day to day. So I don't know what the practices are in terms of disclosure, how much information is shared and how. It's not my area of expertise. So I'm reluctant to answer that question on that basis.").

J. THE TRIAL COURT ERRED WITH RESPECT TO THE JURY INSTRUCTIONS.

1. The Trial Court Erred by Refusing Defendants' Instruction No. 10, Which Properly Addressed the Issue of "Duty to Disclose."

Defendants' Instruction No. 10 would have instructed the jury:

> In determining whether the Defendants are liable for fraudulent concealment, you must recognize that "mere silence or unwillingness to divulge wrongful activities is not sufficient." Rather, you must first find that the Defendants had a "duty to disclose" deductions for post-production expenses to the Plaintiffs. . . . Further, you are directed that a "duty to disclose" arises only where a fiduciary or confidential relationship exists between the parties. . . .

The trial court rejected this instruction as an "incorrect statement of law" and an "abstract statement of law," but the Petitioners submit that it was a proper statement of law, as indicated by the citations referenced therein, and should have been given to the jury by the trial court.

2. The Trial Court Erred by Refusing Defendants' Instruction No. 11, Which Properly Addressed the "Prudent Operator" Rule.

Defendants' Instruction No. 11 would have instructed the jury:

> A "prudent operator" in relation to a gas lease is a hypothetical operator who does what he ought to do and not what he ought not to do with respect to operations on the leasehold, but the prudent operator standard is not in itself an independent cause of action and is to be applied in conjunction with, and serves to define, other implied covenants. . . . In determining whether the prudent operator standard has been met in this civil action, you must give consideration only to circumstances existing at the time of the incidents giving rise to the Plaintiffs' cause of action without the wisdom of hindsight.

The trial court rejected this rule in favor of the Respondents' "prudent operator" instruction, which for reasons discussed herein was erroneous.

3. The Trial Court Erred by Refusing Defendants' Instruction No. 13, Which Properly Addressed the Issue of the "Covenant of Good Faith and Fair Dealing" Relative to the Mahonia Transactions.

Defendants' Instruction No. 13 would have instructed the jury:

> Plaintiffs allege that CNR breached a duty of good faith and fair dealing owed to the plaintiffs by not obtaining the best price available for their natural gas. The Court instructs the jury that in West Virginia, each party to a contract owes the other an implied duty of good faith and fair dealing. If you find by a preponderance of the evidence that CNR, NiSource, and Columbia Energy Group acted in good faith in entering the Mahonia forward sales, then you should not find them liable where the market prices later increased above the forward sales prices.

Rather than giving this instruction, the trial court gave the Respondents' instruction, which effectively granted judgment against the Petitioners on the Mahonia transactions.

4. The Trial Court Erred by Refusing Defendants' Instruction No. 14, Which Properly Addressed the Issue of Long-Term Sales Contracts.

Defendants' Instruction No. 14 would have instructed the jury:

> The Plaintiffs in this civil action claim that they are entitled to damages arising from the Defendants' actions in entering into long-term gas sales agreements. The Plaintiffs claim that the Defendants acted improperly by negotiating a price for gas that was different from the actual market value of gas throughout the duration of the long-term gas sales contracts. "Market value," for purposes of the long-term sales contracts at issue in this civil action, means "the price assigned in the sales contract so long as the contract was made prudently and in good faith." Therefore, if you find that the Defendants, at the time of entering into long-term gas sales contracts, such as Mahonia, acted prudently and in good faith in negotiating a sales price, you must find in favor of Defendants.

Rather than giving this instruction, however, the trial court gave the Respondents' instruction, which effectively granted judgment on the Mahonia transactions. The Petitioners' instruction would have properly placed the focus on whether there was a violation of the business judgment rule and whether the Mahonia price was reasonably consistent with the market price at the time of the transactions.

5. The Trial Court Erred by Giving Plaintiffs' Instruction No. 13, Which Erroneously Instructed the Jury on the Issue of Alter Ego.

After initially reading a portion of Plaintiffs' Instruction No. 13 to the jury, the trial court realized that it was erroneous:

> <u>There's some mistakes in this. We're really talking about liability. We're not talking about the Court's jurisdiction here. We're talking about the liability of the parent</u>

> corporation, NiSource and Columbia Energy Group, or one or the other. We're talking about the liability of those corporations for the acts – some of the acts, or all of the acts, of CNR, the resident business operating here in West Virginia.[427]

The trial court then proceeded to instruct the jury, not on alter ego, but on personal jurisdiction:

> You are instructed that a parent, NiSource, CEG, subsidiary relationship, the subsidiary being CNR, between corporations, one doing business in this state, does not, without showing of additional factors, subject a non-resident corporations, again the parent corporations, CEG and/or NiSource, to liability for the claims which it is plaintiffs' duty to prove as to CNR.[428]

Of course, for piercing the corporate veil of an alter ego corporation, it is irrelevant whether the parent, the subsidiary, or both are resident or non-resident corporations. The trial court's further instructions, however, continued this resident/non-resident theme:

> The extent of control exercised by the non-resident parent corporation over the subsidiary corporation, doing business in this state's jurisdiction, determines whether the parent non-resident corporation is subject to liability for the claims for relief that you may find have been proven against CNR.[429]

The collective effect of these instructions was to erroneously inform the jury that the question was whether to impose liability on a "non-resident" parent because of the acts of its "West Virginia" subsidiary, as if geographical location had anything to do with the determination of alter ego.

6. The Trial Court Erred by Giving Plaintiffs' Instruction No. B-1 (Revised), Which Effectively Awarded Judgment as a Matter of Law on the Respondents' Mahonia Claims.

The trial court erroneously instructed the jury that, "In some leases that are before the Jury, there are provisions called 'market value,' which provide that royalty is to be based on the market value of the gas. In such leases, the lessee, CNR, is obligated to pay one-eighth of the market value

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[427]Tr. at 46 (Jan. 27, 2007) (emphasis added).

[428]Tr. at 46-47 (Jan. 27, 2007).

[429]Tr. at 47 (Jan. 27, 2007).

of gas existing from time to time."[430] This instruction is incorrect. Lessees are not required to pay royalties based upon some theoretical "market value" of gas; rather, royalties are paid upon the actual sales price. It completely defeats the purpose of a "prudent operator" rule if lessors are automatically entitled to royalties based upon some "market value." This instruction, together with the trial court's other instructions, had the effect of entering judgment against the Petitioners on the Mahonia transactions. Indeed, the trial court expressly instructed the jury:

> [T]he Court instructs you that you should determine whether the defendant, CNR, paid royalty values which were less than market values existing from time to time. And, if so, you should award the plaintiffs such damages as you may find . . . will compensate them for the difference between the royalties actually paid and the royalties which should have been paid had such royalties been based upon the market value of such gas when produced.[431]

These erroneous instructions warrant the award of a new trial.

7. The Trial Court Erred By Giving Plaintiffs' Instruction No. 28, Which Instructed the Jury that it Could Return a Verdict for Constructive Fraud Irrespective of any Fiduciary Relationship.

The trial court erroneously instructed the jury:

> The Court instructs the Jury that fraud may be actual or constructive. Constructive fraud is a breach of legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate the public or private confidence or to injure public interests. Thus, constructive fraud does not require scienter or intent to mislead. It can be established whether representation is innocently or knowingly made.[432]

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[430]Off Tr. at 36 (Jan. 27, 2007).

[431]Tr. at 36 (Jan. 27, 2007).

[432]Tr. at 40 (Jan. 27, 2007).

"Constructive fraud," however, can only arise from a fiduciary or other special relationship.[433] Here, the trial court determined that there was no fiduciary relationship between the Respondents and the Petitioners. Thus, it was error to give the constructive fraud instruction.

8. The Trial Court Erred by Giving Plaintiffs' Instructions No. 29 and 30, Which Instructed the Jury that it was to Presume that Fraud as to any Class Member Was Fraud as to All of the Class Members.

The trial court erroneously instructed the jury:

> The Court instructs the Jury that one who intends to defraud a particular class of persons is deemed to have intended to defraud every individual in that class who is actually misled. One who makes a fraudulent concealment intending, or with reason to expect that more than one person or class of persons will be induced to rely on, or that there will be action, or inaction, in more than one transaction or type of transaction, is subject to liability for pecuniary loss to any one of such persons justifiably relying upon the concealment in any one or more of such transactions. . . . In other words . . . you may infer reliance to the entire class, even though all the named and unnamed members of the plaintiffs' class have not directly, positively, provided evidence of such detrimental reliance.[434]

First, in light of the myriad of leases and royalty owners in this case, there was no "particular class of persons" across whom fraud could be presumed.[435] Second, the instruction advised the jury that even if "named . . . members of the plaintiffs' class," i.e., the class representatives, did not provide "evidence of such detrimental reliance," the jury could nevertheless "infer reliance to the entire class." Even if none of the representative Respondents offered evidence of reliance at trial, the trial court's instruction permitted the jury to nevertheless "infer reliance to the entire class." This is not a consumer fraud case in which a company engages in a uniform practice that is both fraudulent and violates state law. Thus, it was improper to give a "fraud as to one is fraud as to all" instruction.

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[433]*Napier v. Compton*, 210 W. Va. 594, 558 S.E.2d 593 (2001); *Wooton v. Roberts*, 205 W. Va. 404, 518 S.E.2d 6445 (1999).

[434]Tr. at 44-45 (Jan. 27, 2007).

[435]Even the trial court, post-trial, excluded flat-rate leaseholders from sharing in punitive damages.

9. The Trial Court Erred by Refusing to Give any Statute of Limitations Instructions.

Even though the Petitioners raised several statute of limitations defenses, the trial court gave not a single statute of limitations instruction.

The trial court refused to give Defendants' Instruction No. 3, which would have informed the jury of the ten-year statute of limitations on claims for breach of express contract, and the five-year statute of limitations on claims for implied contract, under W. Va. Code § 55-2-6. This prevented the Petitioners from arguing that one or more of the Respondents' claims were not based upon the language of the leases, but based upon the assertion of violation of the implied covenant of good faith and fair dealing. One simply cannot reconcile the fact that the trial court instructed the jury on the implied covenant of good faith and fair dealing,[436] yet prevented the Petitioners from restricting the Respondents' damages on their implied covenant claims to five years.

The trial court refused to give Defendants' Instruction No. 7, which would have advised the jury that if it determined that the Respondents knew or should have known for more than two years that the flat-rate leases were against the public policy of a 1982 statute, they should find that the Respondents' flat-rate claims were time-barred. Instead, the trial court gave the jury no instruction on any statute of limitations applicable to the flat-rate claim, but effectively ruled that judicial reformation of private contracts pursuant to a statutory declaration of public policy is somehow subject to the ten-year statute applicable to suits on written contracts.

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[436]See, e.g., Tr. at 34-35 (Jan. 27, 2007)("You are instructed that a lessee gas company, in the operation of his lease, must act in good faith. Where there is an expressed duty in an oil and gas lease to perform certain acts, there is an implied duty to refrain from performance of other acts that operate to defeat the purpose of the expressed duty. There is an implied covenant in the lease . . . .").

The trial court refused to give Defendants' Instruction No. 9, which would have advised the jury that if it determined that the Respondents knew or should have known of any fraud more than two years prior to filing suit, they should find that the Respondents' fraud claims were time-barred. Instead, the trial court gave no instruction to the jury on any statute of limitations.

10. The Trial Court Erred by Giving Plaintiffs' Instruction No. B, Which Instructed that an Implied Covenant of Good Faith Includes a Duty "to Obtain the Best Price Reasonably Available at the Time of Sale."

The trial court erroneously instructed the jury that, "Defendant gas companies, in this case, are required to obtain the best price available at the time of sale."[437] First, none of the cases referenced in Respondents' instruction stand for such proposition. The trial court's instruction was equivalent to instructing a jury in a medical malpractice case that a physician was required to use the "best technology" or the "best techniques" at the time of surgery. A requirement to use "reasonable care" or act with "reasonable prudence" does not require an action to render the "best care" or the "best prudence." Second, when read together with the trial court's other instructions, such instruction constituted judgment as a matter of law on the Mahonia claims. It is painfully obvious that if the Petitioners were required to "obtain the best price reasonably available at the time of sale," they did not do so in conjunction with sales made that were below index prices in conjunction with the Mahonia transactions. The trial court's instructions, taken as a whole, rendered illusory the liability trial on the Mahonia transactions.

11. The Trial Court Erred by Giving Plaintiffs' Instruction No. H, Involving the Petitioners' Duty to Speak and Fraud from Mere Silence.

The trial court instructed the jury that, "A failure to volunteer information is not fraud absent a duty to speak. However, mere silence, or a failure to volunteer information [even absent a duty

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[437]Tr. at 36 (Jan. 27, 2007).

to speak], if accompanied by acts or conduct tending to affirmatively and intentionally suppress the truth, or to a covering up or disguising the truth, or to a distraction of the party's attention from the real facts, is actionable as fraudulent concealment of material information."[438] By use of the word "however" after just instructing the jury that "silence" or "failure to volunteer information" in the absence of a "duty to speak" is "not fraud," the instruction effectively places the bracketed language "even absent a duty to speak" in the trial court's instruction. This is plainly error and warrants a new trial. Obviously, in the absence of a duty to speak, one can suppress the truth.[439]

The trial court further erroneously instructed the jury that:

> In determining whether the defendants had a duty to speak and provide the true information to plaintiffs about the royalty deductions from royalty volume of gas, sale of gas or to whom it was sold, it is not necessary that such duty be expressly stated in the contract to the parties. You may also consider, one, whether CNR knew that disclosure of truth was necessary to prevent some previous assertion made by CNR from being a misrepresentation of the truth; and, two, whether CNR and the defendants had exclusive knowledge of material facts not know to the plaintiffs.[440]

First, the instruction presupposes that the Petitioners did not "provide the true information to plaintiffs about the royalty deductions." If the instruction had stated, "In determining whether the defendants had a duty to speak, it was not necessary that such duty be expressly stated in the contract," it might not have been so erroneous, but it inferred that the trial court had already determined that the

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[438]Tr. at 41 (Jan. 27, 2007).

[439]Moreover, there was no evidence to support the instruction. If, for example, the Petitioners owed no fiduciary duty to the Respondents, as the trial court has so held, there was no duty to inform the Respondents regarding the details of the Mahonia transactions. There was certainly no evidence, in this light, that the Petitioners "suppressed the truth," "covered up the truth," "disguised the truth," or "distracted attention away from the truth about" the Mahonia transactions. Likewise, with regard to the deductions, which were not reported in the detail argued by the Respondents, there was no evidence that the Petitioners "suppressed the truth," "covered up the truth," "disguised the truth," or "distracted attention away from the truth about" the deductions. Indeed, the only evidence was that when royalty owners asked, they were not provided false information about the decisions.

[440]Tr. at 43 (Jan. 27, 2007).

Petitioners had not provided "the true information." Second, the instruction had the effect of telling the jury that, even if the contracts which governed the relationship between the parties created no duty to speak, the fact that the Petitioners "had exclusive knowledge of material facts not known to the plaintiffs" and "disclosure of the truth was necessary to prevent some previous assertion . . . from being a misrepresentation of the truth," alone created such duty.

12. The Trial Court Erred by Instructing the Jury that it Could Award Punitive Damages for Fraudulent Breach of Contract.

The trial court erroneously instructed the jury as follows:

> Ordinarily, punitive damages cannot be awarded where simple breach of contract is all that is proven. However, where it is proven by a preponderance that there is an intentional wrong, or where there are circumstances that warrant an inference of malice, willfulness, or wanton disregard of the rights of others, or where there is a wrong done with criminal indifference to civil obligations affecting the rights of others, punitive damages may be awarded, where the underlying claim is for fraudulent concealment or for breach of the lease or contract and the duties of the parties arising thereunder.[441]

In other words, the jury was instructed that it could award punitive damages for "fraudulent concealment," which was correct if the requirements for such an award were met, but also for "breach

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[441]Tr. at 57-58 (Jan. 27, 2007)(emphasis supplied). With respect to the instruction's use of the term "or," this Court recently noted:

> This Court has previously observed that "the word 'or' is 'a conjunction which indicate[s] the various objects with which it is associated are to be treated separately.'" *Holsten v. Massey*, 200 W. Va. 775, 790, 490 S.E.2d 864, 879 (1997)(*quoting State v. Carter*, 168 W. Va. 90, 92 n. 2, 282 S.E.2d 277, 279 n. 2 (1981)). Moreover, the use of this term "ordinarily connotes an alternative between the two clauses it connects." *Albrecht v. State*, 173 W. Va. 268, 271, 314 S.E.2d 859, 862 (1984)(*citing State v. Elder*, 152 W. Va. 571, 577, 165 S.E.2d 108, 112 (1968)).

State v. Saunders, 2006 WL 2861783 at *2 (W. Va.) (*quoting Tennant v. Smallwood*, 211 W. Va. 703, 712, 568 S.E.2d 10, 19 (2002). By placing the disjunctive "or" between "fraudulent concealment" and "breach of the lease or contract and the duties of the parties arising thereunder," the jury was left with the "alternative" of awarding punitive damages for either and, because no damages were returned for fraudulent concealment and the verdict form is otherwise ambiguous, the punitive damages should not be sustained.

of the lease or contract and the duties of the parties arising thereunder" if done maliciously, willfully, or wantonly, which is incorrect.[442]

13. The Trial Court Erred by Failing to Instruct the Jury to Exclude from Consideration the Flat-Rate Leases in Awarding Punitive Damages.

After the trial, the trial court indicated that the flat-rate lessors would not share in any punitive damages award, but nowhere in the trial court's instructions did it direct the jury to exclude the issue of flat-rate leases from its punitive damages analysis. Indeed, a fair reading of the instructions indicates that if the jury found a "general disregard of the rights of others," it could make "an inference of malice"[443] sufficient to award punitive damages. This plainly would have allowed the jury to determine, as it had been instructed by the trial court immediately prior to opening statements, that because the Petitioners had "disregarded" the public policy of the State and the "rights" of royalty owners to fair compensation by failing to reform its flat-rate leases, the jury could make "an inference of malice," and award punitive damages. Because the trial court's instructions would have permitted the jury to award punitive damages due to the flat-rate issue, punitive damages should be set aside.

K. THE CUMULATIVE EFFECT OF THE PROCEDURAL, SUBSTANTIVE, EVIDENTIARY, AND INSTRUCTIONAL ERRORS COMMITTED BY THE TRIAL COURT SO PROFOUNDLY DEPRIVED THE PETITIONERS OF THEIR RIGHT TO A FAIR TRIAL THAT A NEW TRIAL IS WARRANTED ON ALL ISSUES.

Although any number of the foregoing procedural, substantive, evidentiary, and instructional errors are sufficient to warrant a new trial, all of those errors, taken collectively, so profoundly deprived the Petitioners of their right to a fair trial that a new trial is warranted on all issues. Where

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[442]Because of the nature of punitive damages, a failure to properly instruct a jury on their award is fatal. *Kocher v. Oxford Life Ins. Co.*, 216 W. Va. 56, 602 S.E.2d 499 (2004)(setting aside $34 million award based upon improper punitive damages instruction).

[443]Tr. at 58 (Jan. 27, 2007).

the cumulative effect of multiple errors render a judgment inherently unreliable, reversal of such judgment is proper.[444] In this case, where the Petitioners were erroneously precluded from offering evidence or making legal arguments in the proper defense of the claims against them, the verdict is so compromised, that invocation of the cumulative error doctrine is appropriate.

V. CONCLUSION

The Petitioners face a judgment in excess of $400 million as the result of proceedings that violated their constitutional rights, violated the Rules of Civil Procedure, violated this Court's precedents, and violated fundamental principles of fairness. Consequently, they submit that the case more than warrants full appellate review.

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[444]Syl. pt. 8, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 459 S.E.2d 374 (1995)("The cumulative error doctrine may be applied in a civil case when it is apparent that justice requires a reversal of a judgment because the presence of several seemingly inconsequential errors has made any resulting judgment inherently unreliable.").

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CERTIFICATE OF SERVICE

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