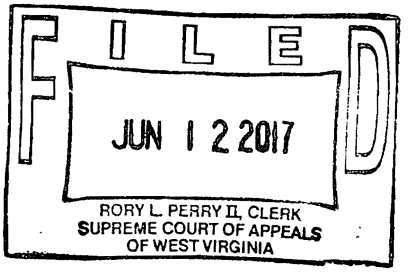
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 17-0126
(Appeal from Civil Action No. 13-C-434; Circuit Court of Ohio County)

ROBERT ANDREWS, et al.,
Appellants/Petitioners,

v.

ANETERO RESOURCES CORP., et al.,
Respondents/Appellees.



BRIEF OF APPELLANTS DEBORAH G. ANDREWS, RODNEY AND KATHERINE ASHCRAFT, GREGG D. MCWILLIAMS MARY MIKOWSKI, AND ROBERT AND LORETTA SIDERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes, Rules, and Regulations

Other Authorities

INTRODUCTION

Fifty to one-hundred years ago, land owners in West Virginia severed mineral interests from their rights to use and enjoy the surface. In doing so they contemplated that they might suffer minor inconveniences when and if the owners of the mineral rights choose to drill for gas or oil. Modern technology has evolved. Fracking and horizontal drilling techniques have allowed industry to drill deeper and wider, but the trucks, other equipment, resources, and burden from these operations has transformed the rural residential communities where the drilling occurs. This combined with careless and uncaring operations conducted all throughout the day and night has created a nuisance for the surface owners under any reasonable definition of the term. The substantial burden is one that was never contemplated when the interests were severed. This is a case brought by a number of surface owners with nuisance cases pending before the West Virginia Mass Litigation Panel ("Panel") who believe that they should not be forced to bear these burdens without compensation. The Panel disagreed. These surface owners now seek justice and the vindication of their property rights in this Court.

ASSIGNMENTS OF ERROR

1. The Panel erred in holding that a mineral severance deed grants the mineral owner the right to extract natural gas using methods uncontemplated when the deeds were executed, that are not necessary to the extraction of the minerals, and that substantially burden the surface owner.

2. The Panel erred in concluding that an owner of mineral rights underlying a particular property has the right to create a nuisance on the surface of that tract to develop minerals underlying another property.

3. The Panel erred in failing to recognize that public policy supports allowing Appellants' nuisance claims so that Appellants should not be forced to disproportionately bear the burden of Appellees' activities.

STATEMENT OF THE CASE

I. Procedural History

Appellants, herein are Deborah G. Andrews, Rodney and Katherine Ashcraft, Gregg D. McWilliams, Mary Mikowski, and Robert and Loretta Siders.[1] Appellants filed their Complaint on October 11, 2013, alleging claims for temporary nuisance and negligence against Antero Resources Corporation, LLC, Antero Resources Bluestone, LLC and Hall Drilling, LLC ("Appellees").

Appellants claims were transferred to the West Virginia Mass Litigation Panel ("Panel") on November 25, 2014 by order of this Court. Appellants' claims were designated as part of the first trial group to be resolved by the Panel. The claims of over two-hundred Appellants remain pending before the Panel. A:2918-3024. In spite of the fact that Appellees are just one of the major gas drilling operators in this State, the vast majority of the claims pending before the Panel involve claims against Appellees. *Id.*

Following discovery, on January 15, 2016, Appellees moved for summary judgment. A:000182. Appellants filed their response on January 29, 2016, and Appellees filed their reply on February 5, 2016. A:001402, 002375. The Panel Mass Litigation Panel entered an in initial order on April 18, 2016, but held its ruling in abeyance pending settlement discussions. A:002407. After settlement discussions were unsuccessful, the Mass Litigation Panel entered its final judgment granting Appellees' summary judgment on October 11, 2016. A:002485.

[1] The Orders being appealed originally included the claims of Lindsey N. Feathers, April, Robert and M. Golden, Daniel and Sharon Kinney, Douglas and Catherine Mazer, Charles A. Mazer, Susan Maple (formerly Susan Mazer), the Estate of Charles T. Mazer and David S. Nutt. These parties, while originally joining in the notice of appeal have moved to dismiss their appeals and consent to the finality of the judgments entered against them.

Thereafter, Appellants filed a timely motion to alter or amend the judgment, which was denied on January 11, 2017. A:002507, 002902. This appeal followed.

II. Statement of Facts

Appellee Antero Natural Resources Corporation (Antero) based in Denver, Colorado, is a relative newcomer to the United States oil and gas industry. Since its origins in 2002 as a privately held entity, Antero has specialized in the development of unconventional resources, including shale gas and basin-centered tight gas through the utilization of horizontal drilling and hydraulic fracturing.

In 2010, Antero intensified its exploration and drilling efforts in the Marcellus Shale by purchasing a privately held West Virginia based oil and gas producer called Bluestone Energy Partners (Bluestone). The purchase price was reported at $93 million in cash, the assumption of $25 million in subordinated debt and the issuance of 3.8 million units in the transaction. The acquisition included Bluestone's approximately 40,000 acres in the Marcellus shale with 93 operated vertical wells, 3 horizontal wells, gathering pipelines and compression facilities.

Prior to Antero acquiring Bluestone, Bluestone and Appellee Hall Drilling, LLC (Hall Drilling), had entered into a partnership around 2006 to work exclusively together as partners in the oil and gas industries. Hall Drilling managed and operated well sites and Bluestone worked with land and mineral rights owners to secure leases, including areas within Cherry Camp. The partnership between these two entities claimed to bring unprecedented knowledge and experience to every drilling project along with unique strengths to land and mineral rights owners.

After Antero acquired Bluestone, Hall Drilling continued to work as an Antero subcontractor through a Master Service Agreement on the Cherry Camp well pads. Hall Drilling performed

work, along with approximately 400 Antero subcontractors on the 23 wells which were drilled and hydraulically fractured on the 6 well pads located within 1 mile of Appellants' residences.

The drilling and hydraulic fracturing of the 23 Cherry Camp wells involved the transportation of thousands of workers, millions of gallons of water, truckloads of heavy equipment, toxic chemicals, piping and other supplies along the narrow rural roads in the Cherry Camp community. This unprecedented industrial activity also necessitated the construction of numerous pipelines to connect the pads to a newly built compressor station located on land utilized by Antero to develop and extract natural gas.

Antero has been the subject of many Notices of Violations ("NOVs"), Cessation Orders ("COs"), or Orders for Compliance ("OFCs") (collectively referred to as "Violations") issued by the WVDEP, USEPA, or the United States Army Corps of Engineers related to well pads at issue in this case. There have also been multiple spills on Antero's well pads at issue. A:1640-1778.

Appellants claim nuisance conditions related to Appellees' development, control, operation, and maintenance of seven structures which are generally within one mile or less from Appellants' properties at issue. A:872.

1. O. Rice Pad, which consists of the following horizontal natural gas wells along with associated structures: O. Rice South Unit 1H-Permit No. 47-033-05437; Posey Unit 1H- Permit No. 47-033-05507; and O. Rice North Unit 1H- Permit No. 47-033-05533 (A:2552-54);
2. Hill Pad, which consists of the following horizontal natural gas wells along with associated structures: Haymond NW Unit 2H-Permit No. 47-033-05236; Haymond NW Unit 4H-Permit No. 47-033-05238; Haymond NW Unit 5H-Permit No. 47-033-05239; Bland Unit 1H-Permit No. 47-033-05390; Bland Unit 2H-Permit No. 47-033-

05391; Koonse Unit 1H-Permit No. 47-033-05674; and Koonse Unit 2H-Permit No. 47-033-05675 (A:2555-61);

3. Mary Post Well Pad, which consists of the following horizontal natural gas wells along with associated structures: R. Haught South Unit 1H-Permit No. 47-033-05453; and Mary Post Unit 1H-Permit No. 47-033-05375 (A:2562-63);
4. Matthey Well Pad, which consists of the following horizontal natural gas wells along with associated structures: Haymond Unit 1H-Permit No. 47-033-05303; Haymond Unit 2H-Permit No. 47-033-05304; Tetrick Unit 1H-Permit No. 47-033-05392; and Tetrick Unit 2H-Permit No. 47-033-05389 (A:2564-67);
5. Johnson Well Pad, which consists of the following horizontal natural gas wells along with associated structures: Bailey Unit 2H-Permit No. 47-033-05327; Morgan Unit 1H-Permit No. 47-033-05243; Morgan Unit 2H-Permit No. 47-033-05244; and Morgan Unit 3H-Permit No. 47-033-05245 (A:2568-75);
6. Hustead Well Pad, which consists of the following horizontal natural gas wells along with associated structures: Hustead South Unit 1H- Permit No. 47-033-05448; Hustead North Unit 1H- Permit No. 47-033-05413; Huffman Unit 1H- Permit No. 47-033-05731; and Riffee Unit 1H- Permit No. 47-033-05730 (A:2571-74); and
7. Salem Compressor Station.

All told, there are twenty-four horizontal wells at issue in this case and a compressor station that processes and transports the gas from those wells. A:2576.

A. Appellees' activities constituting a nuisance

It would be next to impossible to fully describe the misery each Appellant has endured in the past few years as a result of Appellees' activity. However, in essence, each Appellant has

experienced some or most of the following on a frequent basis as a result of Appellees' activities, each of which have substantially impaired Appellants' quality of life, use and enjoyment of property and cause significant annoyance, inconvenience, and discomfort: loud noises, concerns about well water safety, flooding due to diversion of water, loss of air quality, excessive dust, mud, bright lights, emissions diesel fumes, exhaust fumes, gas fumes and odors, excessive traffic delays/road blockages, rude, aggressive and generally dangerous drivers, speeding of very large trucks, vehicle damage due to poor road conditions, rude and interrogative flag persons, chemical spills in the streams and waters of Cherry Camp, vibrations/shaking, explosions/blasting, flaring, blow offs of condensate tanks, pipeline blow outs, an invasion of mostly out-of-state workers with little regard or respect for local residents, and trespassing.

Words, however, are not adequate to describe the scale and the scope of the industrialization of Appellants' neighborhoods. A video, submitted as part of the opposition to the summary judgment motions, A:0017779 can be viewed here. https://youtu.be/gbSfRtIX1tc

(1) Noise, truck traffic, and odors

In her deposition, Appellant Deborah Andrews testified extensively about her experience with noise, truck traffic, and odors resulting from Appellee Antero's activities in the area, and stated,

> [the gas activities have] affected my whole life, my quality of life . . .one word is concentration. It's hard to concentrate when things are happening every day, especially in the flux of fracking and traffic and the flow past my properly. I live right on the road. It's like Grand Central Station in front of my house as trucks are going towards the Hill pad and towards the Matthey pad and, formerly, the Mazer pad, the [O Rice] pad. So it's disruptive.

A:1455. Ms. Andrews was often anxious to leave her farm because she lived in a congested area, and there was constant truck traffic and potential for accidents. A:1454. In fact, trucks have hit her gate numerous times. A:1458. She described being run off the road and the excessive speed

Appellees' trucks travel on the rural roads. A:1459. The truck traffic continues through the night, and she could hear the trucks using Jake brakes and driving too fast at night, which would wake her up. A:991, 1003. Deborah testified that her troubled sleeping began when Antero's activities began. A:1458. The noise was "very disruptive" and "very annoying." A:1455. Her home intermittently vibrates from the trucks driving in front of her house. A:1460. Other witnesses confirmed this testimony regarding the noise caused by Appellees. *See* A:757, 765-768 (nonstop noise from trucks driving past and that the trucks have loud engines and the wheels clank on the road); A:1526 (noise is so loud that you could not have a conversation because the person you were talking to could not hear what you were saying); A:744-745. ("flaring noise" can be heard for days at a time along with truck and brake noises from the Mary Post and Hustead well pads during day and night.); A:1468. (area was quiet enough to hear a pin drop before the drilling started and that now with the noise, vibrations, and truck traffic, "it's not quiet anymore."); A:1468 (constant but intermittent noise interrupted family's sleep; "[i]t didn't used to be like that."); A:660-661, 669-671, 680 (could not sit on the porch on summer evenings because of noise from truck traffic and drilling); A:1523-1524. (noise prevented sleep; would retreat to the basement to avoid the noise). A:663 (unable to get out of property because roads were blocked for 1-4 hours).

Appellants also testified about constant dust and odors. *See, e.g.,* A:1457 (has "been exposed to various odors, dust in the air which is carrying who knows what"); A:1000. (routinely exposed to odors when diesel trucks are left running near her home and from other trucks, for long periods of time). Other witnesses confirmed Appellant's testimony A:603, 609. (noting repeated instances of exposure to diesel fumes from trucks when they pass and when they sit and wait while roads are blocked); A:770 (smell of diesel fumes from the tractor trailers so bad and it

caused headaches); A:700-701 (truck tipped over in front of driveway smell lingered for weeks in addition to continued odor from truck traffic).

(2) Dust contamination

Appellant Mikowski testified that the truck traffic in front of her house, sometimes 13 of them at one time, created constant dust for 1-2 years causing the family to be unable to use their front porch. A:832-834. She thought they lived in a quiet, nice neighborhood with pastures all around with a few cars, then came a horrendous amount of traffic and clouds of dust in our field and around or house. A:1489-1489. The dust is very unpleasant, it's on the house, on the porch, having to clean it, the idea of having to breathe it is worrisome, "unpleasant all around." A:1491-1492. Other witnesses confirmed this testimony. A:1483 ("the constant dust that would hang in the air for hours") A:1019-1020 (car is constantly caked in mud and must be washed often); A:626 (dust settled on the house, windows, and porch furniture and that the house windows could not be kept open during the summer due to dust and fumes); A:1505-1506 (dust would get into her house and on furniture).

(2) Light pollution

D. Nutt alleging that the place was lit up like Mountaineer Field on a Saturday night even with the blinds closed. A:1050-1053. Other witnesses confirmed this testimony. A:995 (constant lights from the trucks as they travel up and down the hill shine into the house); A:600, 607-608 (truck lights shine through bedroom windows which wake him up at night); A:760-763 (truck headlights would shine into her bedroom at night as the trucks drove by and would wake her up); A:578-579 (lights lit up his bedroom even with the blinds were shut); A:815-819 (lights from the pond and truck traffic were issues from 2009-2013).

(3) Vibrations

D. Kinney testified are vibrations that cause his windows and kitchenware to rattle. A:1511-1512. The vibrations woke him up, shook his windows, everything in his home vibrated and the house was shaking for 24 hours per day for a while; It was like living on a volcano; there were still vibrations and window rattling occurring at the time of the deposition on March 3, 2015. A:1511-1512. Many other witnesses confirmed the vibrations caused by Appellees' activities. Other Appellants testified concerning vibrations as well. A:994-995 (feels vibrations from the constant flow of truck traffic in front of her house); A:1077-1078 (vibrations kept family awake at night); A:604-605 (vibrations from the trucks would turn his touch lamps on or off and that he has not been able to use these lamps in two years as a result); A:739 (vibrations have caused sleep issues); A:1045-1046, 1049 (vibrations caused the windows to vibrate or the house to rattle and shake).

(4) Confirming expert opinions

Appellants retained two experts, Drs. Cheremisinoff and Ingraffea, to review, analyze, and bring their expertise to bear on the issues presented by Appellants' Complaint. In granting summary judgment, the Panel completely ignored Appellants' experts.

Dr. Anthony R. Ingraffea, is a licensed professional engineer who holds a Ph.D. in Civil Engineering. Dr. Ingraffea has been a member of the faculty at Cornell University since 1979. Since 2009, his research has concentrated on the impacts of large-scale development of shale gas using a combination of high-volume hydraulic fracturing, and directional drilling from clustered, multi-well pads.

Dr. Ingraffea explained Appellees fracking in the Marcellus Shale, however, is different than traditional operations due to the impermeability of shale rock and the low permeability of a shale

rock mass when, as was the case here, the drilling is accompanied by technologies of scale and by application of spatial intensity drive increased impacts [to human health and property]." A:1592-1593.

Dr. Ingraffea explained that technologies of scale include,

> the use of 50 to 100 times more fracking fluid in a shale well than in a non-shale well. The average Marcellus shale gas/oil well consumes about 5 million gallons of frack fluid. More fracking fluid in turn requires more water, more proppant, more chemical additives and produces more fluid waste. These cause higher traffic demands on road/bridge infrastructure, require more and larger pumps, and create higher risk for transport and pad spills of dangerous substances, and larger waste disposal problems. Technologies of scale also include the use of much longer wells, with lateral length often exceeding vertical well depth. Longer wells require heavier drilling equipment, longer drilling periods, and cause more challenges for successful cement jobs. These create higher probability for unacceptable local air/noise/light pollution and contamination of underground sources of drinking water.

A:1593. According to Dr. Ingraffea, each well in the Marcellus shale play drains about eighty surface acres and there are approximately eight wells per square mile—a concept known as spatial intensity. "The principal consequence of spatial intensity is that homeowners, farms, schools, and businesses are required to co-exist within a widespread, heavy industrial zone. They are literally embedded within a complex of pads, storage tanks, compressor stations, processing units and pipelines." A:1593. This industrialization within the community results in various negative consequences, which include contaminated air, increased ozone and smog, noise disturbances, light disturbances, and contaminated ground and surface water. A:1594.

From his review of documents, visit to the Cherry Camp area, and discussion with Appellants in this action, Dr. Ingraffea opined, "[i]n summary, each family with whom I met recounted exactly the types of impacts to their health, to their peace and serenity, and to the continued use, enjoyment and value of their property described in the growing literature and to be expected from 'normal' shale gas operations." A:1597.

According to Appellants' retained expert, Dr. Nicholas Cheremisinoff, Appellees' operations do not meet the standard of care and do not constitute "normal" operations. Dr. Cheremisinoff holds a Ph.D. in Chemical Engineering and specializes in the safe handling and management of chemicals and hazardous materials with more than forty years of industry, business and applied research experience. A:3030.

Setting the scene in his report, he explained, "[t]he Appellees began operations in late 2009 and expanded significantly through 2013. Currently there are 23 hydraulically fractured natural gas wells distributed between 6 sites. These sites are within a relatively small geographical area in close proximity to residential homes. These wells transmit nearly 58 billion cubic feet of natural gas to the Crestwood Salem Compressor Station on an annual basis." A:3027.

Dr. Cheremisinoff also noted that "[t]he Appellee is a sophisticated company that has understanding and expertise in natural gas production. It understands that natural gas production operations may create air pollution that requires control, yet it does not appear to have applied its knowledge and expertise to controlling these discharges." A:3027.

Ultimately, Dr. Cheremisinoff offered the following opinions regarding Appellees' natural gas operations:

- Appellees do not rely on Leak Detection and Repair (LDAR) programs which are well recognized and widely used by industry to reduce fugitive VOC emissions.
- Appellees have poor maintenance practices and do not maintain their equipment in good working order which is a contributing factor to air pollution.
- Appellees did not bother to perform an equipment component count and estimate potential air emissions from leaks.

- Appellees do not have basic piping diagrams or an inventory list of the numbers of connections, valves, PRVs, flanges, safety valves, open ended lines, regulators, continuous bleeds, pneumatic control valves, actuators, seals and other components – all of which require monitoring and may leak.
- The evidence supports that Appellees went out to each site and began building and adding surface equipment without giving thought or applying good industry practices to managing fugitive air discharges.
- "Collectively, the observations and conclusions drawn in my investigation of the well pad operations support the opinion that the [Appellees] acted in a reckless and careless manner and continue to do so. They appear to place little or no emphasis on managing air pollution discharges and provide no evidence that they were proactive in managing air pollution during the rapid industrialization of the sites. They expanded their operations at a significant pace but did not adapt any greater level of diligence in the quantification of air emissions nor do they appear to have adopted good practices to minimize the air emissions. Their actions reflect callous indifference toward their neighbors."
- "Both the [Appellees] well extraction sites and the compressor station are creating significant levels of air pollution. Both operations are not relying on reasonable and best industry practices." A:3027-3028.

B. Antero and Appellants' Respective Land and Mineral Interests

For the minerals underlying the properties of Appellants Deb Andrews, Rodney and Katherine Ashcraft, Mary Mikowski, and Gregg McWilliams, all oil and gas underlying their properties was reserved by deed dated July 22, 1905. The current lease under which Antero

claims said mineral rights is dated August 17, 1984 (Moran Lease). A:873-875, 2314-2316, and 2317-2320.

According to Alvin Schopp's affidavit, the minerals underlying Appellant Andrews' 48.258 surface acres, Appellants Ashcraft's 33.06 surface acres, and Appellants Mikowski/McWilliams' 24.588 surface acres are all subject to the 1984 Moran Lease which covers 228 acres. A:873-875.

Pursuant to the plain terms of this 1984 Moran Lease, Antero has an easement only to use the surface of the properties of Appellant Andrews, Appellants Ashcraft, and Appellants Mikowski/McWilliams to develop the minerals underlying the 228 acres contained in the 1984 Moran Lease.

However, in this case, Appellants Andrews, Ashcrafts, and Mikowski/McWilliams have brought nuisance claims for Appellees' activities that go far beyond the development of minerals underlying the estate servient, the 228 acres contained in the 1984 Moran Lease. In other words, these Appellants have presented substantial evidence that Appellees have used the surface of these Appellants' properties, by creating a nuisance thereon, through activities outside of the scope of any easement afforded under the 1984 Moran Lease.

According to Schopp's affidavit, and Antero's own records submitted to the WVDEP, Minnie Morgan is the mineral royalty owner under the 1984 Moran Lease and only portions of four (4) of the twenty-four (24) wells at issue are used to enjoy the mineral estate granted under the 1984 Moran Lease.[2] A:2346-2367; 873-875, 885, 887, 890, 892, 894.

[2] The only four (4) wells used by Appellees to enjoy the Minnie Morgan mineral estate granted under the 1984 Moran Lease are Haymond Unit 2H (A:2346-2347), Tetrick Unit 1H (A:2348-2351), Tetrick Unit 1H (A:2352), and Bailey Unit 2H (A:2355-2367).

Similarly, the minerals underlying Appellants Robert and Betty Siders' 91.53 surface acres are all subject to the 2001 Bland Lease which covers 131 acres. A:882-883. Again, in this case, Appellants Siders have brought nuisance claims for Appellees' activities that go far beyond the development of minerals underlying the estate servient, the 131 acres contained in the 2001 Bland Lease. Such nuisances perpetrated by Appellees to develop mineral estates not underlying the property covered under the 2001 Bland Lease cannot possibly fall within the scope of the 2001 Bland Lease and therefore must survive summary judgment.

According to Schopp's affidavit, and Antero's own records submitted to the WVDEP, David, Victoria, and Arthur Bland are the mineral royalty owners under the 2001 Bland Lease, and only three (3) of the twenty-four (24) wells at issue are used to enjoy the mineral estate granted under the 2001 Bland Lease.[3] A:2344-2345, 2346-233747, 882-883, 911.

Appellees' actions are directed at recovering gas over a vast area that far exceeds the property Appellants' predecessors severed decades ago. Included in the record is a graphic depiction of the gas fields and Appellants' property that illustrates the scope of Appellees activities in relation to Appellants' property. *See* A:2576.

SUMMARY OF ARGUMENT

With respect to the current Appellants, the only grant of rights from them flows from the severance deeds entered into decades ago by their predecessors in title. The Panel impliedly concluded that the severance deeds constituted an easement, and based on syllabus point 5 of *Quintain Development LLC v. Columbia Nat. Res. Inc.*, 210 W. Va. 128, 556 S.E.2d 95 (2001),

[3] The only three (3) wells used by Appellees to enjoy the Bland mineral estate granted under the 2001 Bland Lease are Bland Unit 1H (A:2324-2327), Bland Unit 2H (A:2328-2331), and Koonse Unit 2H (A:2335-2337).

the actions of the Appellees, could not constitute a nuisance because their actions as the supposed owner of the easement did not exceed the scope of the easement.

The Panel's application of *Quintain* to a severance deed is misplaced as *Quintain's* holding limiting nuisance claims against the owner of an easement was made in the context of an express easement for a pipeline to cross the grantee's property and did not involve an easement supposedly implied by a mineral severance deed. *Quintain's* holdings regarding the scope of activities contemplated by the parties is evidence that this Court did not intend *Quintain* to be so broadly applied.

The Panel's application of *Quintain* is inconsistent with this Court's precedents regarding the rights reserved by surface owners which make clear that the mineral owner's right of access is limited to operations that constitute a reasonable burden and are fairly necessary in the development of the mineral rights. This test is not materially different than the test for a private nuisance.

Second, the Panel's decision ignores this Court's precedents regarding the contemplation of the parties in construing deeds which should be interpreted and construed as of the date of their execution. This Court has applied these principles to restrict the owner of a deed or easement from utilizing a technology that did not exist at the time an indenture was executed.

Similarly, the Panel incorrectly concluded that only where drilling methods have been shown to be wholly incompatible with the surface estate due to total destruction may those methods be found to be beyond the contemplation of the parties. The proper test from is whether the new technology was known and accepted, reasonably necessary for the extraction of the mineral, and without any additional substantial burden. This Court has long held that any use of the surface by virtue of rights granted by a mining deed must be exercised reasonably so as not to unduly

burden the surface owner's use and that with respect to implied rights, it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner.

* * * *

The Panel also erred in effectively allowing an owner of mineral rights underlying a particular property to create a nuisance on the surface of that tract to develop minerals underlying another property.

In West Virginia, an easement may be defined as the right one person has to use the lands of another for a specific purpose. Appellants are not aware of any authority, and neither the Panel nor Appellees cited any such authority, supporting the idea that an owner of mineral rights underlying a particular tract has the right to use the surface of that tract to develop minerals underlying another property other than the particular mineral estate granted under a particular deed, lease, or contract. In fact, West Virginia law is clear that a lease granting minerals carries with it, by necessary implication, the right to enter upon the property and do all things necessary for the purpose of acquiring and enjoying only the estate granted. Thus, a mineral owner cannot make use of the surface on one's property to enjoy the mineral estate underlying another separate tract because when a mineral owner sells his or her mineral rights, he or she can only sell or lease rights that are owned by him or her. Conversely, a mineral owner cannot convey mineral rights that are not owned by him or her.

In this case, the leases and deeds of record establish that the Appellees' massive operations exist to take gas from a vast pool that exceeds the property rights granted by Appellants' predecessors in title. Under the plain language of the leases and agreements at issue, Appellees do

not have the right to create a nuisance on Appellants' properties for the purpose of extracting or enjoying oil and gas underlying other properties not encompassed under the lease or agreement.

* * * *

The Panel ignored substantial evidence in the record that the burdens on surface owners from Appellees horizontal Marcellus natural gas drilling were not contemplated by the parties at the time the severance deeds were executed as the factual record submitted and the explicit findings of the West Virginia Legislature establish that Appellees' methods were not contemplated fifty to one-hundred years ago when the interests were severed.

While the Panel concluded that Appellees' actions were necessary for the development of their gas rights, there is no factual basis for this conclusion. Appellants' complaints noted above all involve the conduct that can be mitigated or eliminated. Appellees presented no testimony that they could not recover gas without operating in the abusive manner in which they did. The Panel ignored evidence that Appellees at times had mitigated their operations and Appellants' expert testimony to the contrary.

Finally, the Panel improperly concluded that West Virginia precedent makes clear that the noise, traffic, vibrations, dust, lights, and odors of which Plaintiffs complain are well within the bounds of what is reasonable and necessary use to develop minerals. The cases relied on by the Panel permitted physical construction on the surface tracts such as roads and pipelines, which are clearly distinguishable from the manner in which Appellees' operations were being conducted. None of these cases hold unreasonable noise, traffic, vibrations, dust, lights, and odors are not a substantial burden.

* * * *

This case is not about whether Appellees should be permitted to drill horizontal wells in the Marcellus formation. The fundamental question presented by this appeal is whether these Appellants should disproportionally bear, without compensation, the substantial burden from these activities because their predecessors in title severed mineral rights at a time when the burden from these activities was not imaginable. Such a conclusion violates numerous legislative findings, implicates constitutional takings concerns, and ignores the fact that the Legislature declined to grant Appellees the immunity they seek.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellants request a Rule 20 oral argument pursuant to Revised Rule of Appellate Procedure 20(a)(2). It is respectfully submitted that the interpretation of the subject deeds and mineral leases involve important questions of first impression in this Court. In addition, the claims arise in the context of proceedings pending before the Panel where over two hundred plaintiffs are pursuing claims raising these issues. Following briefing and argument, Appellants believe that the appropriate disposition of this case would be a signed opinion reversing the summary judgment entered by the Panel below.

ARGUMENT

This Court reviews the grant of summary judgment under Rule 54 and the order denying relief under Rule 59(e) de novo. *Zimmerer v. Romano*, 223 W. Va. 769, 776, 679 S.E.2d 601, 608 (2009); *Wickland v. Am. Travellers Life Ins. Co.*, 204 W. Va. 430, 435, 513 S.E.2d 657, 662 (1998). For the reasons noted below, the Panel's orders granting summary judgment must be reversed.

I. The Panel's Decision Applied the Wrong Legal Standards which Ignored Established Surface Owners' Rights under West Virginia Law.

A. A mineral severance deed does not grant the mineral owner the right to extract natural gas using methods uncontemplated when the deeds were executed, that are not necessary to the extraction of the minerals, and that substantially burden the surface owner.

With respect to the current Appellants, the only grant of rights from them flows from the severance deeds entered into decades ago by their predecessors in title. The Panel impliedly concluded that the severance deeds constituted an easement, and based on syllabus point 5 of *Quintain, supra,* the actions of the Appellees, could not constitute a nuisance because their actions as the supposed owner of the easement did not exceed the scope of the easement. The legal conclusions that underlie this finding are contrary to established West Virginia law.

First, the Panel's application of *Quintain* to a severance deed is misplaced. *Quintain's* holding limiting nuisance claims against the owner of an easement was made in the context of an express easement for a pipeline to cross the grantee's property and did not involve an easement supposedly implied by a mineral severance deed. 556 S.E.2d at 98. Appellants are not aware of any case from this Court applying *Quintain's* limitations on nuisance claims to implied rights granted by a severance deed. Indeed, *Quintain's* holdings regarding the scope of activities contemplated by the parties is evidence that this Court did not intend *Quintain* to be so broadly applied. *Quintain*, 556 S.E.2d at 100 (parties' contemplation principles restrict the owner of an easement from utilizing a technology that did not exist at the time an indenture was executed); *id.* at 137 (limiting easements to rights within contemplation of parties at time of grant). Indeed, this expansion of *Quintain* to bar nuisance claims based on the language of Appellants' severance deeds was accomplished *sua sponte* by the Panel as the Appellees' argument for the application of *Quintain* was limited to surface agreements signed by the plaintiffs who are no

longer seeking to appeal the Panel's judgments against them. *See, e.g.,* A:231 (noting contemporary surface agreements signed by former plaintiffs); A:232 (citing *Quintain).*

The Panel's application of *Quintain* is inconsistent with this Court's precedents regarding the rights reserved by surface owners. This Court's precedents make clear that the mineral owner's right of access is limited to operations that constitute a "reasonable burden" and are "fairly necessary in the development" of the mineral rights. *Squires v. Lafferty,* 95 W. Va. 307, 121 S.E. 90, 91 (1924); *Buffalo Min. Co. v. Martin,* 165 W.Va. 10, 15, 267 S.E.2d 721,724 n.3 (1980) ("The fundamental basis for all of the decisions is whether the easement sought is substantially compatible with the surface rights granted to the mineral owner and whether it substantially burdens the surface owner's estate." This test is not materially different than the test for a private nuisance. *Hendricks v. Stalnaker,* 181 W. Va. 31, 33, 35, 380 S.E.2d 198, 200, 202 (1989) (a private nuisance is "a substantial and unreasonable interference with the private use and enjoyment of another's land....The unreasonableness of an intentional interference must be determined by a balancing of the landowners' interest."). The Panel's application of *Quintain* which immunizes conduct based on whether the activity involved is generally permitted improperly reads out of the law the balancing considerations in this Court's decisions interpreting severance deeds and nuisances.

Second, the Panel's decision ignores this Court's precedents regarding the contemplation of the parties. "In any construction of the language of a deed the intent of the parties is controlling." *Kell v. Appalachian Power Co.,* 170 W.Va. 14, 19, 289 S.E.2d 450, 456 (1982) (footnote omitted). Furthermore, in *Quintain* this Court noted: "[A] deed will be interpreted and construed as of the date of its execution." 556 S.E.2d at 100 (internal quotation omitted). Thus, this Court

has "applied these principles to restrict the owner of an easement from utilizing a technology that did not exist at the time an indenture was executed." *Quintain*, 556 S.E.2d at 100.

> In *Kell,* this Court concluded that a right-of-way easement granting a power company the right to cut and remove trees did not authorize the power company to broadcast spray toxic herbicides over the right-of-way. In reaching this conclusion, the Court considered, *inter alia,* the fact that "[t]he use of aerial broadcast spraying of herbicides to control vegetation along a right-of-way was unknown in 1939 [when the indenture was executed] and could not have been within the specific contemplation of the parties to the 1939 indenture involved in this case." *Kell,* 170 W.Va. at 19, 289 S.E.2d at 456.

Quintain, 556 S.E.2d at 100.

This Court's precedents regarding whether a grant of rights to coal include the right to conduct surface mining evidence a similar focus on the parties' intention:

> The right to surface mine will only be implied if it is demonstrated that, at the time the deed was executed, surface mining was a known and accepted common practice in the locality where the land is located; that it is reasonably necessary for the extraction of the mineral; and that it may be exercised without any substantial burden to the surface owner.

Syl., *Phillips v. Fox,* 193 W.Va. 657, 458 S.E.2d 327 (1995) (quoted with approval in *Quintain, supra*); *see also Brown v. Crozer Coal & Land Co.,* 144 W.Va. 296, 107 S.E.2d 777 (1959); *Oresta v. Romano Bros.,* 137 W.Va. 633, 73 S.E.2d 622 (1952); *West Virginia–Pittsburgh Coal Co. v. Strong,* 129 W.Va. 832, 42 S.E.2d 46 (1947).

The Panel ignored this precedent and concluded: "Under West Virginia law, parties to contracts are held to contemplate advancements in technology, absent specific language to the contrary. A:2502 at ¶ 36 (citing *Phillips, supra; Bassell v. W. Va. Central Gas Co.*, 86 W. Va. 198, 103 S.E. 116 (1920); *Armstrong v. Md. Coal Co.*, 67 W. Va. 589, 69 S.E. 195, 203 (1910); and *Squires, supra*). These cases do not support the Panel's holdings; indeed, they support Appellants.

The sole syllabus point in *Phillips, supra,* set forth the three requirements noted above. Indeed, after finding that surface mining was known and accepted at the time of execution, the

Court remanded the case for a determination of whether the method was reasonably necessary for the extraction of the mineral and whether it may be exercised without any substantial burden to the surface owner. 458 S.E.2d at 335. In *Bassell,* which predates *Phillips* by seventy-five years, the new technology was the use of compression which did not involve a challenge based on burden to the surface owner other than the loss of free gas which the Court ordered must be replaced "even though it may be expensive and inconvenient to do so." *Syl.,* 103 S.E. at 116. The 1910 holding in *Armstrong* prohibited an option holder of mining rights who elects to purchase from demanding as a condition precedent to the execution of the contract additional rights beyond those reasonably adequate for the purposes of mining and removing the coal conveyed. *Syl.,* 69 S.E. at 196. Finally, the 1924 opinion in *Squires* likewise does not address new technology, but as noted above approved activities that constitute a "reasonable burden" and are "fairly necessary in the development" of the mineral rights. 121 S.E. at 91.

Nothing in *Quintain* changes this analysis. Indeed, in concluding that an easement limits a nuisance claim unless those challenged actions or inactions exceed the scope of the easement, the Court cited and quoted language expressly adopting contemplation of the parties as the test. *Quintain,* 556 S.E.2d at 104 (citing Syl. pt. 1, *Hoffman v. Smith,* 172 W.Va. 698, 310 S.E.2d 216 (1983) ("Where one acquires an easement over the property of another by an express grant, the use of that easement must be confined to the terms and purposes of the grant."); syl. pt. 2, *Lowe v. Guyan Eagle Coals, Inc.,* 166 W.Va. 265, 273 S.E.2d 91 (1980) ("No use may be made of a right-of-way different from that established at the time of its creation so as to burden the servient estate to a greater extent than was contemplated at the time of the grant.").

Similarly, the Panel incorrectly concluded that "[o]nly where those methods have been shown to be wholly incompatible with the surface estate due to total destruction may those

methods be found to be beyond the contemplation of the parties." A:2502 at ¶ 37 (citing *Quintain Dev.*, 133, 556 S.E.2d at 100 (2001) and *Buffalo Mining Co.*, 267 S.E.2d at 725). As noted above, the test from *Quintain* is whether the new technology was known and accepted, reasonably necessary for the extraction of the mineral, and without any additional substantial burden. And noted below in more detail, *Buffalo Mining,* which predates *Quintain* by almost twenty years, held that "any use of the surface by virtue of rights granted by a mining deed must be exercised reasonably so as not to unduly burden the surface owner's use" and that with respect to implied rights, "it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner." 267 S.E.2d at 725–26. Thus, these cases support Appellants' position rather than the "total destruction" requirement imposed by the Panel.

Prior to 1980, West Virginia courts only analyzed surface owner claims based upon the reasonably necessary standard. *Adkins v. United Fuel Gas Co.*, 134 W.Va. 719, 61 S.E.2d 633 (1950); *Squires v. Lafferty*, 95 W.Va. 307, 121 S.E. 90 (1924); *Porter v. Mack Manufacturing Co.*, 65 W.Va. 636, 64 S.E. 853 (1909); 54 Am.Jur.2d *Mines and Minerals* § 210; 58 C.J.S. Mines and Minerals § 159; R. Donley, *Coal Mining Rights and Privileges in West Virginia*, 52 W.Va.L.Rev. 32 (1949). Courts generally held that if the mineral owner's extractive methods were determined to be reasonably necessary to enjoy and profit from the mineral estate, and the methods were performed without negligence, such methods would not be enjoined and damages would not be awarded. *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 724-25, 61 S.E.2d 633, 636 (1950).

However, in *Buffalo Mining,* this Court added the requirement that the implied use be "without substantial burden to the surface owner." 267 S.E.2d at 723. The *Buffalo Mining* Court

stated the issue was "whether the utilization of the surface for an electric power line can be *inferred [implied]* as a reasonable use within the context of the severance deed language." *Id.* (emphasis added). The Court reasoned that in cases "where severance deeds contain broad rights for utilization of the surface in connection with underground mining activities and these broad rights are coupled with a number of specific surface uses, courts will be inclined to *imply* compatible surface uses that are necessary to the underground mining activity. 267 S.E.2d at 725 (emphasis added). This implication of rights was not, however, unlimited.

> [W]here implied as opposed to express rights are sought, the test of what is reasonable and necessary becomes more exacting, since the mineral owner is seeking a right that he claims not by virtue of any express language in the mineral severance deed, but by necessary implication as a correlative to those rights expressed in the deed. In order for such a claim to be successful, it must be demonstrated not only that *the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner.*

Buffalo Mining, 267 S.E.2d at 725-26. (emphasis added).

B. An owner of mineral rights underlying a particular property does not have the right to create a nuisance on the surface of that tract to develop minerals underlying another property.

In West Virginia, "[a]n easement may be defined as the right one person has to use the lands of another for a specific purpose...." *Kelly v. Rainelle Coal Co.,* 135 W.Va. 594, 604, 64 S.E.2d 606, 613 (1951), *overruled in part on other grounds by Kimball v. Walden,* 171 W.Va. 579, 301 S.E.2d 210 (1983); *see also* Restatement (Third) of Property § 1.2(1) (2000) ("[a]n easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement."); Black's Law Dictionary 527 (7th ed. 1999) (defining an easement as "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose ....").

As the *Quintain* Court stated: "an easement allows a person to engage in activities on another's land that, in the absence of the easement, would be a nuisance." *Quintain*, 210 W. Va. at 135. The *Quintain* Court continued, in cases involving a lease to use a particular property for a specific purpose,[4] "an easement authorizes activity to be engaged in *upon* the servient property, it is generally considered that the easement authorizes a trespass." *Id.* (emphasis added).

Accordingly, in *Quintain*, the Court held "that the actions or inactions of the owner of an easement, which otherwise meet the legal definition of a nuisance, do not create a nuisance *as to the estate servient to the easement* unless those actions or inactions exceed the scope of the easement." *Quintain*, 210 W. Va. at 136-37 (emphasis added).

Appellants are not aware of any authority, and neither the Panel nor Appellees cited any such authority, supporting the idea that an owner of mineral rights underlying a particular tract has the right to use the surface of that tract to develop minerals underlying another property other than the particular mineral estate granted under a particular deed, lease, or contract.

In fact, West Virginia law is clear that "[a] lease granting minerals carries with it, by necessary implication, *the right to enter upon the property and do all things necessary for the purpose of acquiring and enjoying the estate granted." Montgomery v. Economy Fuel Co.*, 61 W. Va. 620, 57 S.E. 137, 138 (1907). (emphasis added). The *Montgomery* case leaves no doubt that a mineral owners' rights to use the surface are limited only to the purpose of acquiring and enjoying the mineral estate granted, and not the mineral estate underlying other lands not subject to each lease. *Id.*; *see also Ross Coal Co. v. Cole*, 249 F.2d 600 (4th Cir. 1957) (use of the

[4] Rather than "in the context of two neighboring properties, one being the dominant estate and one the servient estate, where some activity on the dominant estate may rightfully create a nuisance on the servient estate." *Quintain*, 210 W. Va. at 135.

surface above lessee's minerals for mineral development from adjacent lands significantly increased the burden on the surface and would not be implied absent express deed provision).

In other words, a mineral owner cannot make use of the surface on one's property to enjoy the mineral estate underlying another separate tract. This makes perfect sense, because when a mineral owner sells his or her mineral rights, he or she can only sell or lease rights that are owned by him or her. Conversely, a mineral owner cannot convey mineral rights that are not owned by him or her.

Under *Quintain* and the related authority cited above, at best Appellees have an easement to use the surface of the Appellants' property to extract the oil and gas underlying the same property, in a manner which otherwise would constitute a nuisance, were it not for the easement.

In this case, the undisputed evidence is that the leases and deeds of record in this case establish that the Appellees massive operations exist to take gas from a vast pool that exceeds the property rights granted by Appellants' predecessors in title.

Under the plain language of the leases and agreements at issue, Appellees do not have the right to create a nuisance on Appellants' properties for the purpose of extracting or enjoying oil and gas underlying other properties not encompassed under the lease or agreement. Therefore, any nuisance conditions that adversely impact the Appellants arising from the extraction of gas underlying other properties unequivocally are beyond the scope of the easement created under the leases, and Appellees are liable for nuisances they create that are caused by such activities.

II. Appellees failed to establish as a matter of law that their activities were contemplated when the relevant deeds were executed, that they were necessary to the extraction of the minerals, and that they do not substantially burden Appellants as the surface owners.

As noted above, in order to be relieved of the burdens of nuisance law, Appellees must establish that their activities are within the scope of the easement which requires proof of three

factors: (1) that their activities were contemplated when the relevant deeds were executed, (2) that they were necessary to the extraction of the minerals, and (3) that they do not substantially burden Appellants as the surface owners. *Quintain*, 556 S.E.2d at 100; *Buffalo Mining*, 267 S.E.2d at 725-26.

(1) The burdens on surface owners from Appellees horizontal Marcellus natural gas drilling were not contemplated by the parties at the time the severance deeds were executed.

With respect to the first factor, the Panel concluded: "[t]here is no evidence in the record indicating Antero's methods are 'materially different' from the extraction methods contemplated at the time the minerals were severed or acquired..." A:2502 at ¶ 38. This conclusion, upon which the Appellees submitted no supporting evidence, is completely contradicted by the Panel's own findings, the record noted above and explicit findings of the West Virginia Legislature.

The severance deeds at issue in this case were executed as early as 1905, decades before the subject wells were drilled. It is common knowledge within the industry that the first ever Marcellus Shale well was drilled by in Washington County, Pennsylvania in 2004. A:2577. Further, the first horizontal Marcellus well ever drilled in West Virginia was in 2007, by Chesapeake Appalachia in Marshall County. A: 2578. As such, prior to 2007, horizontal drilling of the Marcellus Shale in West Virginia had never been done, much less was it the usual method, usage, or accepted common practice or custom in Harrison County. The Appellees produced no evidence to the contrary.

In addition, contrary to the Panel's conclusion, there is substantial evidence in the record regarding how horizontal Marcellus wells are "materially different" from the conventionally drilled wells common in Harrison County when the Appellants' predecessors executed the relevant deeds. Appellants presented their expert, Dr. Ingraffea, who, as note above succinctly

described the vast differences in the scale between prior technology and the Appellees' practices. A:1592-97.

The Panel's finding that the technology was not materially different is also contradicted by its own findings of fact:

> 3. The activity at issue in this complaint is horizontal well drilling and hydro-fracturing as part of the development of the Marcellus Shale in West Virginia. Traditional oil and gas wells in West Virginia are vertical wells, with smaller drill rigs and fairly small well pads, located on one-third to one-half of an acre of land. . . .
>
> 4. With the development of the Marcellus Shale, horizontal drilling is used to recover natural gas. Horizontal drilling requires a vertical well to be drilled, then the drill bit is turned and runs underground in a horizontal direction, extending anywhere from 2,000 to 10,000 feet away from the vertical well site. Several underground, horizontal wells are drilled away from the vertical well sites, much like a spider web design. Because of the horizontal drilling, more wells can be located on one well pad. *Consequently, the well pads are usually larger, there are more hydro-fracturing zones, hydro-fracturing takes a longer period of time, and it takes more sand and water.*

A:2487 at ¶¶ 3-4 (emphasis added).

In addition to the factual record submitted by Appellants, the West Virginia Legislature acknowledged the material differences regarding these technologies when it passed the three separate statutes recognizing the changes in the industry since the deeds in question were executed. First, Legislature enacted the Rotary Drilling Act, W.Va. Code § 22-7-1, et. sec. ("RDA"). In enacting the RDA in 1994, the Legislature made specific findings:

> (2) *Modern methods of extraction of oil and gas require the use of substantially more surface area than the methods commonly in use at the time most mineral estates in this state were severed from the fee tract*; and, specifically, the drilling of wells by the rotary drilling method was virtually unknown in this state prior to the year one thousand nine hundred sixty, so that no person severing their oil and gas from their surface land and no person leasing their oil and gas with the right to explore for and develop the same could reasonably have known nor could it have been reasonably contemplated that rotary drilling operations imposed a greater burden on the surface than the cable tool drilling method heretofore employed in this state. . .

(3) *Prior to the first day of January, one thousand nine hundred sixty, the rotary method of drilling oil or gas wells was virtually unknown to the surface owners of this state nor was such method reasonably contemplated during the negotiations which occasioned the severance of either oil or gas from the surface.*

W.Va. Code § 22-7-1(a) (emphasis added).

Similarly, the Natural Gas Horizontal Well Control Act ("Horizontal Well Act"), W.Va. Code § 22-6A-1, et seq., which became effective on December 14, 2011, and specifically addresses horizontal wells, such as those at issue here, supports Appellants' argument and the notion that horizontal drilling into the Marcellus Shale was a new technology, and the disturbances caused therefrom, could not have been contemplated at or near the time of the execution of the leases at issue. *See* W.Va. Code § 22-6A-2(a)(2), (3) (legislative findings that new practices have resulted in a new type and scale of natural gas development that utilize horizontal drilling techniques which "may involve fracturing processes that use and produce large amounts of water" and which "may require the construction of large impoundments or pits for the storage of water or wastewater"). Finally, the 1994 findings underlying the Flat Rate Statute, W.Va. Code § 22-6-8(a)(3), constitute a third finding by the Legislature regarding the change in circumstances brought on by new technology. *Id.* ("a great portion, if not all, of such [oil and gas] leases or other continuing contracts. . . have 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 horizons currently being developed by the well operators").

Thus, the Panel's findings that Appellees methods are not "materially different" from the methods used when the mineral rights were severed is contracted by its own findings, the record submitted, and explicit legislative findings.

(2) Appellants have failed to establish that their activities are necessary.

While the Panel concluded that Appellees' actions were necessary for the development their gas rights, there is no factual basis for this conclusion. Appellants' complaints noted above all involve the conduct that can be mitigated or eliminated. Appellees presented no testimony that they could not recover gas without operating in the abusive manner in which they did. Dust can be controlled, traffic can be moderated, lights can be repointed or focused, and the extent of nighttime operations can be reduced or eliminated. Indeed, the fact that, after these lawsuits were filed, Appellees took some minimal action to moderate the harm on Appellants is itself evidence that the scope and intensity of their activities were not necessary. A:198-199; A:2272. Finally, Appellants' expert testimony from Dr. Cheremisinoff and Dr. Ingraffea described above establish that Appellees reckless operations were conducted in a manner that is outside the relevant industry standards.

(3) Appellees' activities constitute a substantial burden on Appellants' rights to use and enjoy the surface.

The Panel concluded that "West Virginia precedent makes clear that the noise, traffic, vibrations, dust, lights, and odors of which Plaintiffs complain are well within the bounds of what is reasonable and necessary use to develop minerals." A:2501 at ¶ 35. In reaching this conclusion, the Panel relied on cases permitting physical construction on the surface tracts such as roads and pipelines. *Id.* (citing *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 724, 61 S.E.2d 633, 636 (1950) (construction of road, pipeline, and drainage ditch); *Adams v. Cabot Oil & Gas Corp.*, No. 13-1299, 2014 WL 6634396 (W. Va. Nov. 24, 2014) (new access road); *Coffindaffer v. Hope Nat. Gas Co.*, 74 W. Va. 107, 81 S.E. 966 (1914) (same)); *Teel v. Chesapeake Appalachia, LLC*, 906 F. Supp. 2d 519 (N.D. W. Va. 2012), aff'd, 542 F. App'x 255 (4th Cir. 2013) (depositing of drilling waste and other materials in pits on plaintiffs' property

was not a trespass). The question of whether a physical disturbance of the surface property was necessary is clearly different from the manner in which Appellees' operations were being conducted. None of these cases hold unreasonable noise, traffic, vibrations, dust, lights, and odors are not a substantial burden.

Indeed, *Teel* relied on *Whiteman v. Chesapeake Appalachia, LLC*, 873 F. Supp. 2d 767, 779 (N.D.W. Va. 2012), *aff'd* 729 F.3d 381 (4th Cir. 2013). In *Whiteman,* the district court, while rejecting a trespass claim for depositing drilling waste, allowed plaintiffs common law claims for damages including nuisance to survive. *Id.* Moreover, the conduct at issue was not the substantial activity involved in the drilling of horizontal wells in the Marcellus formation. Indeed, on appeal the Fourth Circuit found that "whether horizontal drilling far below the surface, a drilling method now popular in the oil and gas industry," meets the *Buffalo Mining* test "presents a broader question that only marginally overlaps with the narrower one presented" in that case. *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 386 n. 8 (4th Cir. 2013).

Factually, Appellants presented testimony of a constant barrage of light, noise, dust, odor, and vibration which even one of the members of the Panel noted were such that he would not want to live there. A:2270. The Panel discounted the testimony as "self-serving," A: 2495, but it is undisputed. Moreover, the Panel completely ignored the Appellants' expert testimony from Dr. Cheremisinoff and Dr. Ingraffea regarding the substantial impacts on the surface owners from Appellees careless operations.

III. Public policy supports allowing Appellants' nuisance claims as Appellants should not be forced to disproportionately bear the burden of Appellees' activities.

This case is not about whether Appellees should be permitted to drill horizontal wells in the Marcellus formation. The fundamental question presented by this appeal is whether these Appellants should disproportionally bear the substantial burden from these activities because their predecessors in title severed mineral rights at a time when the burdens from these activities was not imaginable.

In enacting the West Virginia Oil and Gas Production Compensation Act and the Oil and Gas Horizontal Well Production Damage Compensation Act the West Virginia Legislature has made it clear that in authorizing oil and gas drilling operations, "[e]xploration for and development of oil and gas reserves in this state must coexist with the use, agricultural or otherwise, of the surface of certain land and that each constitutes a right equal to the other." W.Va. Code § 22-7-1(a)(1); W.Va. Code § 22-6B-1(a)(1). Consequently, both Acts expressly preserve common law remedies are preserved:

> Nothing in section three or elsewhere in this article shall be construed to diminish in person against the oil and gas developer for the unreasonable, negligent or otherwise wrongful exercise of the contractual right, whether express or implied, to use the surface of the land for the benefit of the developer's mineral interest.

W.Va. Code § 22-7-4(a); *see also* W.Va. Code § 22-6B-4(a) (same).

And while the Panel may be correct in its determination that its decision does not amount to a violation of the takings clause of the fifth amendment to the United States Constitution, (*see* A:2910 at p.9), *Baltimore & P.R. Co. v. Fifth Baptist Church,* 108 U.S. 317 (1883) establishes that government action granting immunity to a private party to creates a nuisance constitutes a taking. *See also Richards v. Washington Terminal Co.*, 233 U.S. 546, 553 (1914) ("We deem the

true rule, under the 5th Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such character as to amount in effect to a taking of private property for public use."). This Court should interpret the subject severance deeds and the respective rights thereunder in light of these concerns so as not to impose the burden of living with uncompensated nuisances caused by Appellees' activities based on fifty to one-hundred-year-old severance deeds.

Appellees have unsuccessfully attempted to convince the West Virginia Legislature to bar the very claims brought by the Appellants here. *See* http://www.wvgazettemail.com/news/20160307/bill-to-shield-industry-from-lawsuits-in-wv-appears-dead. While Appellees rejection by the Legislature has not yet been repeated (likely due to the adoption of the Panel's opinion), the Legislature's failure to give the Appellees the immunity they received from the Panel should be given some weight here, especially given the express preservation of common law remedies in the code. *Cf. State v. Butler*, ___ W.Va. ___, No. 16-0543, 2017 WL 1905948, at *6 (May 9, 2017).

Allowing limited nuisance claims preserves the balance directed by W.Va. Code § 22-7-1(a)(1) and W.Va. Code § 22-6B-1(a)(1). Allowing nuisance claims does not automatically or necessarily result in tort liability being imposed on Appellees. In *Hendricks*, this Court defined private nuisance as "a substantial and unreasonable interference with the private use and enjoyment of another's land." *Hendricks v. Stalnaker*, 181 W. Va. 31, 33, 380 S.E.2d 198, 200 (1989). "The unreasonableness of an intentional interference must be determined by a balancing of the landowners' interest." *Id*, at 35. The Panel did not determine whether the conduct constituted a nuisance – instead it immunized Appellees' actions. Finally, if Appellees want to be

free from nuisance judgments, they are free to negotiate with the surface owners whose land they intend to burden to purchase the rights that were never contemplated to be given up to a century ago. *Cf.* A:2503-2502 at ¶¶ 42-46.

CONCLUSION

For the reasons stated herein, this Court should reverse the summary judgments entered by the Panel and remand this case for further proceedings on the merits of Appellants' nuisance claims.

DEBORAH G. ANDREWS, RODNEY AND KATHERINE ASHCRAFT, GREGG D. MCWILLIAMS, MARY MIKOWSKI, AND ROBERT AND LORETTA SIDERS

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 17-0126
(Appeal from Civil Action No. 13-C-434; Circuit Court of Ohio County)

ROBERT ANDREWS, et al.,
Appellants/Petitioners,

v.

ANETERO RESOURCES CORP., et al.,
Respondents/Appellees.

CERTIFICATE OF SERVICE

I, Anthony J. Majestro, counsel for Petitioners, hereby certify that I have served a true and exact copy of "BRIEF OF APPELLANTS DEBORAH G. ANDREWS, RODNEY AND KATHERINE ASHCRAFT, GREGG D. MCWILLIAMS, MARY MIKOWSKI, AND ROBERT AND LORETTA SIDERS" via Electronic Mail and U.S. Mail on this 12th day of June, 2017 to:

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