

No. 33527

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ST. LUKE'S UNITED METHODIST CHURCH,
MARY MAXINE WELCH, and
JAY-BEE PRODUCTION COMPANY,

Plaintiffs Below,

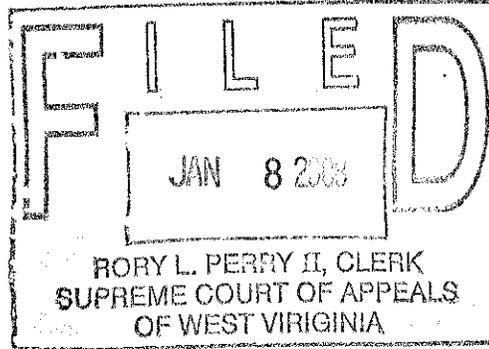
MARY MAXINE WELCH,
Appellant,

v.

CNG DEVELOPMENT COMPANY,
TRI COUNTY OIL AND GAS, INC.,
EAST RESOURCES, INC., and
ENERVEST OPERATING, LLC,

Defendants Below,

CNG DEVELOPMENT COMPANY,
Appellee.



FROM THE CIRCUIT COURT
OF RITCHIE COUNTY
No. 03-C-65

BRIEF OF APPELLANT

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I. THE KIND OF PROCEEDING AND THE NATURE OF RULING IN LOWER TRIBUNAL

Appellant Mary Maxine Welch (“Appellant Welch”) brings this interlocutory appeal pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure from an Order entered November 15, 2006 in the Ritchie County Circuit Court, the Honorable Robert L. Holland, Jr. presiding. That Order stayed this case pending Appellant Welch’s application for an interlocutory appeal. (*See* Order, November 15, 2006, p. 3) On the morning of trial, the Circuit Court, which had previously deferred ruling on a motion to dismiss filed by Appellee CNG (now known as “Appellee Dominion”) for over ten months, granted said Appellee’s motion to dismiss Appellant’s partial rescission claim and then promptly granted Appellant’s motion for an interlocutory review of the Circuit Court’s ruling.

More than one claim has been filed by Appellant in this multiple-party civil action, and the Court’s Order from which Appellant Welch now appeals has directed the entry of a final judgment as to one or more but fewer than all of the claims. (*See* Rule 54(b), West Virginia Rules of Civil Procedure, and *Province v. Province*, 196 W. Va. 473, 473 S.E.2d 894 [W. Va. 1996]) The Circuit Court’s Order effectively certified this case as ready for appeal on the claims dismissed, with the Court implicitly recognizing that the dismissed claims are the heart of the litigation.

This case brings the following important question before this Court – is the lessor of an oil and gas lease entitled to the equitable remedy of partial rescission or reformation of the lease where there is a lack of diligence on the part of the lessee in developing the lease and the lack of diligence results in extreme hardship to the lessor?

II. STATEMENT OF THE FACTS OF THE CASE

Appellant Welch and St. Luke's United Methodist Church ("St. Luke's"), a former plaintiff herein,¹ each own one-half of the oil and gas underlying an 850 acre tract in Union District, Ritchie County. (See Complaint ¶ 2) As successors of Zimry and Sarah C. Flanagan, Appellant Welch and St. Luke's are lessors under an oil and gas lease, dated November 16, 1898 (the "Flanagan Lease") from "Zimri" Flanagan to the Carter Oil Company; and, ultimately, title to the lease went from Carter Oil Company to Hope Gas, then to Appellee Dominion Exploration and Production, Inc. ("Appellee Dominion") (*Id.*, ¶¶ 4-7, 13, 22-23) Enervest Operating, LLC ("Enervest") owns three marginally productive oil and gas wells upon the subject leasehold.² (See Amended Complaint, ¶ 40) The 1898 Flanagan Lease contains the following pertinent provisions of conveyance:

To have and to hold unto and for the use of the lessee for the term of five years from the date hereof, and as much longer as oil or gas is produced in paying quantities or

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Upon information and belief, St. Luke's has entered into a settlement agreement with Appellee Dominion and is no longer a party to the case *sub judice*. (See Tr. Hearing, November 15, 2006, p. 9; and see Tr. Hearing, August 15, 2006, p. 3, where W. Henry Lawrence, Esq., counsel for Appellee Dominion, stated: "Following the or at the conclusion of the trial back in February or when we were here for the trial and it was continued I spoke directly with Mr. Haught and asked if there was some way for the drilling to go forward on the church's behalf and proposed Dominion – proposed to Mr. Haught that a survey had been performed. The survey split the lease right in half to allow for the entry into where Dominion would enter into settlement with the church and drill on that half that went to the church. The parties negotiated and entered into a settlement agreement.) In a Motion filed July 10, 2006, St. Luke's then attorney of record, Gary Morris, requested leave to withdraw as counsel for St. Luke's, stating that Appellee Dominion had "unilaterally and directly negotiated a settlement" with the church, without counsel's knowledge. See *Kocher v. Oxford Life Insurance Company*, 216 W. Va. 56, 602 S.E.2d 499 (W. Va. 2004).

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Two initial Defendants, Tri-County Oil and Gas Inc. and East Resources, Inc., were voluntarily dismissed by Plaintiffs' stipulation pursuant to Rule 41(a)(1) of the West Virginia Rules of Civil Procedure on January 29, 2004. These Defendants subsequently released their rights under the Flanagan Lease to Jay-Bee Production Company, Inc., which currently owns certain oil rights and casing head gas rights under the Flanagan Lease; Appellee Dominion owns the gas rights. Former Defendant Enervest was first joined, pursuant to Appellee Dominion's Motion to Dismiss, and then dismissed by mutual consent after the filing of the Amended Complaint seeking only partial release of the subject oil and gas lease.

the rental paid thereon, yielding to the lessor the one-eighth part of all the oil produced and saved from the premises, delivered free of expense into tanks or pipe lines to the lessor's credit; and should a well be found producing gas only, then the lessor shall be paid for each such gas well the sum of One hundred fifty Dollars for each year, so long as the gas is sold therefrom, payable quarterly when so marketed.

Dissatisfied with Appellee Dominion's failure to develop the subject tract while oil and gas operators with wells on adjoining tracts drained coterminous oil and gas reserves, Appellant Welch and St. Luke's executed separate but identical oil and gas lease agreements on June 1, 2002 and September 10, 2003, respectively, with Jay-Bee Production Company, Inc. ("Jay-Bee"),³ for a primary term of two years "and as long thereafter as operations for oil & gas are being conducted on the premises, or oil & gas is found thereon." The lease agreements with Jay-Bee also state as follows: "It is the intention of the lessee to clear title on this lease so that it may be drilled." (See Complaint ¶ 3, Exhibits B and C attached thereto)

Subsequently, on December 31, 2003, Appellant Welch, St. Luke's and Jay-Bee filed their Complaint in the instant matter, alleging, in pertinent part as follows:

First Count: As a result of the Defendants having failed to further drill or develop the lease, the Defendants have breached the implied covenant to reasonably and fully develop the subject lease and have abandoned the same. (*Id.*, ¶ 40)

Second Count: Various operators have drilled wells along the perimeter of the 850 acre tract, draining oil and gas from said 850 acre tract, and as a result the Defendants have failed to protect the Plaintiffs oil and gas from drainage and have breached Defendants implied duty to protect the lessors from drainage and have therefore abandoned the 850 acre lease. (*Id.*, ¶ 2)

Moreover, pursuant to their initial Complaint, Plaintiffs asked the court to declare the ancient Flanagan Lease "forfeited, canceled, terminated and removed as a cloud upon the title to the

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Jay-Bee Production Company, Inc. is also a plaintiff in the underlying civil litigation but is not a party to this appeal.

Plaintiff's land." Plaintiff also demanded "such other and further relief, both general and special, to which they are entitled in or about the premises." (See Complaint, "Demand," ¶¶ 1 and 2) Thus, through this civil action, your Appellant sought freedom to develop this potentially valuable 850-acre tract located in Ritchie County.

Subsequently, Appellee Dominion filed a Motion for Summary Judgment on December 3, 2004; a hearing was held on that motion on January 26, 2005. The Circuit Court of Ritchie County granted summary judgment to Appellee Dominion on the forfeiture claim⁴ at the hearing held on January 26, 2005 but the Circuit Court granted permission to the Plaintiffs, including your Appellant, to file an amended complaint. (See Order, August 15, 2005) The Circuit Court found, as follows:

[W]hat would be the appropriate procedure, would be to allow the plaintiff to file an amended complaint because the state legislature has clearly stated that the development of oil and gas is a very important mineral interest in the state of West Virginia and they have adopted language that says full development is a legislative desire.

Accordingly, on February 10, 2005, Plaintiffs filed their Amended Complaint, asserting, in pertinent part, as follows:

First Count – that numerous oil and gas wells have been drilled within the past five years on tracts immediately adjoining the Flanagan Lease, which have depleted the oil and gas bearing strata underlying portions of the Flanagan Lease, to Plaintiffs' detriment; that there are numerous viable oil and gas well locations to be drilled upon the Flanagan lease; that standard good oil and

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See Order, entered August 15, 2005, wherein the Circuit Court found, as follows: "the relief sought by the Plaintiffs in this matter was one of forfeiture and the Court was not aware of any case law in this state under the current fact situation, which being undisputed – the three wells are producing and have been paying throughout the life of the lease – that would entitle the plaintiffs to any relief for forfeiture . . . the Court does believe the plaintiff does have the right to seek enforcement of the implied covenants to fully develop the lease and as to the implied covenant to prevent drainage of the leasehold assets."

gas operating practice in the North Central West Virginia geographical area provides for maximization of the potential for full recovery and prevention of drainage of oil and gas reserves underlying an operating leasehold and provides for the prevention of drainage of oil and gas reserves underlying an operating leasehold; that the subject lease is under developed because Defendant Dominion does not currently operate gas wells upon the subject Flanagan Lease and that Defendant Enervest operates but three aging wells upon said lease, resulting in economic hardship to the Plaintiffs; that Defendant Dominion's failure to operate gas wells upon the subject Flanagan lease and Defendant Enervest's operation of but three aging wells upon said lease is a deviation from the accepted standard of good oil and gas operating practice in the North Central West Virginia geographical area; that Plaintiffs have suffered monetary damages and have lost an opportunity to maximize the fullest return on their investment; that Plaintiff Jay-Bee recently acquired the oil rights under the subject lease, including seven abandoned wells; that there are at least 20 viable oil and gas well locations to be drilled upon the Flanagan Lease, and that Plaintiff Jay-Bee had recently surveyed two well locations upon the subject lease which were ready to be permitted and drilled; that Defendant Dominion had unreasonably failed or refused to exercise due and reasonable diligence in prosecuting operations pursuant to the Flanagan Lease for the benefit of both the lessor and lessee and have thus substantially breached the lease agreement so as to defeat the very object of the contract; that Plaintiffs have fully performed all obligations under the lease agreement; that Plaintiffs have a right to complete or partial rescission or reformation of the oil and gas lease on the ground of abandonment and upon circumstances of fraud, extreme hardship, undue advantage or other established equitable ground; that Plaintiffs do not have an adequate, certain or complete legal remedy, except to rescind or reform the lease; and that as a result of Defendant Dominion having

failed to further drill or develop the lease, Defendant Dominion has breached the implied covenant or obligation to drill the number of wells reasonably necessary to develop the property and to prevent drainage by operations on adjoining lands.

Second Count – that various operators have drilled wells along the perimeter of the 850 acre tract, draining oil and gas in substantial quantities from said acreage, and that as a result Defendant Dominion has failed to protect Plaintiffs' oil and gas from drainage and thus has breached Defendant Dominion's implied duty to protect Plaintiffs from drainage; Defendant Dominion's failure to protect Plaintiffs' oil and gas from drainage, as well as Defendant Dominion's failure to reasonably and fully develop the leased premises, amounts to fraud on the part of Defendant Dominion, to-wit: in depriving Plaintiffs of the benefits of the oil and gas so drained; in promoting Defendants' independent selfish interests, and in ignoring Plaintiffs' interests, all resulting in extraordinary hardship for Plaintiffs; and that Defendant Dominion's conduct has resulted in an impairment of valuable property of Plaintiffs, resulting in irreparable injury, and demanding a measure of relief not available at law.

Count Three – that Plaintiffs do not have an adequate, certain or complete legal remedy, except to rescind or reform the lease; however, alternatively, if this Court finds that the only relief permissible is by an action at law, Plaintiffs have a right to recovery of damages for the injuries sustained by Plaintiffs as a result of Defendant Dominion's conduct.

Thus, pursuant to their Amended Complaint, Plaintiffs demand that the Flanagan Lease be rescinded or reformed so that the residue of the lease, not encumbered by existing oil and gas wells operated by Enervest which had no right to drill further wells, be partially released from the original lease, thus affording Plaintiffs an opportunity to fully develop the remaining lease acreage and protect

the same from drainage from oil and gas wells on adjoining tracts; a decree terminating all right, title, estate, lien and interest in Defendants to all acres not used by the existing three wells, thus returning Defendant to the status quo; and in the alternative to equitable relief, an award to Plaintiffs of damages for pecuniary loss due to past and future drainage by operations on adjoining lands.

Appellee Dominion filed its Answer to the Amended Complaint on February 22, 2005, and additionally filed a Motion to Dismiss and Strike to which your Appellant filed her Response. Subsequently, the Court held a hearing on the Motion to Dismiss and Strike on February 23, 2006; an Order was entered on November 15, 2006, granting the motion and dismissing those portions of the Amended Complaint relating to partial rescission, specifically paragraphs 42(C), 42(D), 45(B) and 45(C).

Thus, in addition to forfeiture, the Circuit Court of Ritchie County has directed the entry of dismissal, or final judgment, with regard to the following claims:

42(C) – Plaintiffs have a right to complete or partial rescission or reformation of the oil and gas lease on the ground of abandonment and upon circumstances of fraud, extreme hardship, undue advantage or other established equitable ground;

42(D) – Plaintiffs do not have an adequate, certain or complete legal remedy, except to rescind or reform the lease.

45(B) – Defendant Dominion’s failure to protect Plaintiffs’ oil and gas from drainage, as well as Defendant Dominion’s failure to reasonably and fully develop the leased premises, amounts to fraud on the part of Defendant Dominion, to-wit: in depriving Plaintiffs of the benefits of the oil and gas so drained; in promoting Defendants’ independent selfish interests, and in ignoring Plaintiffs’ interests, all resulting in extraordinary hardship for the Plaintiffs.

45(C) – Defendant Dominion’s conduct has resulted in an impairment of valuable property of Plaintiffs, resulting in irreparable injury, and demanding a measure of relief not available at law.

The Circuit Court granted your Appellant's motion for a stay and general continuance in order to pursue an interlocutory appeal to review the court's ruling, stating as follows:

THE COURT: It is an issue that has been raised and the plaintiffs, prior to going to trial, should be able to know exactly before they put on their evidence where they stand. The court will defer these proceedings to allow an interlocutory appeal to be filed and have the plaintiffs address these issues to the Supreme Court on the issue of rescission and based upon Mr. Morrison's (sic) previous arguments as well as the issue of forfeiture. So, the court will grant that stay until a determination is made whether the Supreme Court will accept the matter for hearing or whether it will allow the matter to proceed for argument.

(See Tr. Hearing, February 23, 2006, p. 4)

Appellant Welch appeals herein the Circuit Court's Order, entered November 15, 2006, wherein the Circuit Court of Ritchie County, the Honorable Robert L. Holland, Jr. presiding, stayed this case pending Appellant Welch's application for an interlocutory appeal regarding the Circuit Court's final rulings that neither forfeiture nor rescission are proper remedies, or claims for relief, pursuant to the case *sub judice*. (See Order, November 15, 2006, p. 3; Tr. Hearing, February 23, 2006, p. 4) Appellant Welch is one of several parties involved with this litigation. Rule 54(b) of the West Virginia Rules of Civil Procedure provides in pertinent part:

When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The Order entered November 15, 2006 is a final order in its nature and effect.⁵ See *Province v. Province*, 196 W. Va. 473, 480, 473 S.E.2d 894, 901 (1996), citing *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 775, 461 S.E.2d 516, 521 (1995), quoting Syllabus Pt. 2, *Durm v. Heck's, Inc.*, 184 W. Va. 562, 401 S.E.2d 908 (1991).

III. ASSIGNMENT OF ERROR

Whether the Circuit Court of Ritchie County committed reversible error in summarily dismissing those portions of Appellant's Amended Complaint relating to partial rescission, specifically 42(C), 42(D), 45(B) and 45(C), despite a clear showing by Appellant that the Lessee, Appellee Dominion, has not diligently developed the 850 acre tract in Ritchie County, which has resulted in demonstrable extraordinary hardship to the Lessor, Appellant Welch, and where Appellee Dominion has not protected the 850 acre tract from drainage.

RULING: The Circuit Court granted Appellee's Motion to Dismiss and Strike the Amended Complaint, dismissing those portions of the Amended Complaint relating to partial rescission, and held that partial rescission of the Flanagan Lease is not a proper remedy available under the state of current West Virginia law.

IV. SUMMARY OF ARGUMENT

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See the Circuit Court's statements at the November 15, 2006 hearing regarding entry of the November 15, 2006 Order, as follows: "The court would further note there has been pending before the court a proposed order submitted by Henry Lawrence on behalf of CNG as well as Gary Morris on behalf of Mary Maxine Welch and JayBee Production. The court having had the opportunity to review the file and transcripts of the proceedings as well as the two proposed orders by counsel, which they did not agree upon, has the correct ruling. The court finds that the order submitted from the hearing held on February 23, 2006 as submitted by Mr. Lawrence correctly reflects the findings of the court, the rulings therein and the order also. Preserved are the objections of the opposing counsel to the findings of the court. So the order has been entered and will be made a part of the record and the clerk shall provide counsel the duly attested copy thereof." (Tr. Hearing, November 15, 2006, pp. 2-3)

Appellant Welch submits that this appeal presents a *prima facie* case of extreme hardship, as envisioned by this Court in *Adkins v. Huntington Development and Gas Company, Inc.*, 113 W.Va. 490, 168 S. E. 366 (1932), entitling her, as a lessor, to the equitable remedy of partial rescission or reformation of the “grossly underdeveloped” Flanagan Lease. It is difficult to imagine an oil and gas law case scenario that is more factually unfair or presents greater hardship to the lessor. Here, there are only three closely grouped, marginally productive wells on the immense 850-acre tract of land in Ritchie County encompassing the Flanagan Lease, while oil and gas operators with wells on adjoining tracts drain coterminous oil and gas reserves. Appellant Welch asserts that Appellee Dominion has an implied duty to exercise due and reasonable diligence to develop this huge leasehold, but has unreasonably failed to do so, thus tying up the land for speculative purposes in violation of the common law and public policy of this State. This lessor argues that she has a right to the equitable remedy of partial rescission or reformation of the lease due to the extreme hardship caused by Appellee Dominion’s failure to drill the number of wells reasonably necessary to develop the property and to prevent drainage by operations on adjoining lands. Appellant further asserts that partial rescission or reformation of the Flanagan Lease is the appropriate remedy in that further development of the tract would likely be profitable and a competent and well-qualified producer is ready, willing and able to go forward with a comprehensive plan to develop the tract. Established precedent holds that production of oil or gas on a small portion of the Flanagan Lease does not justify Appellee Dominion in holding the balance of the tract indefinitely and depriving Appellant Welch of royalties as well as the privilege of making some other arrangement for recovering the minerals from the land.

V. STANDARD OF REVIEW

The standard of review applicable to all of the issues contained in this appeal is set forth, as follows:

Where the issue on an appeal from the circuit court is clearly a question of law or involving the interpretation of a statute, we apply a *de novo* standard of review. Syllabus Pt. 3, *Ewing v. The Board of Education of the County of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998) (citations omitted) Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 775, 461 S.E.2d 516, 521 (1995) (citations omitted). This Court exercises plenary review over a circuit court's decision to grant either a motion to dismiss or a summary judgment. *Conrad v. ARA Szabo*, 198 W. Va. 362, 369, 480 S.E.2d 801 (1996).

VI. ARGUMENT

A. THE CIRCUIT COURT OF RITCHIE COUNTY COMMITTED REVERSIBLE ERROR IN RULING THAT PARTIAL RESCISSION OF THE FLANAGHAN LEASE IS NOT THE APPROPRIATE REMEDY WHERE APPELLEE DOMINION HAS NOT DILIGENTLY DEVELOPED THE 850-ACRE TRACT, RESULTING IN DEMONSTRABLE EXTREME HARDSHIP TO APPELLANT WELCH

Currently, there are only three producing gas wells on the "grossly underdeveloped"⁶ 850 acre-tract of land in Ritchie County which encompasses the subject leasehold. Enervest owns and operates these aging wells without the right to drill additional wells. A classic

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See "Plaintiffs' Response to Defendant's Motion for Summary Judgment," Exhibit A, Affidavit of Donald Kesterson, stating: "... the Flanagan Lease is grossly underdeveloped in that Defendant Dominion does not currently operate gas wells upon the subject Flanagan Lease and that Defendant Enervest operates but three aging wells upon said lease."

“underachieving lessee,”⁷ Appellee Dominion does not currently operate a single oil or gas well on the large tract pursuant to the Flanagan Lease.

Oil and gas leases, such as the Flanagan Lease, usually are for a specific term of years, during which “the lessee is required to drill on the leased premises, and for such further period as either oil or gas may be produced in paying quantities.” Annot., 79 A.L.R. 2d 792, 797 § 3. As discussed earlier in the factual narrative of this Brief, the 1898 Flanagan Lease contains the following pertinent provision: “[t]o have and to hold unto and for the use of the lessee for the term of five years from the date hereof, and as much longer as oil or gas is produced in paying quantities or the rental paid thereon . . .”

Citing *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 78 L. Ed. 1255, 54 S. Ct. 671 (1934) (discussed at length later in this Brief) and a host of decisions from numerous jurisdictions, the annotation also states that “[e]ven though there has been no showing that further exploration and development of the leased premises would reasonably be expected to prove profitable to the lessees, it has been held in many cases that the lessee, to retain the lease, has a duty to drill additional wells on the leasehold in a further search for gas and oil.” Annot., 79 A.L.R. 2d 792 § 3 at 794.

This Court’s decision in *Adkins v. Huntington Development & Gas Company, Inc.*, 113 W. Va. 490, 168 S. E. 366 (1932) provides a discussion of relevant general principles of West Virginia law, including recognition of the implied covenants requiring a lessee “to drill the number of wells

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See the lengthy discussion regarding implied covenants in oil and gas law in *The Kansas Baptist Convention and Hugoton Energy Corporation v. Mesa Operating Limited Partnership*, 253 Kan. 717, 728, 864 P.2d 204, 213 (1993), which employs this term to describe lessees such as Appellee Dominion.

reasonably necessary to develop the property and prevent drainage by operation on adjoining lands.” 113 W. Va. at 492-493, 168 S. E. at 367.⁸ *Adkins* also provides important controlling precedent herein that equity recognizes “a lessor’s right to a complete or partial cancellation of an oil and gas lease on the ground of abandonment and upon circumstances of fraud or extreme hardship.” *Id.*

In this leading case, W.G. Adkins and his wife Minnie entered into a 10-year oil and gas lease in 1916 with a certain A.F. Black over their 112-acre farm in Lincoln County. Black assigned his lease to Huntington Development & Gas Company, which owned the mineral rights to two tracts adjoining the Adkins’ property. In 1922, the Gas Company drilled a gas well on one of the tracts, in a location 40 feet from the Adkins’ property, and began marketing gas from the well. Then, in 1925, with only a few months remaining on the original lease, the Gas Company was successful in obtaining a three-year extension of the lease, despite the fact that there had been no drilling on the 112-acre tract. W.G. Adkins died in 1926. In 1928, having failed to secure a second renewal from the Adkins’ heirs, the Gas Company drilled a paying gas well on the Adkins’ property. Subsequently, the Gas Company did not drill offset or other wells on the property. 113 W. Va. at 491-492 and 168 S.E. at 366. The Adkins’ heirs filed suit against the Gas Company, claiming that the Gas Company had fraudulently ignored its obligations and the implied covenants in the lease;

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The commentators in 5 Williams & Meyers, *Oil and Gas Law*, § 831, p. 217 (1998), state that “[t]he gist of the cause of action for breach of the implied covenant of reasonable development is the failure to produce oil or gas from a known producing formation, or the failure to produce minerals from such known formation with the proper rapidity.” With regard to the covenant to protect from drainage, the commentators provide that this implied covenant “serves to protect the lessor from permanent loss of oil or gas due to migration of the hydrocarbons from the leasehold to neighboring land. Where a prudent operator would do so, it requires the drilling of offset wells, and hence is often referred to as the ‘offset well covenant.’” *Id.*, § 821, p. 78.1.

failed to protect the lessor's land from drainage, and drained the lessor's land by the use of a "powerful pumping station" located five miles away. 113 W. Va. at 493-494, 168 S.E. at 367.

In *Adkins*, the Circuit Court of Lincoln County entered judgment in favor of the Adkins' heirs, requiring the Gas Company "to drill an additional well, with the possibility of a second, or payment of the usual royalty for two wells, and, in case of failure so to do, that the lease be cancelled as to all the property, with the exception of 37-1/3 acres around the present producing well." 113 W. Va. at 491, 168 S. E. at 366. On appeal, this Court affirmed with modifications, finding that the Adkins' heirs had stated a claim because the alleged actions of the Gas Company amounted to fraud and called for the "intervention of a court of equity." 113 W. Va. at 494, 497-498, 168 S.E. at 368-369.

The *Adkins* Court provides a lengthy discussion of West Virginia law that is relevant to this Court's analysis herein, stating, as follows:

Under our decisions, the lessee, upon the completion of a paying well, acquires a vested right in the oil and gas underlying the leased premises. (Citations omitted) And having acquired such right, he may not arbitrarily refuse further development, for by virtue of the very nature of the lease, the subject matter thereof and the situation of the partes, there is always, in the absence of an express covenant, an implied obligation on his part to drill the number of wells reasonably necessary to develop the property and prevent drainage by operation on adjoining lands. (Citations omitted) . . . **While equity will not enforce a forfeiture of a vested estate (citation omitted), it does recognize a lessor's right to a complete or partial cancellation of an oil and gas lease on the ground of abandonment and upon circumstances of fraud or extreme hardship.** (Citations omitted) (Emphasis added)

113 W. Va. at 492-493, 168 S. E. at 367.

The *Adkins* Court recognized the “prudent operator standard,”⁹ stating that “a lessor cannot require further development of the premises, after the lessee has acquired a vested interest in the minerals by the completion of a paying well, except upon proof to the effect that operators for oil and gas of ordinary prudence and experience in the same neighborhood under similar conditions have been proceeding successfully with the further development of their lands or leases, and the further fact that additional wells would likely inure to the mutual profit of both lessors and lessee.” 113 W. Va. at 497, 168 S. E. at 369.

The *Adkins*’ heirs were unable to provide such proof; however, the *Adkins* Court found that the allegations and proof showed with “reasonable certainty a fraudulent drainage in substantial quantities from the leased premises through the well on the adjoining ten-acre tract, which belongs to and is being operated by the lessee.” The Court said that under such circumstances, “the lessee will not be heard to contend that the drilling necessary to protect the plaintiff’s property must show a profit to it as well as the lessor.” *Id.*

Although there do not appear to be any cases directly on point to the case *sub judice* in West Virginia, the factual scenario presented in *Sauder, supra*, is quite similar. In this leading United States Supreme Court decision, the lessor (Philip Sauder) entered into an oil and gas lease in 1916, to which Mid-Continent Petroleum Corp. became the lessee through various assignments. The lease term was for ten years, and as long thereafter as oil and gas could be procured in paying quantities. The lease covered a half section of 320 acres, together with a 40-acre tract. By 1922, only two wells

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Pursuant to 5 Williams & Meyers, *Oil and Gas Law*, § 806.3, p. 42-43 (1998), “[t]he prudent-operator standard has the same function in oil and gas litigation as the reasonable man standard has in negligence litigation” According to the commentators, “Since the standard of conduct is objective, a defendant cannot justify his act or omission on personal grounds or by reference to his peculiar circumstances. . . . In short, the question is not what was meet and proper for *this* defendant to do, given his peculiar circumstances, but what a hypothetical operator acting reasonably would have done, given circumstances generally obtained in the locality.”

had been drilled on the smaller tract “to offset two wells drilled on adjoining property” and were producing oil in “small but paying quantities.” 292 U.S. at 275-277, 54 S. Ct. at 671-672 and 78 L. Ed. at 1256-1257.

Philip Sauder ultimately filed suit against the Petroleum Corporation, asserting (similar to the instant matter) that “there had been development and production of oil on adjacent tracts, with consequent drainage of oil from the leased land; the respondent was bound to explore and develop the land and had neglected so to do; unless the lease were cancelled the respondent would continue to hold it for speculative purposes, and the plaintiffs be deprived of the objects and considerations for which the lease was made.” (After Sauder’s death, the case was revived in the right of his administratrix and heirs.) *Id.* At trial, the Petroleum Corporation introduced expert testimony indicating that “the geological formation, and the experience with wells drilled on nearby lands, made it so unlikely that oil would be obtained as to justify a prudent operator in abstaining from drilling additional wells on the Sauder tract.” *Id.*

The *Sauder* Court rejected the Petroleum Corporations’ argument – holding that the Sauder heirs were entitled to relief in equity – stating, as follows:

It is conceded that a covenant on respondent’s part to continue the work of exploration, development and production is to be implied from the relation of the parties and the object of the lease; and that this covenant was not abrogated by the expiration of the primary term of ten years. (Footnote omitted) The matter in dispute is the respondent’s alleged failure to comply with its obligation. The petitioners say that if the lessee with good reason believes there is no mineral to be obtained by further drilling it should give up the lease; the respondent insists that as there is only a possibility of finding mineral, no prudent operator would presently develop, but the mere possibility entitles it to hold the lease because it is producing oil from a portion of the area. We think that the respondent’s contention cannot be sustained.

292 U.S. at 279, 54 S. Ct. at 673 and 78 L. Ed. at 1258-1259

With respect to a lease with similar provisions, the *Sauder* Court quoted *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 810, 814 (8th Cir. 1905), an often-cited case from Kansas, as follows:

The implication necessarily arising from these provisions – the intention which they obviously reflect – is that if, at the end of the five-year period prescribed for original exploration and development, oil and gas, one or both, had been found to exist in the demised premises in paying quantities, the work of exploration, development, and production should proceed with reasonable diligence for the common benefit of the parties, or the premises be surrendered to the lessor.

The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable.

292 U.S. at 279, 54 S. Ct. at 673 and 78 L. Ed. at 1259

Still referencing *Brewster*, the *Sauder* Court stated that “[a]fter commenting on the fact that the lessee is not required to carry the operations on beyond the point where they will be profitable to him, even though some benefit to the lessor will result, the court adds:

‘Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, . . . Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required.’”¹⁰

292 U.S. at 280, 54 S. Ct. at 673, and 78 L. Ed. at 1259

Finally, the *Sauder* Court stated that the facts demonstrated that the respondent Petroleum Corporation had not complied with its obligations, explaining as follows:

It has held a half section for seventeen years without the drilling of an exploratory well, and claims to be entitled to hold the lease for an indefinite period with no exploration unless some other operator brings in a producing well on adjoining land, or fresh geological data come to light. The two producing wells are on the forty acres

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The *Sauder* Court stated that the *Brewster* definition of the scope of the implied covenant has been generally adopted in decisions of federal and state courts, citing numerous cases. See *Sauder*, Footnote 2.

comprising the smaller of the adjacent areas embraced in the lease. The justification for the respondent's position is that the geologic data and the experience upon surrounding lands are both unfavorable to the discovery of oil or gas upon the east half of section 16 (the 320 acre tract). The respondent's officers state that they desire to hold this tract because it may contain oil; but they assert that they have no present intention of drilling at any time in the near or remote future. This attitude does not comport with the obligation to prosecute development with due regard to the interests of the lessor. The production of oil on a small portion of the leased tract cannot justify the lessee's holding the balance indefinitely and depriving the lessor not only of the expected royalty from production pursuant to the lease, but the privilege of making some other arrangement for availing himself of the mineral content of the land.

292 U.S. at 280-281, 54 S. Ct. at 673-674, and 78 L. Ed. at 1259-1260.

The Supreme Court ruled that the Sauder heirs were entitled to "relief in equity as they have no adequate remedy at law," and agreed with the dissenting judge in the court of appeals who "thought that a decree should be entered cancelling the lease as to the 320 acre tract . . . unless within a reasonable time an exploratory well should be drilled therein to the Mississippi lime, and that the 40 acres . . . should remain under the lease." 292 U.S. at 281-282, 54 S. Ct. at 674, and 78 L. Ed. at 1260.

In quashing Appellant Welch's partial rescission claims, the Circuit Court of Ritchie County cited five West Virginia cases as authority that the court had "the opportunity to review and read." At the February 23, 2006 hearing, the Circuit Court identified these decisions, which range in date from 1902 through 1932, "so the Supreme Court is aware of the cases that the court did review." (*See* Tr. Hearing, February 23, 2006, pp. 22-23, and Order, November 15, 2006, pp. 2-3) The cases cited by the Circuit Court are as follows: *Doddridge County Oil & Gas Co. v. Smith*, 154 F. 970 (N.D. W. Va. 1907); *Adkins v. Huntington Development & Gas Company*, *supra*; *Jennings v. Southern*

Carbon Co., 73 W. Va. 215, 80 S. E. 368 (1913); *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S. E. 124 (1910), and *Core v. The New York Petroleum Company*, 52 W. Va. 276, 43 S. E. 128 (1902).

For purposes of this Court's *de novo* analysis, the equities herein must be evaluated with regard to relevant case law as well as the current public policy announced by the West Virginia Legislature, which is to "[f]oster, encourage and promote exploration for and development, production, utilization and conservation of oil and gas resources." West Virginia Code § 22C-9-1(a)(1)

Relevant portions of the Circuit Court's Order, entered November 15, 2006, are as follows:

Whereupon, the Court announced its decision to grant the Defendant's Motion to Dismiss and Strike the Amended Complaint, dated February 22, 2005, following its review of the memoranda of law submitted by the parties and the case law in West Virginia. The Court rules that partial rescission of the Flanagan lease is not a proper remedy available under the state of current West Virginia law in this matter based upon the allegations in plaintiffs' amended complaint dated February 10, 2005. It is accordingly hereby ORDERED that those portions of plaintiffs' Amended Complaint relating to partial rescission, specifically paragraphs 42(C), 42(D), 45(B) and 45(C) are dismissed.

By way of background, the Court notes that it previously granted summary judgment to Dominion Exploration on January 26, 2005, and ruled that forfeiture, cancellation, termination, and removal were not proper remedies in this matter. The Court then permitted plaintiffs to file an amended complaint. In their Amended Complaint, plaintiffs added new claims for monetary damages and partial rescission of the Flanagan lease. Dominion Exploration moved to dismiss that portion of the Amended Complaint that sought partial rescission as a remedy for the reason that the Court had previously granted summary judgment on the rescission theory.

The Court notes that rescission and forfeiture are similar equitable remedies and rescission is not a proper remedy where a remedy at law exists. In their Amended Complaint, plaintiffs seek both a remedy at law of damages for defendant's alleged breach of the lease and an equitable remedy of partial rescission. The Court is mindful that several decisions in West Virginia recognize rescission as a remedy in limited circumstances but the Court concludes that plaintiffs have failed to plead facts to support such a remedy in this matter. These cases include Doddridge County Oil & Gas Co. v. Smith, et al, 154 F. 970 (N.D. W. Va. 1907); Adkins, et al. v.

Huntington Development & Gas Co., 113 W. Va. 490, 168 S. E. 366 (1932); Jennings v. Southern Carbon Co., 73 W. Va. 215, 80 S. E. 368 (1913); Hall et al. v. South Penn Oil Co., 71 W. Va. 82, 76 S. E. 124 (1912) ; and Core v. The New York Petroleum Company, 52 W. Va. 276, 43 S. E. 128 (1902).

The three instances where the West Virginia Supreme Court of Appeals has recognized a possible remedy of rescission include instances of fraud by a lessee, such as a lessee drilling its own wells on an adjoining tract to the detriment of its lessor, or abandonment by the lessee though (sic) clear and express acts, or undue hardship to the lessor. The Court finds that plaintiffs have not alleged fraud with the particularity required by Rule 9 of the West Virginia Rules of Civil Procedure, nor with the sufficiency to meet the requirements for a remedy of rescission. In addition, the Court finds no evidence of lease abandonment as EnerVest Operating, LLC is currently operating three active oil and gas wells on the lease. The Court further finds no evidence of undue hardship on plaintiffs.

The Circuit Court of Ritchie County states in its Order, entered November 15, 2006, that “rescission and forfeiture are similar equitable remedies and rescission is not a proper remedy where a remedy at law exists.” (See Order, November 15, 2006, p. 2.) The Circuit Court also states that “several decisions in West Virginia recognize rescission as a remedy in limited circumstances but the Court concludes that plaintiffs have failed to plead facts to support such a remedy in this matter.” *Id.* The cases cited by the Circuit Court – *Doddridge*, *Adkins*, *Jennings*, *Hall* and *Core*, *supra* – deal with “forfeiture” or “cancellation” but none of these cases specifically reference the term “rescission.” (See *Westerman v. Dinsmore*, 68 W. Va. 594, 600, 71 S. E. 250, 253 [1911]: “[r]escission, cancellation and other similar forms of relief . . . are matters of absolute right, though they render the contracts . . . only voidable” and *Holderby v. Taylor Co.*, 87 W.Va. 166, 172, 104 S.E. 550, 552 [1920]: “[r]escission is not permitted for a casual, technical, or unimportant breach or failure of performance, but only for a breach so substantial as to tend to defeat the very object of the contract.”) For purposes of this analysis, your Appellant adopts the Circuit Court’s position that the operative principle espoused in *Adkins* – recognition of a lessor’s right to a complete or partial

cancellation of an oil and gas lease on the ground of abandonment and upon circumstances of fraud or extreme hardship – is applicable to rescission and partial rescission, as well, although Appellant Welch asserts that rescission is a different remedy from “forfeiture” and “cancellation.” It is notable that Appellant’s Amended Complaint seeks complete or partial rescission or “reformation” of the Flanagan Lease. Accordingly, it is instructive to review the following relevant definitions of these terms offered by *Black’s Law Dictionary* (6th Ed. 1990), which clearly shows the difference between these remedies:

Rescission of Contract. “[a] ‘rescission amounts to the unmaking of a contract, or an undoing of it from the beginning, and not merely a termination, and it may be effected by mutual agreement of parties, or by one of the parties declaring rescission of contract without consent of other if a legally sufficient ground therefor exists, or by applying to courts for a decree of rescission (citation omitted).” (*Id.* at 1306-1307)

Reformation. “A court-ordered correction of a written instrument to cause it to reflect the true intentions of the parties. Equitable remedy used to reframe written contracts to reflect accurately real agreement between contracting parties when, either through mutual mistake or unilateral mistake coupled with actual or equitable fraud by other party, the writing does not embody contract as actually made. (citation omitted) . . . Reformation means doing over to bring about a better result, correction or rectification. (citation omitted).” (*Id.* at 1281)

Forfeiture. “A comprehensive term which means a divestiture of specific property without compensation; it imposes a loss by the taking away of some preexisting valid right without compensation. (citation omitted) A deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition.” (*Id.* at 650)

Cancellation. “Occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of ‘termination’ except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.” (citation omitted) (*Id.* at 206)

Appellant Welch’s allegations of abandonment of the Flanagan Lease by Appellee Dominion are relevant to the issue of rescission in accordance with the rule relating to the

abandonment of contracts set forth in *Carroll Gas & Oil Company v. Skaggs*, 231 Ky. 284, 297, 21 S.W.2d 445, 451 (1929) (citing 13 C.J. p. 615), as follows:

Where one party to a contract abandons it and refuses further performance, the other party is entitled to rescind. He is not, however, bound to rescind, but he may keep the contract alive and sue upon it for a breach, or he may adopt a middle course and treat the contract as at an end for further performance, but it is still alive for the purpose of adjusting the rights of the parties as to the breach.

Therefore, following the principles espoused by the Circuit Court pursuant to the most recent of the court-cited cases, *Adkins, supra*, Appellant Welch should be released from that portion of the Flanagan Lease not currently being produced (i.e., everything but the three aging wells currently being operated by Enervest) in that Appellee Dominion has not diligently developed the 850-acre tract, which has resulted in extraordinary hardship to Appellant Welch.

In its Order from which your Appellant now appeals, the Circuit Court erred by failing to address the “hardship” factor set forth in *Adkins* in any meaningful or significant fashion, stating only that “[t]he Court further finds no evidence of undue hardship on plaintiffs.” (*See* Order, November 15, 2006, p. 3) The Circuit Court’s finding is clearly wrong in light of Appellant Welch’s clear evidence of hardship. By “farming out” drilling operations in the 1970s to United Operating (Enervest’s predecessor in title) (*see* Complaint ¶ 13), which resulted in only three closely grouped wells on this immense tract, Appellee Dominion has essentially abandoned the leasehold. Appellee Dominion has taken no further action to develop this property (no other entity having rights to develop this lease). Thus, Appellant Welch has suffered emotional and financial hardship, frustrated with the knowledge that this massive leasehold could be a virtual “goldmine” for all of the parties involved. Yet, Appellee Dominion insists on “tying up the land” – in contradiction to the common law of this State (*see Steelsmith, infra*) as well as the announced public policy of our State

Legislature, which is to “[f]oster, encourage and promote exploration for and development, production, utilization and conservation of oil and gas resources.” West Virginia Code § 22C-9-1(a)(1).

In one of the earlier decisions cited by the *Adkins* Court, *supra*, this Court stated in *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 42 S. E. 655 (W. Va. 1902), that “[i]f there is one principle that is asserted in *Steelsmith v. Gartlan*¹¹ more vigorously, and with more emphasis, than any other, it is, that the lessee shall proceed to make the lease profitable to both parties **and that he shall not be permitted to tie up the land.**” (Emphasis added) 51 W. Va. at 591-592, 42 S. E. at 658. *See also Starn v. Huffman*, 62 W. Va. 422, 59 S. E. 179 (W. Va. 1907) which provides:

An oil or gas lease cannot be held for merely speculative purposes. “No lease of land for a rent for a return to the landlord out of the land which passes can be construed to enable the tenant merely to hold the lease for purposes of speculation, without doing and performing therewith what the lease contemplated. Such a construction would, indeed, make all such contracts a snare for the entrapment and injury of the unwary landlord. A man buying and paying for land may do with it as he likes – work it or let it lie idle. But a tenant to whom land passes for a specified purpose has no such discretion; he must perform what he stipulated to do.”

62 W. Va. at 425-426, 59 S.E. at 180, quoting *Crawford v. Ritchey*, 43 W. Va. 252, 27 S.E. 220 (1897)

Appellant Welch asserts that Appellee Dominion has had an implied duty to exercise due and reasonable diligence to develop this massive 850 acre tract of land – but has unreasonably failed or refused to do so, thus impermissibly “tying up the land,” pursuant to *Parish Fork* and *Steelsmith*, *supra*.

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45 W. Va. 27, 29 S. E. 978 (1898)

Thus, Appellee Dominion is “attempting to tie up the land,” in violation of the common law and public policy of this State, and causing extraordinary hardship to your Appellant. The Circuit Court committed reversible error in its finding that there was “no evidence of undue hardship on plaintiffs.” Accordingly, the Circuit Court erred in refusing to apply the *Adkins* principles to the case *sub judice*. Appellant Welch has a right to a partial rescission of the Flanagan Lease due to the extreme hardship caused by Appellee Dominion’s failure to drill the number of wells reasonably necessary to develop the property and to prevent drainage by operations on adjoining lands.

Finally, another relevant decision to this discussion is *Jennings v. Southern Carbon Co.*, 73 W. Va. 215, 80 S.E. 368 (W.Va. 1913), which provides in Syllabus Pt. One, as follows:

The owner of a lease for the production of oil and gas, containing the usual terms and conditions, must, if either mineral is found in paying quantities on or near the lands leased, exercise due and reasonable diligence in prosecuting operations thereunder, for the mutual benefit of himself and the landowner; and, if he fraudulently fails or refuses to conduct such further operations, equity will, at the suit of the lessor, decree either total or partial cancellation of the lease, according to the facts and circumstances averred and proved.

As discussed above, Appellant Welch has reasonable and justifiable expectations that drilling operations be diligently prosecuted on the Flanagan Tract and has every reason to be extremely dissatisfied with Appellee Dominion’s virtual abandonment of development. The *Jennings* Court further stated that the phrase “‘adequate remedy at law’ is often misinterpreted,” and continued: “To defeat equitable cognizance, the legal remedy must be full, it must be complete, it must be adequate. If it does not reach the end intended and actually compel performance of the duty, the breach of which is alleged, it can not be said to be fully adequate to meet the justice and necessities of the case.” 73 W. Va. at 223, 80 S.E. at 371.

In this case, an award of monetary damages alone would not be a complete remedy for Appellant Welch, pursuant to *Jennings*, as it will not compel performance on the part of Appellee Dominion. If monetary damages only are awarded, then Appellee Dominion will merely pay the award and continue to woefully under-develop the property – which is decidedly against the interests of all the parties herein. Thus, only an equitable remedy, such as partial rescission, will provide a complete and adequate remedy for Appellant Welch.

B. PARTIAL RESCISSION OR REFORMATION IS THE APPROPRIATE REMEDY HEREIN WHERE FURTHER DEVELOPMENT OF THE 850-ACRE FLANAGHAN LEASE WOULD LIKELY BE PROFITABLE; A COMPETENT AND WELL-QUALIFIED PRODUCER IS READY, WILLING AND ABLE TO DEVELOP THE TRACT, AND THE “DEVELOPED” AREA OF THE TRACT IS DISPROPORTIONATELY SMALL IN RELATION TO THE TOTAL SIZE OF THE LEASEHOLD

Evidence of Appellee Dominion’s lack of diligence in developing the potentially profitable Flanagan Lease is clear, as shown through witness testimony, pleadings and other facts presented to the Circuit Court. Donald C. Kesterson, a petroleum geologist who has been retained as Appellant Welch’s expert witness herein, provided a report, dated June 20, 2005¹², which had the objective of determining the drilling potential and loss of reserves and income on the Flanagan Lease “due to the previous lack of development.” (*See* Report of Donald C. Kesterson, June 20, 2005, p. 1, attached to Tr. Dep., Donald C. Kesterson, June 28, 2005)

In order to evaluate the drilling potential of the Flanagan Lease, Mr. Kesterson performed an analysis of “various well records and production from the Flanagan, off-sets and nearby wells.”

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The effective date of this report is January 1, 2004.

Id. He stated that analysis of “the thirteen Devonian Shale wells, direct off-set wells, was performed” and that secondarily, “some of the best wells in the immediate area were also selected and studied.” *Id.* Mr. Kesterson mapped out the property to determine drill-site, based on appropriate spacing. Under the first scenario, if no drilling had been allowed along the “line-fence” then a total of 27 Devonian well sites “could have been drilled” on the Flanagan Lease. *Id.* at p. 2

Under the second scenario, producing off-set wells surrounding the lease were taken into consideration, thus “a total of 13 deep Devonian locations could be drilled” on the Flanagan Lease, according to Mr. Kesterson’s Report. *Id.* For purposes of estimating what could be the development of the Flanagan Lease with respect to 27 wells, Mr. Kesterson estimated that nine of the wells would be “good” and that eighteen would be “average.” *Id.*

The report forecasts substantial “lost reserves” income and “lost royalty reserves” income, as set forth herein:

To determine the total Flanagan lease reserves, these 13 wells, four “Good” and nine “Average” were forecast into the future for a period of 20 years. (See Lease Reserves) Based on these figures:

	“lost reserves”	
MCF	Barrels	Income
(794,792)	(53,957)	(\$7,176,726)

As for the royalty, these figures are:

	“lost royalty reserves”	
MCF	Barrels	Income
(99,349)	(6,745)	(\$897,091)

The other method used to determine “lost reserves” was to take the difference between the lessee’s ability to drill 27 wells versus 13 wells on the Flanagan lease (See Summary Sheet)

	Difference	
MCF	Barrels	Income

One Year	(203,749)	(13,800)	(\$1,779,978)
Ten Years	(969,188)	(52,861)	(\$7,114,674)

	MCF	Difference Royalty Barrels	Income
One Year	(29,106)	(1,971)	(\$261,339)
Ten Years	(138,455)	(7,552)	(\$1,088,381)

(*Id.*, see Chart, p. 3)

Additionally, Mr. Kesterson made the following significant observation, at page four of his report:

With the recent off-set developments by other operators off-setting the Flanagan property, some literally along or near the "line-fence," it is my opinion that several of these wells could be draining natural gas and crude oil reserves from the Flanagan tract and the royalty owners are not receiving compensation.

This Court provided in *Adkins, supra*, that after a lessee, such as Appellee Dominion, has acquired a vested interest in the minerals through the completion of a paying well, "a lessor cannot require further development of the premises . . . except upon proof to the effect that operators for oil and gas of ordinary prudence and experience in the same neighborhood under similar conditions have been proceeding successfully with the further development of their lands or leases, and the further fact that additional wells would likely inure to the mutual profit of both lessors and lessee." 113 W. Va. at 497, 168 S.E. at 369, citing *Hays v. Bowser*, 110 W. Va. 323, 158 S.E. 169 (W. Va. 1931)

In addition to Mr. Kesterson's report showing that additional wells likely would be profitable and his deposition testimony, two affidavits have been filed in support of Appellant Welch's position in this case, all of which satisfy the above-stated *Adkins* requirement. One of the affidavits was executed by petroleum geologist Kesterson, who also authored the June 20, 2005 report, discussed above. In his affidavit, Mr. Kesterson stated, as follows:

- (1) that numerous oil and gas wells have been drilled within the past five years on tracts immediately adjoining the Flanagan lease;
- (2) that these adjoining wells have depleted the oil and gas bearing strata underlying the portions of the Flanagan lease immediately adjoining the tracts upon which the recently drilled wells are situate, to Plaintiffs' detriment;
- (3) that there are numerous viable oil and gas well locations to be drilled upon the Flanagan Lease;
- (4) that standard good oil and gas operating practice in the North Central West Virginia geographical area would provide for maximization of the potential for full recovery of oil and gas reserves underlying an operating leasehold ;
- (5) that standard good oil and gas operating practice in the North Central West Virginia geographical area would provide for the prevention of drainage of oil and gas reserves underlying an operating leasehold from oil and gas wells being drilled on tracts immediately adjoining an operating lease depleting the oil and gas bearing strata underlying the adjacent portions of an operating lease;
- (6) that the Flanagan Lease is grossly underdeveloped in that Defendant Dominion does not currently operate gas wells upon the subject Flanagan Lease and that Defendant Enervest operates but three aging wells upon said lease;
- (7) that these Defendants have deviated from the accepted standard good oil and gas operating practice in the North Central West Virginia geographical area with regard to the Flanagan Lease by virtue of Defendant Dominion's failure to operate gas wells upon the subject lease and Defendant Enervest's operation of but three aging wells upon said lease, and
- (8) that the oil and gas wells that have been drilled within the past five years on tracts immediately adjoining the Flanagan Lease have depleted the oil and gas bearing strata underlying the portions of the Flanagan Lease immediately adjoining the tracts upon which the recently drilled wells are situate, to the detriment of Plaintiffs' lease, and said Plaintiffs have suffered monetary damages.

(See "Plaintiffs' Response to Defendant's Motion for Summary Judgment," Exhibit A, Affidavit of Donald Kesterson.)

Randy Broda, the President of Jay-Bee Oil and Gas Production, Inc., whose corporation is also a plaintiff in this litigation, also caused an affidavit to be prepared pursuant to this litigation

which concurs with the statements contained in Mr. Kesterson's affidavit. Both Kesterson and Broda stated that they have assisted Jay-Bee in planning numerous viable oil and gas well locations upon the Flanagan Lease and in preparing well permits for two initial locations. Mr. Broda stated that he had planned at least 20 oil and gas well locations for the Flanagan Lease and that he had acquired from the oil and gas owners an oil and gas lease covering the Flanagan tract. (*Id.*, Exhibit B, Affidavit of Randy Broda)

Prior to the initiation of this litigation, Appellant Welch and St. Luke's United Methodist Church were dissatisfied with Appellee Dominion's failure to develop the Flanagan Lease while oil and gas operators with wells on adjoining tracts drained coterminous oil and gas reserves. (*See "Statement of the Facts of the Case," supra*). Thus, as more fully discussed in Appellant Welch's factual statement, on June 1, 2002 and September 10, 2003, the disgruntled lessors executed separate but identical oil and gas lease agreements with Jay-Bee Production Company, Inc. with the proviso that the lessors intended to clear title so that their grossly underdeveloped leasehold could be drilled by Jay-Bee. As evidenced by the Kesterson and Broda affidavits, Jay-Bee is ready, willing and able to proceed to develop and produce oil and gas on the Flanagan tract – which is in direct contrast with Appellee Dominion's current and historical intransigence with regard to development of the leasehold.

The deposition testimony of Appellee Dominion's expert witness, Dr. Khashayar Aminian, a professor of petroleum engineering at West Virginia University, reveals Appellee Dominion's lack of corporate desire and intent to develop the leasehold.. Dr. Aminian confirmed there are no potential drilling sites in the Flanagan Lease that meet Appellee Dominion's exploration engineering parameters of "22 million for the first year and 250 million for total estimated recovery."

(See Deposition of Dr. Khashayar Aminian, February 22, 2006, p. 52) Mr. Aminian testified as follows:

Q. So your opinion would be that given those parameters they shouldn't drill this lease?

A. I would not, I would not recommend it if I was evaluating that lease.

Id. at 54. (Emphasis added)

If indeed, market conditions are the source of Appellee Dominion's determination not to develop the subject leasehold, as Mr. Aminian's deposition testimony suggests, then such a market-based rationale should not be tolerated by this Court pursuant to *Tucker v. Watts*, 1 Ohio C.C. (n.s.) 589, 1903 Ohio Misc. LEXIS 211 (1903), which stated as follows:

If it had appeared that for several years – four, or five, or six – that upon adjoining lands oil had been produced, we are of the opinion that the lessee would not have been excused from drilling and would not be permitted to retain his interest in the absence of drilling simply because, while oil was found, it was deemed, by reason of the state of the oil market, that it would not be profitable to do the drilling. If it is not profitable, there is an easy escape for the oil driller; he may either confer the benefits of the royalty upon the land owner by drilling, or he may surrender his interest in the land; but he has no right, when oil is found in considerable quantities to decline to produce the oil for the benefit of the landowner because in the condition of the oil market it would not be profitable for the producer to do the drilling. He may do that, but if he does it he must surrender his interest in the premises.

1 Ohio C.C. (n.s.) at 596.

In upholding the cancellation of the lease, the Ohio court in *Tucker* pointed out that the lessee's attitude indicated an unwillingness "to experiment further upon these lands at the then price of oil." The court further stated: ". . . the specific intention was to drill further wells when there was an advance in the price of oil. Now an intention to drill further wells when there is an advance in

price is tantamount to an intention not to drill further wells until after such advance.” 1 Ohio C.C. (n.s.) at 594.

In *Carter v. U.S. Smelting, Refining & Mining, Co.*, 1971 OK 67, 485 P.2d 748 (1971), the Supreme Court of Oklahoma affirmed the trial court’s decision to cancel an oil and gas lease, based upon the alleged failure of the lessee’s assigns to comply with the implied covenant to drill an additional well or wells. Interestingly, in its decision, the *Carter* Court quoted trial testimony of lessee’s production superintendent as supporting the trial court’s “implied finding” that the lessees were holding the lease “for sheer speculation and without any purpose for future development” – language which is strikingly similar to the deposition testimony of Mr. Aminian, Appellee Dominion’s expert witness – as follows:

Q. The purpose of the Company in trying to hold this lease for just the possibility of something developing in the future that might be worthwhile and somebody else might solve or there might be some particular means to recover for itself – that’s the purpose of the company, isn’t it?

A. I can agree with most of that, Yes, sir.

Q. You have no plans to drill any part of the Carter lease, do you?

A. To date, No, sir.

Q. You don’t think, geologically, and have so advised the Company, that it is not good business to drill any other wells on this Carter lease?

A. For commercial production at this time, no.

485 P.2d at 753.

Turning to a decision from the Supreme Court of Louisiana, *Carter v. Arkansas Louisiana Gas Co.*, 213 La. 1028, 36 So. 2d 26 (1948), the appellate court concluded that the lessee of a lease encompassing 1,263 acres had failed to develop the entire leased area with due diligence and was

thus, not entitled to hold the entire tract, in view of the fact that “another competent and well-qualified producer” was willing to drill in an area that the current lessee deemed to be undesirable due to the existence of a certain fault line. Stating that “the main consideration of mineral lease is the development of the leased premises for minerals,” the Louisiana court further stated that lessee “must develop with reasonable diligence or give up the contract.” 213 La. at 1034. 36 So. 2d at 28.

The Carter Court further provided, as follows:

Our analysis of all of the testimony convinces us that defendant herein has failed to develop sufficiently the 1263 acres covered by the lease, and that the drilling of only two gas wells which produce in paying quantities is not a reasonable development of this large tract, and that the reasons by which defendant attempts to justify its refusal to develop the property further are not adequate and sufficient, especially in view of the fact that another competent and well qualified producer is willing to drill to the north and east of the main fault line. In other words, defendant has violated the implied condition of the lease to develop the property prudently and reasonably.

213 La. 1037-1038, 36 So.2d at 29.

Stating that “many oil producing areas today were developed in the very teeth of adverse geological advice,” the Court of Appeal of Louisiana (Second Circuit) ruled in favor of a oil and gas lessor who sought cancellation of a 40-acre portion of a lease consisting of 84 acres on the ground of non-development in *Nunley v. Shell Oil Company*, 76 So.2d 111, 1954 La. App. LEXIS 938 (1954). The lessee’s assignee based its opposition to further development and “its claim to the status of a prudent operator in the matter” upon the opinion of a consulting geologist who testified that the 40-acre tract which lessor sought to be released would be “completely unproductive . . . with the possible exception of one acre.” 76 So. 2d at 115. The Louisiana court was not impressed with this “single fact of an unfavorable geological prognosis, “ but was more persuaded by the fact that the lessor “had received a bona fide offer of lease on the 40 acres” from a reputable broker, who had

been involved in the buying, selling and development of leases in that area for a 20-year period. 76

So.2d at 112, 115. The court further stated in *Nunley*, as follows:

The record incontrovertibly establishes the fact that a bona fide offer of lease involving the payment of a cash consideration and the contingent accrual of an additional sum was made to plaintiff by a banker who was also a dealer in leases in the area. This offer further provided for an obligation on the part of the prospective lessee to drill a well. . . . There is no showing in the record that the individual who made the above offer to plaintiff was not a reasonable and prudent operator. . . . The value of the lease and the rights granted thereunder is an unimportant collateral issue since all rights of the lessee must be determined on the basis of its compliance, vel non, with the obligations provided in the lease, in this instance, the prudent and reasonable development of the leased premises. . . . Under the facts related, we are convinced that plaintiff has adequately established his right to a cancellation of the lease on the ground of nondevelopment.

76 So.2d at 115.

Moreover, in the case *sub judice*, there are only three marginally productive wells on the immense 850-acre tract of land encompassing the Flanagan lease, all of which are currently owned by Enervest. Decisions from other jurisdictions indicate that “if any area which has been developed appears disproportionately small in relation to the whole area of the lease, it has been held that the lessee is under a duty to explore and develop further if he wishes to continue the lease in force as to the entire tract.” Annot., 79 A.L.R.2d 792, 804, § 4. Clearly, in line with the decisions discussed below, the “developed” area on the subject leasehold is disproportionately small in relation to the 850-acre tract herein.

In *Ezzell v. Oil Associates, Inc.*, 180 Ark. 802, 22 S.W. 2d 1015 (1930), the oil and gas lease comprised a 1,170 acre tract of land in Arkansas. Only two wells were drilled upon the entire tract, with only one becoming a producing well. 180 Ark. at 813, 22 S. W. 2d at 1019. The Supreme Court of Arkansas decreed cancellation of the entire lease, with the exception of a 10-acre area around the

single producing well, stating that “there is an implied covenant on the part of the lessee in oil and gas leases to proceed with reasonable diligence in the search for oil and gas, and also to continue the search with reasonable diligence, to the end that oil and gas may be produced in paying quantities throughout the whole of the leased premises.” 180 Ark. at 810, 814-815, 22 S.W.2d at 1018-1019.

In another Arkansas decision, *Standard Oil Company of Louisiana v. Giller*, 183 Ark. 776, 38 S. W. 2d 766 (1931), the appellate court held that a lease was properly cancelled where the assignee of a 40-acre oil lease drilled a paying well in a corner of the tract but refused to drill any more wells. The court found that there was evidence that one well would “drain the oil from only ten acres surrounding it;” that it was “impossible for one well in the corner of the forty-acre tract to produce all of the oil therefrom;” and that “the probabilities are oil will be found in commercial quantities under the entire tract if explored.”

183 Ark. at 779, 38 S. W. 2d at 766-767.

The Supreme Court of Kansas upheld the cancellation of an oil and gas lease as to 200 acres, with the exception of 10 acres on which there was a producing oil well, in *Harris v. Morris Plan Co.*, 144 Kan. 501, 61 P.2d 901 (1936). The lessee argued on appeal that additional drilling would be unprofitable, but the court was not persuaded, stating that the lease “was executed to provide development and not an opportunity for speculation.” 144 Kan. at 507, 61 P.2d at 905.

In *Hodges v. Mud Branch Oil & Gas Co.*, 270 Ky. 206, 109 S.W.2d 576 (1937), the Court of Appeals of Kentucky reversed the lower court’s refusal to cancel an oil and gas lease where the lessee had drilled one well on a 70-acre tract which produced gas and a “small showing of oil.” The lessor argued that the failure of the lessee to develop the lease was “in effect an abandonment” and that the lease should be cancelled, but the chancellor held that the lessee had not had a reasonable

time, under all the circumstances, within which to develop the lease. 270 Ky. at 207, 109 S.W.2d at 576-577. In holding that the lease should be canceled for the acreage necessary for efficient operation of the existing gas well, the Kentucky court stated, as follows:

If, as appellee's witnesses expressly state, there is no intention by the lessee to drill further, then to all intents and purposes, the lease has been abandoned as effectively as though there had been no development for ten years instead of three. The lapse of time is merely evidence of abandonment. Other facts may show it too.

In *Lawrence Oil Corporation v. Metcalfe*, 241 Ky. 353, 43 S.W.2d 986, 989 (1931), we said:

"It is well settled that a neglected portion of a lease may be cancelled, preserving all of the rights of the lessee in the developed portion, and such cancellation is a proper, although not the exclusive, remedy."
(Citations omitted)

The *Hodges* Court further stated that the lessor "should not be required to await indefinitely the procuring of a market or the whims of appellee in further prospecting for oil." 270 Ky. at 208, 109 S. W. 2d at 577.

The Fourth Circuit Court of Appeals decision, *Imperial Colliery Company v. OXY USA Inc.*, 912 F.2d 696, 1990 U.S. App. LEXIS 14835 (4th Cir. 1990), is persuasive with regard to an analysis of the phrase "produced in paying quantities" in the subject 1898 Flanagan Lease, which states in pertinent part: "[t]o have and to hold unto and for the use of the lessee for the term of five years from the date hereof, and as much longer as oil or gas is produced in paying quantities or the rental paid thereon . . ." A brief summary of the facts of *Imperial Colliery* is warranted herein. Imperial owned and leased to Oxy 2440 acres of oil and gas producing land in West Virginia upon which there were 14 gas-producing wells. The gas produced from these 14 wells was combined with other gas from the area and sold to Equitable Gas Company. 912 F.2d at 699. Concerned that Oxy was underpaying royalties, Imperial stopped cashing Oxy's royalty checks and brought suit alleging

royalty underpayments, lease termination and damages. The district court determined in a non-jury trial that Oxy had underpaid royalties pursuant to the 1944 lease and that the term of the lease had been terminated automatically when the lease ceased to produce in paying quantities in 1978, making Oxy a “bad-faith trespasser” after that year. *Id.* With regard to Oxy’s contention on appeal that the district court erred “in determining that the lease automatically terminated by its terms at the end of 1978,” the Fourth Circuit construed the term “produced” in the 1944 lease “under controlling state law to mean produced in paying quantities, that is at a profit.” *Id.* at 704, citing *Goodwin v. Wright*, 163 W. Va. 264, 255 S.E.2d 924, 926 (1979). Oxy argued that “so long as one well on a lease operates profitably, the condition for continuation of the lease is satisfied.”¹³ The Fourth Circuit further stated in *Imperial Colliery*, as follows:

This is clearly not the result that *Goodwin* envisions. The *Goodwin* court spoke in terms of the lease’s profitability, not that of any single well. Furthermore, the *Garcia* court held that paying quantities means paying quantities to the lessee.

Imperial Colliery at 705, citing *Goodwin* at 926 (citing *Garcia v. King*, 139 Tex. 578, 164 S. W. 2d 509, 512 [1942])

Thus, the Fourth Circuit found no error in the district court’s holding “that the entire Imperial lease had to produce gas in paying quantities in order to survive automatic lease termination by operation of the habendum clause.” Citing *Clifton v. Koontz*, 160 Tex. 82, 325 S.W.2d 684, 691 (1959), the Fourth Circuit referenced the “marginal well” rule, which states, as follows: “In the case of a marginal well, . . . the standard by which paying quantities is determined is whether or not under

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The Fourth Circuit stated that Oxy’s reliance on *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S. E. 433, 436 (1903) “to support the proposition that any one well producing in paying quantities is sufficient to keep an overall unprofitable lease alive” was without merit. The court stated: “The cases Oxy relies upon to support this argument are cases involving the production of only one well.” *Imperial Colliery* at 705.

all the relevant circumstances a reasonably prudent operator would, for the purpose of making a profit and not merely for speculation, continue to operate a well in the manner in which the well in question was operated.” Appellant Welch asserts that the three “marginal wells” on the Flanagan Lease are not producing in “paying quantities” pursuant to the *Imperial/Clifton* analysis in that a reasonably prudent operator would not continue to operate the subject leasehold as it is currently being operated, if not merely for speculative purposes. Therefore, the Flanagan Lease has effectively terminated due to a cessation of production in paying quantities.

C. PARTIAL RESCISSION OR REFORMATION OF THE FLANAGHAN LEASE IS THE APPROPRIATE REMEDY HEREIN BECAUSE APPELLEE DOMINION HAS NOT PROTECTED THE 850-ACRE TRACT FROM DRAINAGE

Appellee Dominion has an implied obligation to protect the 850 acre tract from drainage by oil or gas wells on adjacent property. See Syllabus Pt. 1, *Adkins, supra*, as follows: “In the absence of an express provision requiring the lessee to protect the leased premises from drainage by oil or gas wells on adjacent property, an implied obligation will be read into the lease to give such protection.” Moreover, this Court stated in *United Fuel Gas Company v. Frank A. Smith*, 93 W. Va. 646, 655-656, 117 S. E. 900, 904 (1923) that “there is always implied in every oil and gas lease a covenant to drill the number of wells reasonably necessary to develop the property and prevent drainage by operation on adjoining lands. (Citations omitted)” Therefore, Appellant Welch must be released from that portion of the Flanagan Lease not being produced in that Appellee Dominion has not protected the tract from drainage.

Appellant Welch has made a strong case on the merits on the issue of drainage, as seen from the discussion pursuant to the arguments above. Donald C. Kesterson and Randy Broda, stated in

their respective affidavits that there are numerous oil and gas wells that have been drilled within the past five years on tracts immediately adjoining the Flanagan Lease and that the said oil and gas wells have depleted the oil and gas bearing strata underlying the portions of the Flanagan Lease immediately adjoining the tracts upon which the recently drilled wells are situate, to the detriment of your Appellant. Thus, Appellant Welch has proven drainage with "certainty." 113 W. Va. at 494, 168 S.E. at 368. Moreover, this Court stated in *Todd v. Manufacturers Light & Heat Co.*, 90 W. Va. 40, 47, 110 S.E. 446, 448 (1922), that partial cancellation on a claim of drainage is allowed if the allegations respecting drainage are "certain and definite." The factual evidence provided in the affidavits of Kesterson and Broda, coupled with the irrefutable fact that there are only three producing wells currently on the immense tract, provide this requisite specificity.

Moreover, *Michie's Jurisprudence*, Mines and Minerals, § 61 (Failure to Develop after Discovery and Production of Oil), provides this pertinent discussion:

The practically universal interpretation of oil and gas leases is that, where the contract does not expressly state what shall be done by the lessee, there arises the legal implication that, if the latter finds one or both of these minerals on a lease operated by him, or if either he or other operators find them on adjoining lands, **he will drill as many wells as will afford sufficient protection against drainage, and otherwise so develop the leased premises as to serve the mutual benefit of both lessor and lessee.**

Id. at 104-105 (Emphasis added)

In *Jennings, supra*, the Southern Carbon company entered on the lessor's land in 1905 and drilled a well to the "Big Injun" sand, a depth of about 1600 feet. The well produced gas "in great quantities and at high pressure . . . at first, and in paying quantities thereafter" until suit was filed in 1910, wherein Virginia Jennings charged Southern Carbon with fraud "in denying plaintiff's importunities for the drilling of additional wells to further test her lands, and to protect her premises

from drainage through wells on contiguous lands.” She claimed that the company and/or its stockholders had an interest in the lands adjacent to her leasehold and that Southern Carbon “fraudulently refrained from making any effort to protect her lands against drainage.” 73 W. Va. at 218 and 80 S. E. at 369. The *Jennings* Court’s analysis with regard to an “adequate remedy at law” is particularly pertinent to the discussion herein regarding drainage:

The cases in which, because of a supposed adequate remedy at law, relief in equity has been denied upon allegations similar to those contained in the bill, do not meet general approval, and therefore are not satisfactory. Most of them say that *ordinarily* the remedy is by an action at law. All of them exclude from the holding cases where fraud is charged and proved. Judge BRANNON, in *McGraw Oil Co. v. Kennedy*, 65 W. Va. 595, 64 S. E. 1027, said: “I have never been reconciled to the doctrine that for failure to drill additional wells the lessor must sue at law for damages, and equity will not cancel, unless for draining from nearby territory and thus exhausting oil in the leasehold involved. I have asked, how many actions must the landlord bring? How can damages be measured? Who can see into the depth of the earth”? There are, in fact, many cases sustaining jurisdiction in equity to cancel an oil and gas lease, in lieu of specific performance of its implied covenants for diligent operation and protection of the lines.

73 W. Va. at 224-225 and 80 S.E. at 371-372, citing *Brewster, supra*, and numerous other decisions, which are omitted herein.

Noting that it was “reasonably certain” that some of lessor’s oil and gas was drained by adjoining wells, the Court found in *Jennings* that the lessor was entitled to bring her suit in a court of equity, because her remedy at law, an action to recover damages, was not complete and adequate.

Therefore, the appropriate remedy for drainage may be found only in equity. The exact amount of damages owed to Appellant Welch for drainage is not ascertainable, and therefore not measurable in damages in an action at law. Not only are Appellant Welch’s damages difficult to

approximate or calculate, an assessment of monetary damages will not compel Appellee Dominion's performance to prevent future drainage from the 850 acre leasehold.

D. APPELLANT WELCH DOES NOT DISPUTE THE CIRCUIT COURT'S RULING WITH REGARD TO FORFEITURE, BUT ASSERTS THAT PARTIAL RESCISSION OR REFORMATION IS THE APPROPRIATE REMEDY HEREIN

In her initial Complaint, Appellant Welch asked the Circuit Court of Ritchie County to declare the Flanagan Lease "forfeited, canceled, terminated and removed as a cloud upon the title to the Plaintiff's land." (See Complaint, "Demand," ¶ 1) Appellee Dominion subsequently moved for summary judgment on December 3, 2004, and a hearing was held on the motion on January 26, 2005. The Order granting summary judgment on the basis that "forfeiture can never be a remedy under the current status of the allegation contained by the plaintiff" was entered on August 15, 2005. Pursuant to that Order, the Circuit Court granted permission to the Plaintiffs, including your Appellant, to file an amended complaint to seek other viable relief.

The Circuit Court's statements from the bench on the forfeiture issue at the January 26, 2005 hearing are set forth in pertinent part, as follows:

THE COURT: The court is troubled actually with the argument of both counsel in this case. From the standpoint of the defendant Dominion the court does agree that under the current status of the case and in reviewing the complaint that the relief sought for by the plaintiffs in this matter is one of forfeiture. This court read both memorandums supplied by counsel, and it is not aware of any case law in this state under the current fact situation which was undisputed – the three wells are producing and have been paying throughout the life of the lease – that would entitle the plaintiffs to any relief for forfeiture. On the other hand, the defendant asserts there is no action for implied covenant because this is clearly an express contract. I think that it is a disingenuous argument in that if that argument were adopted by the court there would be no times when any implied covenant and any written contract could be enforced or pursued.

The court agrees with the defendant that under the language of the complaint the appropriate relief would be monetary relief rather than forfeiture for the implied covenant.

The court does believe the plaintiff does have the right to seek enforcement of the implied covenants to fully develop the lease as to the implied covenant to prevent drainage of the leasehold assets.

The remedy is, I think, hard fashioned in there are sufficient genuine issues of material fact to allow the case to go forward. My concern is that the plaintiffs' complaint at this time only seeks forfeiture rather than any other remedy. I think what would be the appropriate procedure would be to allow the plaintiff to file an amended complaint because, Mr. Lawrence, I believe our state legislature has clearly stated that the development of oil and gas – I believe it is Chapter 7, that may not be right, Chapter 22 – our legislature has clearly expressed the fact that oil and gas is a very important mineral interest in the State of West Virginia and they have adopted language that says full development is a legislative desire.

The court would further find that the case is not fully developed through discovery at this point. I would caution you, Mr. Morris, that as your complaint now stands the court would agree even if this case would further develop through discovery your potential seeking of relief of forfeiture is not recognized as a manner of relief in this case.

So the motion for summary judgment is denied. The court would find there are genuine issues of material fact. The problem still rests with the plaintiff concerning, regarding the current status of the complaint.

. . . Forfeiture, in my understanding of the current status of the law, I worked with this stuff for years, is not an appropriate remedy.

. . . I will grant the summary judgment and find as matter of law based upon the pleadings of this matter and the evidence before the court and affidavit of both parties that forfeiture can never be a remedy under the current status of the allegation contained by the plaintiff, but the plaintiff will be allowed to amend their complaint to seek other relief that may be viable.

See Tr. Hearing, "Court's Finding," January 26, 2005, pp. 10-13.

Subsequently, the Plaintiffs, including Appellant Welch, filed their Amended Complaint, containing numerous allegations (*see* "Statement of the Facts of the Case," *supra*) and demanding

that the Flanagan Lease be rescinded or reformed so that the residue of the lease, not encumbered by existing oil and gas wells, be partially released from the original lease, thus giving the Plaintiffs the opportunity to fully develop the remaining lease acreage and to protect the leasehold from drainage on oil and gas wells on adjoining tracts. Appellee Dominion filed its Answer to the Amended Complaint on February 22, 2005, and additionally, filed a Motion to Dismiss and Strike to which Plaintiffs filed their Response. Subsequently, the Court held a hearing on the Motion to Dismiss and Strike on February 23, 2006; an Order was entered on November 15, 2006, granting the motion and dismissing those portions of Appellant Welch's Amended Complaint relating to partial rescission, specifically paragraphs 42(C), 42(D), 45(B) and 45(C).

The Order of the Ritchie County Circuit Court entered November 15, 2006 also stayed this case pending Appellant Welch's application for an interlocutory appeal. In issuing its ruling, the Circuit Court stated as follows: **"It is an issue that has been raised and the plaintiffs, prior to going to trial, should be able to know exactly before they put on their evidence where they stand.** The court will defer these proceedings to allow an interlocutory appeal to be filed and have the plaintiffs address these issues to the Supreme Court on the issue of rescission and based upon Mr. Morrison's (sic) previous arguments as well as the issue of forfeiture." (See Tr. Hearing, February 23, 2006, p. 4) (Emphasis added)

For purposes of this appeal, Appellant Welch does not dispute the Circuit Court's ruling with regard to forfeiture; however, as she has argued extensively above, Appellant Welch asserts that partial rescission or reformation is the appropriate remedy pursuant to the case *sub judice*.

VI. CONCLUSION

Therefore, based on the argument and authorities cited above, your Appellant respectfully requests that the Order of the Circuit Court of Ritchie County entered November 15, 2006, granting Defendant's Motion to Dismiss and Strike and dismissing those portions of the Amended Complaint relating to partial rescission, be reversed. Thus, your Appellant requests that this Court hold that the lessor of an oil and gas lease is entitled to the remedy of partial rescission or reformation of the lease where there is a lack of diligence on the part of the lessee in developing the lease and the lack of diligence results in extreme hardship to the lessor.



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Respectfully Submitted,

MARY MAXINE WELCH,
Appellant, By Counsel

No. 33527

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ST. LUKE'S UNITED METHODIST CHURCH,
MARY MAXINE WELCH, and
JAY-BEE PRODUCTION COMPANY,

Plaintiffs Below,

MARY MAXINE WELCH,

Appellant,

v.

CNG DEVELOPMENT COMPANY,
TRI COUNTY OIL AND GAS, INC.,
EAST RESOURCES, INC., and
ENERVEST OPERATING, LLC,

Defendants Below,

CNG DEVELOPMENT COMPANY,

Appellee.

FROM THE CIRCUIT COURT
OF RITCHIE COUNTY
No. 03-C-65

BRIEF OF APPELLANT

CERTIFICATE OF SERVICE

The undersigned certifies that he served a copy of the forgoing document upon the person(s) shown below by depositing a copy thereof in the U. S. Mail, postage prepaid, upon the 8th day of January, 2008, addressed as shown below.

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