875 S.E.2d 216
Supreme Court of Appeals of West Virginia.

SWN PRODUCTION COMPANY, LLC, and Equinor USA Onshore Properties Inc., Defendants Below, Petitioners,
v.
Charles KELLAM, Phyllis Kellam, and all other persons and entities similarly situated, Plaintiffs Below, Respondents.

No. 21-0729
|
Submitted: May 17, 2022
|
Filed: June 14, 2022

Synopsis
Background: Lessor of oil and gas wells brought putative class action against lessees in federal court, challenging lessees' deduction of postproduction costs from royalties payable to lessor. The United States District Court for the Northern District of West Virginia, John Preston Bailey, J., sua sponte certified questions to the West Virginia Supreme Court.

Holdings: The Supreme Court of Appeals, Wooton, J., held that:

[1] ambiguous language in lease would not be effective to permit the lessee to deduct from the lessor's royalty any portion of the postproduction costs, and

[2] Supreme Court of Appeals would decline to answer reformulated certified question as to level of specificity that was required in oil and gas lease to permit the deduction of postproduction costs.

Questions answered, in part.

Hutchison, J., filed concurring opinion.

Walker, J., filed dissenting opinion.

West Headnotes (21)

[1] **Appeal and Error** Cases or questions reported, reserved, or certified

When certified question is not framed so that Supreme Court of Appeals is able to fully address law which is involved in question, then Court retains power to reformulate questions certified to it under Uniform Certification of Questions of Law Act. W. Va. Code Ann. § 51-1A-1 et seq.

1 Cases that cite this headnote

[2] **Appeal and Error** Cases or questions reported, reserved, or certified

Federal Courts Proceedings following certification

A de novo standard is applied by the Supreme Court of Appeals in addressing the legal issues presented by a certified question from a federal district or appellate court.

[3] **Mines and Minerals** Amount and time of payment

If an oil and gas lease provides for a royalty based on proceeds received by the lessee, unless the lease provides otherwise, the lessee must bear all costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale.

[4] **Mines and Minerals** Rent or royalties dependent on existence of oil or gas

If an oil and gas lease provides that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, the lessee shall be entitled to credit for those costs to the extent that they were actually incurred and they were reasonable; before being entitled to such credit, however, the lessee must prove, by evidence of the type normally developed in legal proceedings requiring an accounting, that he, the lessee, actually incurred such costs and that they were reasonable.

1 Cases that cite this headnote

[5] **Mines and Minerals** Amount and time of payment

Under the "marketable product rule," a lessee of an oil and gas well bears all postproduction costs incurred until product is first rendered marketable, unless otherwise indicated in the subject lease.

[6] **Mines and Minerals** Amount and time of payment

Under the "implied covenant to market rule," it is the burden of the lessee of an oil and gas well to bear postproduction costs, unless the lease provides otherwise.

[7] **Mines and Minerals** Amount and time of payment

The question of whether language shifting the burden of postproduction expenses from the lessee of an oil and gas well to the lessor exists in the lease is a matter of contract interpretation.

[8] **Mines and Minerals** Amount and time of payment

Parties to oil and gas leases are well within their rights to contract for the sharing of postproduction costs if they so choose, but the intent to do so must be clear from the lease terms.

[9] **Mines and Minerals** Amount and time of payment

Language in an oil and gas lease that is intended to allocate between the lessor and lessee the costs of marketing the product and transporting it to the point of sale must expressly provide that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, identify with particularity the specific deductions the lessee intends to take from the lessor's royalty (usually 1/8), and indicate the method of calculating the amount to be deducted from the royalty for such postproduction costs.

2 Cases that cite this headnote

[10] **Mines and Minerals** Amount and time of payment

There are three basic requirements for determining whether an oil and gas lease validly permits the sharing of postproduction costs: (1) language explicitly stating the lessor will bear some portion of those costs; (2) identification of the deductions the lessee intends to make; and (3) the method of calculating the amount to be deducted.

1 Cases that cite this headnote

[11] **Statutes** Common or Civil Law

Utilizing common law principles to interpret a statute is not legally sound.

[12] **Mines and Minerals** Amount and time of payment

The implied covenant to market rule, pursuant to which it is the burden of the lessee of an oil and gas well to bear postproduction costs, does not append itself to statutes; rather, it is tool utilized to resolve contractual ambiguities.

[13] **Courts** Previous Decisions as Controlling or as Precedents

In interpretation of a statute, it is not for a court to attempt to retrofit its caselaw to give meaning to a statute enacted well before such precedent, particularly when such precedent employs a rationale wholly inapplicable to statutory construction and so substantially affects the parties' rights.

[14] **Courts** Dicta

A court is not bound to follow its dicta in a prior case in which the point at issue was not fully debated.

[15] **Courts** Decisions of Same Court or Co-Ordinate Court

The Supreme Court of Appeals is compelled by the doctrine of stare decisis to carefully consider whether it is justified in overruling the precedent of the Court.

[16] **Courts** Erroneous or injudicious decisions

An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law.

[17] **Mines and Minerals** Amount and time of payment

Under West Virginia law, ambiguous language in oil and gas well lease would not be effective to permit the lessee to deduct from the lessor's royalty any portion of the postproduction costs incurred between the wellhead and the point of sale.

[18] **Mines and Minerals** Amount and time of payment

Supreme Court of Appeals cannot create hard and fast rule in regard to whether lease agreement for oil and gas well is "particular" enough in listing postproduction costs to be deducted from royalty for such costs to be validly deducted, insofar as the question is tied directly to specific language of the lease and, if ambiguous, the parties' intent in so contracting.

[19] **Mines and Minerals** Amount and time of payment

Whether lease agreement for oil and gas well indicates a method of calculating deductions to be made from royalty payment to lessor is matter of contract interpretation, and will necessarily hinge upon the individual contract at issue.

[20] **Mines and Minerals** In general; general rules of construction

Oil and gas lease agreements are simply contracts and are to be construed as such.

[21] **Federal Courts** Proceedings following certification

Supreme Court of Appeals would decline to answer reformulated certified question from federal district court regarding level of specificity that was required in oil and gas lease to permit the deduction of postproduction costs from a lessor's royalty payments, and if such deductions were permitted, the method of calculation that was required; question presented issue of contract interpretation, which could only be answered by district court or factfinder, as appropriate.

***218** *Syllabus by the Court*

1. "When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under ... the Uniform Certification of Questions of Law Act found in W. Va. Code, 51-1A-1, *et seq.* ..." Syl. Pt. 3, in part, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993).

2. " 'A de novo standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court.' Syllabus Point 1, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998)." Syl. Pt. 1, *Martinez v. Asplundh Tree Expert Co.*, 239 W. Va. 612, 803 S.E.2d 582 (2017).

3. "If an oil and gas lease provides for a royalty based on proceeds received by the lessee, unless the lease provides otherwise, the lessee must bear all costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale." Syl. Pt. 4, *Wellman v. Energy Resources, Inc.*, 210 W. Va. 200, 557 S.E.2d 254 (2001).

4. "If an oil and gas lease provides that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, the lessee shall be entitled to credit for those costs to the extent that they were actually incurred and they were reasonable. Before being entitled to such credit, however, the lessee must prove, by evidence of the type normally developed in legal proceedings requiring an accounting, that he, the lessee, actually incurred such costs and that they were reasonable." Syl. Pt. 5, *Wellman v. Energy Resources, Inc.*, 210 W. Va. 200, 557 S.E.2d 254 (2001).

5. "Language in an oil and gas lease that is intended to allocate between the lessor and lessee the costs of marketing the product and transporting it to the point of sale must expressly provide that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, identify with particularity the specific deductions the lessee intends to take from the lessor's royalty (usually 1/8), and indicate the method of calculating the amount to be deducted from the royalty for such postproduction costs." Syl. Pt. 10, *Estate of Tawney v. Columbia Natural Resources, LLC.*, 219 W. Va. 266, 633 S.E.2d 22 (2006).

6. "An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law." Syl. Pt. 2, *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974).

Certified Question from the United States District Court for the Northern District of West Virginia, The Honorable John Preston Bailey, United States District Judge, Civil Action No. 5:20-cv-85

Attorneys and Law Firms

Marc S. Tabolsky, Esq., Schiffer Hicks Johnson PLLC, Houston, Texas, Elbert Lin, Esq., Hunton Andrews Kurth LLP, Richmond, Virginia, Timothy M. Miller, Esq., Jennifer J. Hicks, Esq., Katrina N. Bowers, Esq., Babst, Calland, Clements, & Zomnir, P.C., Charleston, West Virginia, Counsel for Petitioners

James G. Bordas III, Esq., Richard A. Monahan, Esq., BORDAS & BORDAS, PLLC, Wheeling, West Virginia, Counsel for Respondents

Scott A. Windom, Esq., Windom Law Offices, PLLC, Harrisville, West Virginia, Anthony J. Majestro, Esq., Powell & Majestro, PLLC, Charleston, West Virginia, Counsel for Amici Curiae West Virginia Land and Mineral Owners Association and West Virginia Association for Justice

W. Henry Lawrence, Esq., Amy M. Smith, Esq., Steptoe & Johnson PLLC, Bridgeport, West Virginia, Counsel for Amici Curiae American Petroleum Institute, Gas and Oil Association of WV, Inc., and West Virginia Chamber of Commerce

Howard M. Persinger, III, Esq., Persinger & Persinger, L.C., Charleston, West Virginia, Counsel for Amici Curiae West Virginia Royalty Owners' Association, West Virginia Farm Bureau, Bounty Minerals LLC and Siltstone Resources, LLC

Michael W. Carey, Esq., David R. Pogue, Esq., Carey, Douglas, Kessler & Ruby, PLLC, Charleston, West Virginia, Marvin W. Masters, Esq., April D. Ferrebee, Esq., The Masters Law Firm LC, Charleston, West Virginia, Counsel for Amicus Curiae National Association of Royalty Owners, Appalachia

Opinion

Wooton, Justice:

***219** The United States District Court for the Northern District of West Virginia has certified four questions to this Court, which seek to clarify whether, in payment of royalties under an oil and gas lease, the lessor may be required to bear a portion of the postproduction costs incurred in rendering the oil and gas marketable. First, the district court poses this overarching question:

> Is *Estate of Tawney v. Columbia Natural Resources, LLC.*, 219 W. Va. 266, 633 S.E.2d 22 (2006), still good law in West Virginia?

We answer this question in the affirmative.

[1] The District Court then asks us to expound upon our holding in *Tawney* by posing the following three questions:

What is meant by the "method of calculating" the amount of post-production costs to be deducted?

Is a simple listing of the types of costs which may be deducted sufficient to satisfy *Tawney*?

If post-production costs are to be deducted, are they limited to direct costs or may indirect costs be deducted as well?

We find that these are questions of contract interpretation which may only be answered by the Court and a factfinder, as appropriate, upon consideration of the lease in question and other relevant evidence, through application of the holdings in *Tawney,* its predecessor, *Wellman v. Energy Resources, Inc.*, 210 W. Va. 200, 557 S.E.2d 254 (2001), and applicable contract law. In this regard, we recognize our authority to reformulate questions certified to this Court:

When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under ... the Uniform Certification of Questions of Law Act found in *W. Va. Code,* 51-1A-1, *et seq.* ..."

Syl. Pt. 3, in part, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993); *see also* W. Va. Code § 51-1A-4 (2018) ("The Supreme Court of Appeals of West Virginia may reformulate a question certified to it."). We exercise our authority to reformulate and more succinctly phrase these three questions into a single question as follows:

What level of specificity does *Tawney* require of an oil and gas lease to permit the deduction of post-production costs from a lessor's royalty payments, and if such deductions are permitted, what types of costs may be included?

The answer to this question necessarily involves the exploration of contractual language, the possible need for interpretation of said language, and the development of facts to assist either the court or the factfinder, as appropriate. Therefore, we decline to answer the reformulated question.

I. FACTUAL AND PROCEDURAL BACKGROUND

In August 2007, Respondents Charles and Phyllis Kellam (hereinafter "the Kellams" or "Respondents") entered into an oil and gas lease agreement (the "Kellam Lease") with Great Lakes Energy Partners, LLC ("Great Lakes"). Sometime thereafter, Great Lakes assigned the lease to Chesapeake Appalachia, LLC ("Chesapeake") from whom Petitioners SWN Production Company, LLC ("SWN") and Equinor USA Onshore Properties Inc. ("Equinor") acquired working interests in the lease. SWN now operates oil and gas wells, ***220** and production units within which the Kellams' leased lands are included. Since SWN and Equinor acquired working interests in the Kellam Lease, the parties have all engaged in oil and gas production efforts under the terms of that lease, which provides, in pertinent part:

4. In consideration of the premises the Lessee covenants and agrees:

(A) To deliver to the credit of the Lessor in tanks or pipelines, as royalty, free of cost, one-eighth (1/8) of all oil produced and saved from the premises, or at Lessee's option to pay Lessor the market price for such one-eighth (1/8) royalty oil at the published rate for oil of like grade and gravity prevailing on the dates such oil is sold into tanks or pipelines. Payment of royalty for oil marketed during any calendar month to be on or about the 60th day after receipt of such funds by the Lessee.

(B) To pay to the Lessor, as royalty for the oil, gas, and/or coalbed methane gas marketed and used off the premises and produced from each well drilled thereon, the sum of one-eighth (1/8) of the price paid to Lessee per thousand cubic feet of such oil, gas, and/or coalbed methane gas so marketed and used, measured in accordance with Boyle's Law for the measurement of gas at varying pressures, on the basis of 10 ounces above 14.73 pounds atmospheric pressure, at a standard base temperature of 60 degrees Fahrenheit, without allowance for temperature and barometric variations *less any charges for transportation, dehydration and compression paid by Lessee to deliver the oil, gas, and/or coalbed methane gas for sale.* Payment for royalty for oil, gas, and/or coalbed methane gas marketed during any calendar month to be on or about the 60th day after receipt of such funds by the Lessee.

(Emphasis added).

Paragraph 10 of the Kellam Lease addresses unitization and provides that, if the leased premises are consolidated with other lands to form a development unit, "the Lessor agrees to accept, in lieu of the one-eighth (1/8) oil, gas, and/or coalbed methane gas royalty hereinbefore provided, that proportion of such one-eighth (1/8) royalty which the acreage consolidated bears to the total number of acres compromising said development unit." Finally, Paragraph 11 of the Kellam Lease provides that, "[i]n case the Lessor owns a less interest in the above described premises than the entire and undivided fee simple therein, then the royalties and rentals herein provided for shall be paid to the Lessor only in the proportion which such interest bears to the whole and undivided fee."

According to the Kellams, SWN and Equinor "each have deducted postproduction costs from royalty checks due and payable to [the Kellams] and other similarly situated persons and/or entities." As such, on April 28, 2020, the Kellams instituted the underlying civil action—a putative class action—in the United States District Court for the Northern District of West Virginia, arguing that those deductions were in contravention of this Court's holdings in *Tawney* and *Wellman* because the terms of the lease lack the specificity required under *Tawney* to permit the deduction of post-production costs. While acknowledging that the royalty language provides for the deduction of certain charges for "transportation, dehydration, and compression," they argue the lease fails to include a "method of calculating the amount to be deducted from the royalty share for such post-production costs" as required by *Tawney*. *See Tawney*, 219 W. Va. at 268, 633 S.E.2d at 24, syl. pt. 10 ("Language in an oil and gas lease that is intended to allocate between the lessor and lessee the costs of marketing the product and transporting it to the point of sale must expressly provide that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, identify with particularity the specific deductions the lessee intends to take from the lessor's royalty (usually 1/8), and indicate the method of calculating the amount to be deducted from the royalty for such post-production costs.").

After a short delay in the proceedings caused by a stay issued pending the resolution of Chesapeake's voluntary Chapter 11 petition in the United States Bankruptcy Court for the Southern District of Texas, SWN and Equinor filed answers to the Kellams' ***221** complaint in July 2021. Contemporaneously, SWN and Equinor moved for judgment on the pleadings, seeking dismissal of all of the Kellams' claims with prejudice. In so doing, SWN and Equinor argued that the Kellam Lease satisfied the requirements set forth in *Tawney*. Once briefing was complete, on September 13, 2021, the district court, sua sponte, certified the four questions set forth more fully above. We accepted the certified questions and placed this matter on the docket for argument under Rule 20 of the West Virginia Rules of Appellate Procedure.[1]

II. STANDARD OF REVIEW

[2] This Court has long held that " '[a] de novo standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court.' Syllabus Point 1, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998)." Syl. Pt. 1, *Martinez v. Asplundh Tree Expert Co.*, 239 W. Va. 612, 803 S.E.2d 582 (2017). Our resolution of the certified questions at issue will be guided by this standard.

III. DISCUSSION

A. Is Tawney still good law in West Virginia?

[3] **[4]** **[5]** The first certified question simply asks whether *Tawney* is still "good law" in West Virginia. *See* 219 W. Va. 266, 633 S.E.2d 22. The district court indicated its belief that *Tawney* remained good law, despite SWN and Equinor's contention that its potential overruling was suggested in *Leggett v. EQT Production Co.*, 239 W. Va. 264, 800 S.E.2d 850 (2017). In order to address this question, it is necessary to summarize the legal developments that led to it in the first place. Over twenty years ago, this Court issued its opinion in *Wellman*, wherein we essentially held that: (1) lessees may not deduct postproduction costs unless the lease agreement explicitly permits such deductions; and (2) where there is such a provision, only reasonable and actually incurred expenses may be deducted. We held:

> If an oil and gas lease provides for a royalty based on proceeds received by the lessee, unless the lease provides otherwise, the lessee must bear all costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale.
>
> If an oil and gas lease provides that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, the lessee shall be entitled to credit for those costs to the extent that they were actually incurred and they were reasonable. Before being entitled to such credit, however, the lessee must prove, by evidence of the type normally developed in legal proceedings requiring an accounting, that he, the lessee, actually incurred such costs and that they were reasonable.

Wellman, 210 W. Va. at 202, 557 S.E.2d at 256, syl. pts. 4 and 5. These holdings firmly cemented West Virginia as a "marketable product rule" state, meaning that the lessee bears all post-production costs incurred until the product is first rendered marketable, unless otherwise indicated in the subject lease.

Wellman arose from two oil and gas leases which contained standard one-eighth royalty clauses. Of note, there was no provision under the terms of the lease for the deduction of post-production costs. The lessee, Energy Resources, Inc., extracted gas from a pre-existing well under one of the leases and sold that gas to Mountaineer Gas Company for $2.22 per thousand cubic feet. Energy Resources paid the Wellmans a royalty claiming that it had actually received only $0.87 per thousand cubic feet of gas extracted, and so the Wellmans received approximately $0.11 per thousand cubic feet of gas. Energy Resources indicated to the Wellmans that it arrived at these figures by deducting "certain ***222** expenses" from the $2.22 per thousand cubic feet of gas it had been paid by Mountaineer Gas Company. The Wellmans thereafter instituted a civil action arguing, in pertinent part, that the deduction of those expenses was contrary to the terms of the lease. Ultimately, the Wellmans moved for summary judgment on this point and the circuit court granted that motion, finding that Energy Resources had failed to show that it was entitled to deduct any expenses from the one-eighth royalty, and by taking those deductions, it had essentially short-changed the Wellmans. *Id.* at 203-05, 557 S.E.2d at 257-59.

[6] On appeal, this Court was presented with a matter of first impression: whether, in the absence of lease language permitting the deduction of post-production costs, a lessee was entitled to deduct such costs prior to calculating a lessor's royalty payment. In concluding that the answer was no, this Court surveyed the laws of other states to determine whether such deductions were permissible. At that time we recognized that only two states had permitted these deductions in the absence of an explicit lease provision to that effect (Louisiana and Texas), while several others did not allow the deductions in absence of a lease provision to that effect. Ultimately, we agreed with the jurisdictions who took the latter path, reasoning:

> The rationale for holding that a lessee may not charge a lessor for "post-production" expenses appears to be most often predicated on the idea that the lessee not only has a right under an oil and gas lease to produce oil or gas, but he also has a duty, either express, or under an implied covenant, to market the oil or gas produced. The rationale proceeds to hold the duty to market embraces the responsibility to get the oil or gas in marketable condition and actually transport it to market.

Id. at 210, 557 S.E.2d at 264. Leaning on the analysis of the Colorado Supreme Court in *Garman v. Conoco*, 886 P.2d 652 (Colo. 1994), we explained that under the implied covenant to market, the lessee "had a duty to market oil and gas produced, and since under the law it was required to pay the costs to carry out its covenants, it had the duty to bear the costs of preparing the oil and gas for market and to pay the cost of transporting them to market." 210 W. Va. at 210, 557 S.E.2d at 264. Essentially, it is the lessee's burden to bear post-production costs, unless the lease provides otherwise. *Id.* at 211, 557 S.E.2d at 265.

We adopted the reasoning of the Colorado Supreme Court—as well as the reasoning then employed in Kansas and Oklahoma—finding that

> [l]ike those states, West Virginia holds that a lessee impliedly covenants that he will market oil or gas produced. Like the courts of Colorado, Kansas, and Oklahoma, the Court also believes that historically the lessee has had to bear the cost of complying with his covenants under the lease. It, therefore, reasonably should follow that the lessee should bear the costs associated with marketing products produced under a lease. Such a conclusion is also consistent with the long-established expectation of lessors in this State, that they would receive one-eighth of the sale price received by the lessor.

Id. at 211, 557 S.E.2d at 265 (internal citations omitted). Thereafter, we set out the holdings discussed *supra*, establishing a rule that unless a lease provides for the deduction of postproduction costs, the lessee must bear those costs by default. *Id.* at 202, 557 S.E.2d at 256, syl. pts. 4 and 5.

[7] Five years later, we were once again asked to wade into the waters of postproduction costs in *Tawney*. *Tawney* presented this Court with two certified questions from the Circuit Court of Roane County, West Virginia, asking whether certain specific lease language stating that royalties were to be calculated "at the wellhead" was sufficient to permit the deduction of post-production costs. *See* 219 W. Va. at 268-69, 633 S.E.2d at 24-25. The arguments presented by Columbia Natural Resources ("CNR")—the lessee in that case—essentially posited that gas was not sold at the wellhead, but to a supplier downstream, so it was only logical that the lessee be permitted to deduct post-production costs incurred in making the gas marketable at a point of sale. *Id.* at 270, 633 S.E.2d at 26. We rejected this contention on ***223** the basis that the "at the wellhead" language was flatly ambiguous insofar as it was imprecise. As we stated,

> [w]hile the language arguably indicates that the royalty is to be calculated at the well or the gas is to be valued at the well, the language does not indicate *how* or *by what method*

> the royalty is to be calculated or the gas is to be valued. For example, notably absent are any specific provisions pertaining to the marketing, transportation, or processing of the gas. In addition, in light of our traditional rule that lessors are to receive a royalty for the sale price of gas, the general language at issue simply is inadequate to indicate an intent by the parties to agree to a contrary rule—that the lessors are not to receive 1/8 of the sale price but rather 1/8 of the sale price less a proportionate share of deductions for transporting and processing the gas.

Id. at 272, 633 S.E.2d at 28. In that case, we reiterated that our default rule is that lessees bear the brunt of post-production costs absent lease language shifting that cost—or a portion thereof—to the lessor. *Id.* Accordingly, the question of whether such language exists in the lease is a matter of contract interpretation.

[8] **[9]** **[10]** We observed that parties to oil and gas leases are well within their rights to contract for the sharing of post-production costs if they so choose, but the intent to do so must be clear from the lease terms. To that end, we held that

> [l]anguage in an oil and gas lease that is intended to allocate between the lessor and lessee the costs of marketing the product and transporting it to the point of sale must expressly provide that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, identify with particularity the specific deductions the lessee intends to take from the lessor's royalty (usually 1/8), and indicate the method of calculating the amount to be deducted from the royalty for such post-production costs.

Id. at 268, 633 S.E.2d at 24, syl. pt. 10. This holding sets forth three basic requirements for determining whether a lease enforceably permits the sharing of post-production costs: (1) language explicitly stating the lessor will bear some portion of those costs; (2) identification of the deductions the lessee intends to make; and (3) the method of calculating the amount to be deducted.

For another eleven years, thousands of oil and gas leases in this State—including the Kellams' own lease—were crafted with this standard in mind. However, in 2017, the Court was called upon to again address the deduction of post-production expenses, albeit in a different context, in *Leggett v. EQT Production Co.*, 239 W. Va. 264, 800 S.E.2d 850 (2017).

Leggett was a set of certified questions from the United States District Court for the Northern District of West Virginia, asking whether our decision in *Tawney* applied to bar the deduction of post-production costs with regard to leases governed by West Virginia Code § 22-6-8(e) (1994).[2] *See* 239 W. Va. at 267, 800 S.E.2d at 853. Without delving too far into the specifics of *Leggett*, it is sufficient to state that we held that the unambiguous language used by the Legislature in § 22-6-8(e) permitted royalty payments made pursuant to leases governed by that statute to be subject to pro-rata deduction or allocation of all reasonable post-production expenses actually incurred by the lessee. *Id.* In short order following the issuance of *Leggett*, in 2018 the Legislature amended § 22-6-8(e), effectively overruling that decision and specifically altering ***224** the language of that Code provision to state that royalty payments under that section were to be "free from any deductions for post-production expenses." W. Va. Code § 22-6-8(e) (2021).

It is *Leggett* which forms the basis of the SWN and Equinor's instant challenges to the current validity of *Tawney* and precipitated the district court's first certified question. This is so because this Court in *Leggett* undertook an examination of the legal underpinnings of *Wellman* and *Tawney*, while correctly noting that neither case, nor the implied covenant to market upon which they are founded, were applicable to its analysis of West Virginia Code § 22-6-8(e). *See Leggett*, 239 W. Va. at 275-76, 800 S.E.2d at 861-62 ("Accordingly, the implied covenant to market relied upon by the *Wellman* and *Tawney* Courts has no application as pertains to leases affected by West Virginia Code § 22-6-8."); *see also id.* at 276, 800 S.E.2d at 862 ("We therefore conclude that neither *Wellman* nor *Tawney* are applicable to an analysis of the 'at the wellhead' language contained in West Virginia Code § 22-6-8(e).").

[11] The *Leggett* Court's conclusion in this regard was correct because leases under section 22-6-8 are entirely creatures of statute, unlike the freely negotiated *contractual* provisions addressed in *Tawney* and *Wellman*. As we stated in *Leggett*, "[u]tilizing ... common law principles to interpret a statute ... is not legally sound." 239 W. Va. at 274, 800 S.E.2d at 860 (citing *Kilmer v. Elexco Land Servs., Inc.*, 605 Pa. 413, 990 A.2d 1147, 1155 (2010) (recognizing that states adopting the marketable product rule "have done so as a matter of common law in interpreting ambiguities in leases, not through statutory interpretation of a preexisting statute.")). In rejecting the invitation to apply *Wellman* and *Tawney* to section 22-6-8, we explained that the rules of statutory construction and contract interpretation are vastly different. 239 W. Va. at 275, 800 S.E.2d at 861 ("The legal standards applicable to issues of statutory interpretation have evolved separately from those involving matters of contract interpretation. Thus, despite the fact that ... statutory and contractual language are essentially identical, it is theoretically possible that the application of each set of legal standards would yield divergent results....") (citing *Major Oldsmobile, Inc. v. Gen. Motors Corp.*, No. 93-Civ-2189 (SWK), 1995 WL 326475, at *4 (S.D.N.Y. May 31, 1995), *aff'd*, 101 F.3d 684 (2d Cir. 1996)).

[12] **[13]** Moreover, the *Leggett* Court intimated that a key feature of freely negotiated lease agreements was that the parties may limit the implied covenants—like the implied covenant to market—which append to those leases. *Leggett*, 239 W. Va. at 275, 800 S.E.2d at 861. However, "the implied covenant to market does not append itself to statutes; rather it is a tool utilized to resolve contractual ambiguities." *Id.* We observed that implied covenants are generally recognized to be "gap fillers" to effectuate the parties' intentions in forming the contract when the contract is silent on a particular issue. *Id.* (citing *Allen v. Colonial Oil Co.*, 92 W. Va. 689, 115 S.E. 842, 844 (1923)). In applying these basic concepts, the *Leggett* Court then explained why neither the implied covenant to market nor the cases which are founded upon it were applicable to its interpretation of section 22-6-8:

> In this instance, at the times these leases were executed, the parties contemplated neither the marketing of the product and any implied covenants thereof, nor cost allocation because the leases were flat-rate leases. The lessor's royalty issued irrespective of production, making post-production costs and the marketing efforts of the lessor irrelevant to both parties for purposes of the lease. Only by operation of West Virginia Code § 22-6-8(e), then, is cost allocation implicated in the parties' dealings. *Accordingly, without the commensurate ability to bargain about allocation of costs or limit any implied covenants which may affect cost-bearing, utilizing cases which are premised on these considerations is of limited utility at best and inequitable at worst.* Dogmatic imposition, therefore, of West Virginia's so-called marketable product rule—which was developed upon these considerations—to prohibit allocation of postproduction expenses as requested by the petitioners yields little ***225** parity when the parties were not free to contract otherwise.
>
> *Moreover, use of this Court's cases involving freely negotiated contracts—which were decided years after the statute at issue was enacted—to foster a reading of the statute which affects the terms of a contract regarding matters which were not within the contemplation of the parties is potentially problematic on a constitutional level.* This Court has stated that "those who enter into contracts do so with reference to the law as it exists at the date thereof; and any impairment by legislative action, or otherwise, of an obligation thus created, is plainly inhibited by both the State and Federal Constitutions." *McClintic v. Dunbar Land Co.*, 127 W.Va. 454, 461, 33 S.E.2d 593, 596 (1945). While West Virginia Code § 22-6-8 itself is cognizant of the delicate balancing act it undertakes to avoid unconstitutionally impairing contractual rights by affecting only the issuance of permits, extending the statute beyond that procedural prerequisite into the terms of the negotiated lease between the parties is dangerous territory. In interpretation of a statute, it is not for this Court to attempt to "retrofit" this Court's caselaw to give meaning to a statute enacted well before such precedent, particularly when such precedent employs a rationale wholly inapplicable to statutory construction and so substantially affects the contracting parties' rights. *We therefore conclude that neither Wellman nor Tawney are applicable to an analysis of the "at the wellhead" language contained in West Virginia Code § 22-6-8(e).*

Id. (emphasis added and citation omitted). In essence, the Court openly acknowledged that neither *Wellman* and *Tawney* nor the implied covenant to market had any place in its interpretation of West Virginia Code § 22-6-8(e).

In explicitly recognizing that the common law standards set forth in *Wellman* and *Tawney* did not apply to the issue before it, the *Leggett* Court even reformulated the certified question presented to remove any reference to *Tawney*, and instead asked simply: "Are royalty payments pursuant to an oil or gas lease governed by West Virginia Code § 22-6-8(e) (1994) subject to pro-rata deduction or allocation of post-production expenses by the lessee?" *Leggett*, 239 W. Va. at 281, 800 S.E.2d at 867. Yet, despite these consistent acknowledgments that *Tawney* was utterly inapplicable to the case at bar, the *Leggett* Court engaged in a somewhat indulgent frolic into what it deemed the "faulty legs" upon which *Tawney*—and its predecessor *Wellman*—stood. *Id.* at 276, 800 S.E.2d at 862.[3]

***226** **[14]** By its own admission, *Leggett's* ensuing discussion of those cases and their "faulty legs" was mere obiter dicta and of no authoritative value to this Court today. Just as the United States Supreme Court has recognized, "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006). Accordingly, we see little reason to justify *Leggett's* criticism of *Wellman* and *Tawney* with any further discussion other than to simply reiterate that those cases are the result of a reasonable and justifiable interpretation of this State's common law as evidenced by the fact that several other states employed nearly identical reasoning in concluding that, absent a contract provision to the contrary, the implied covenant to market requires the lessee to bear all post-production costs. This is a common law doctrine; we are not inclined to revisit the underpinnings of *Wellman* and *Tawney*—despite the parties' and *Leggett's* invitation to do so—for several reasons.

First and foremost, we do not *need* to address our interpretation of the implied covenant of marketability in the case at bar because that covenant is not implicated. In this case there is a contractual provision addressing the allocation of post-production costs such that an implied covenant is not necessary to ascertain the parties' intent in contracting. Specifically, Paragraph 4(B) of the Kellams' lease provides that the lessor shall be paid a one-eighth royalty for the market price of the oil, gas, and coalbed methane gas "less any charges for transportation, dehydration and compression paid by Lessee to deliver the oil, gas, and/or coalbed methane gas for sale." As such, the implied covenant of marketability is clearly inapplicable because, insofar as the lease is not silent on the issue of postproduction cost allocation, there is no gap for that implied covenant to fill. The parties have freely negotiated a contract in which they appear to have expressed an intent to share the burden of post-production costs in the manner indicated therein. Therefore, the question whether that provision satisfies the additional requirements set out in *Tawney* that the lease identify with particularity the costs to be deducted and identify a method of calculating those deductions, as explained *infra*, is not a question this Court can answer, but is instead relegated to the finder of fact.

[15] **[16]** Second, we are compelled by the doctrine of stare decisis to carefully consider whether we are justified in overruling the precedent of this Court. As we explained in syllabus point two of *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974), "[a]n appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law." In our review of the briefs and the appendix record, no one—not even this Court in *Leggett*—has articulated any changing conditions or serious judicial error in interpretation sufficient to overturn *Wellman* and *Tawney*. *See id.* The parties present us with no evidence of substantial changes in the deduction of post-production costs since those decisions were rendered sufficient to justify overruling our longstanding ***227** precedent. As to the question of serious juridical error in interpretation, as explained above, *Wellman* and *Tawney* are consistent with decades of oil and gas jurisprudence in this State, as well as general principles of contract which undergird the formation of oil and gas leases—including the use of implied covenants when a lease is silent on an issue. While litigation has arisen under those opinions, that is not indicative of instability or "chaos" but is the "unavoidable consequence" of any opinion of this Court. *Leggett*, 239 W. Va. at 284, 800 S.E.2d at 870 (Workman, J., concurring). In actuality, it is far more likely in our opinion that overruling *Tawney* and *Wellman* would *result* in instability and uncertainty, particularly for the thousands of leases that have been executed in the years since those opinions were published.

[17] In short, neither the parties, nor the *Leggett* Court in criticizing the legal underpinnings of *Wellman* and *Tawney*, have articulated any reason sufficient to justify the overruling of those cases. Accordingly, we decline to do so, and necessarily conclude that those cases remain in effect. As such, we answer the district court's first certified question in the affirmative: *Tawney* is still good law in West Virginia.

B. What level of specificity does Tawney require of an oil and gas lease to permit the deduction of post-production costs from a lessor's royalty payments, and if such deductions are permitted, what costs may be included?

[18] As indicated above, the district court has asked that we clarify what *Tawney* requires when it states that a lease must "identify with particularity the specific deductions the lessee intends to take from the lessor's royalty (usually 1/8), and indicate the method of calculating the amount to be deducted from the royalty for such post-production costs." *Tawney*, 219 W. Va. at 268, 633 S.E.2d at 24, syl. pt. 10. In reviewing the parties' briefs and the district court's certification order, we believe these questions can only be answered by looking to the individual lease at issue and other relevant evidence, thus rendering them, in some instances, questions of contract interpretation which we cannot answer. Specifically, the analysis as to whether a lease agreement is "particular" enough in listing the costs to be deducted will necessarily be different with regard to each contract. Therefore, this Court cannot create a hard and fast rule in that regard insofar as the question is tied directly to the specific language of the lease and, if ambiguous, the parties' intent in contracting.

[19] **[20]** Moreover, the same is true of determining whether the lease agreement indicates a method of calculating the deductions to be made. That is a matter of contract interpretation, and will necessarily hinge upon the individual contract at issue. As such, we believe whether the individual contract sufficiently identifies a method of calculating the deductions is a matter left in the capable hands of the court and fact-finder, as appropriate. This is because oil and gas lease agreements are simply contracts and are to be construed as such. *See* Syl. Pt. 1, *McCullough Oil, Inc. v. Rezek*, 176 W. Va. 638, 346 S.E.2d 788 (1986) ("An oil and gas lease (or other mineral lease) is both a conveyance and a contract. It is designed to accomplish the main purpose of the owner of the land and of the lessee (or its assignee) as operator of the oil and gas interests: securing production of oil or gas or both in paying quantities, quickly and for as long as production in paying quantities is obtainable.").

We reiterate *Tawney* and *Wellman*'s succinct requirements that leases must meet in order to allocate some share of the post-production costs to the lessor. Specifically, the lease must: (1) include language indicating the lessor will bear some of those costs; (2) identify with particularity the deductions to be made (with an understanding that such deductions must be both reasonable and actually-incurred under *Wellman*); and (3) indicate the method of calculating the amount to be deducted. We see no reason to elaborate on these requirements further; whether a lease meets those requirements is a question of contract interpretation guided by principles of contract law. *See, e.g.*, Syl. Pt. 1, *Lee Enters., Inc. v. Twentieth Century-Fox Film Corp.*, 172 W. Va. 63, 303 S.E.2d 702 (1983) ("While the general rule is that the construction ***228** of a writing is for the court; yet where the meaning is uncertain and ambiguous, parol evidence is admissible to show the situation of the parties, the surrounding circumstances when the writing was made, and the practical construction given to the contract by the parties themselves either contemporaneously or subsequently. If the parol evidence be not in conflict, the court must construe the writing; but, if it be conflicting on a material point necessary to interpretation of the writing, then the question of its meaning should be left to the jury under proper hypothetical instructions.")(internal citation omitted); Syl. Pt. 4, *Tawney*, 219 W. Va. at 267-68, 633 S.E.2d at 23-24 ("The term 'ambiguity' is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning."); *see also Frat. Ord. of Police, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 101 n.7, 468 S.E.2d 712, 716 n.7 (1996) ("Exploring the intent of the contracting parties often, but not always, involves marshaling facts extrinsic to the language of the contract document. When this need arises, these facts together with reasonable inferences extractable therefrom are superimposed on the ambiguous words to reveal the parties' discerned intent."); Syl. Pt. 1, *Martin v. Consol. Coal & Oil Corp.*, 101 W. Va. 721, 133 S.E. 626 (1926) ("The general rule as to oil and gas leases is that such contracts will generally be liberally construed in favor of the lessor, and strictly as against the lessee.").

[21] For the foregoing reasons, we believe that the reformulated certified question presents issues which may only be answered by the district court and a factfinder, as appropriate, and not by this Court. Accordingly, we decline to answer the reformulated certified question.

IV. CONCLUSION

Based upon our analysis, we answer the certified questions as follows:

Question One: Is *Estate of Tawney v. Columbia Natural Resources, LLC.*, 219 W. Va. 266, 633 S.E.2d 22 (2006), still good law in West Virginia?

Answer: Yes.

Question Two: What level of specificity does *Tawney* require of an oil and gas lease to permit the deduction of post-production costs from a lessor's royalty payments, and if such deductions are permitted, how are the deductions to be calculated?

Answer: We decline to answer the reformulated certified question because it presents a question of contract interpretation which may only be answered by referencing the individual lease and applicable principles of law.

Certified Questions Answered.

JUSTICE ARMSTEAD, deeming himself disqualified, did not participate in this decision. JUDGE HOWARD sitting by temporary assignment.

JUSTICE BUNN, deeming herself disqualified, did not participate in this decision. JUDGE ALSOP sitting by temporary assignment.

CHIEF JUSTICE HUTCHISON concurs and reserves the right to file a separate opinion.

JUSTICE WALKER dissents and reserves the right to file a separate opinion.

Chief Justice Hutchison, concurring:

I wholeheartedly concur with the majority opinion's assessment that *Estate of Tawney v. Columbia Natural Resources, L.L.C.*, 219 W. Va. 266, 633 S.E.2d 22 (2006) ("*Tawney*"), and *Wellman v. Energy Resources, Inc.*, 210 W. Va. 200, 557 S.E.2d 254 (2001) ("*Wellman*"), remain good law in West Virginia. I also agree that the remaining three questions posed by the district court – essentially asking what language or details are required by *Tawney* and *Wellman* to be included in a lease – are usually case-by-case questions. Leases are contracts, written repositories of the parties' intentions.[1] When oil-and-gas ***229** leases are not properly drafted or are later interpreted by a party in a slipshod manner, the questions posed by the district court become issues to be resolved by a court or factfinder.

I write separately to emphasize the central, general rule underlying *Tawney* and *Wellman* that was only tangentially touched upon by the majority opinion. The rule underlying *Tawney* and *Wellman* is simple: *contracts are formed by a meeting of the minds.* You cannot have a meeting of the minds if a contract uses terms that are vague, ambiguous, and neither understood nor accepted by *both* parties. This rule is immutable and is, with few exceptions, the basis for every legally enforceable agreement.

To understand the general rule at the heart of *Wellman* and *Tawney* in the context of an oil and gas lease, the reader must understand other, more specific, long-standing interwoven guidelines tied to the interpretation of oil and gas leases. These guidelines are, by default, implied into every oil and gas lease. For over a century, the first guideline has been that lessee/oil-and-gas companies cannot lease oil and gas rights and then sit on those rights, to the detriment of the owner/lessor of the rights.[2] Thus, the fundamental goal implied into every single oil and gas lease is that the lessee has a duty to extract the minerals and get them to market for sale.[3] Included in that goal is an understanding that the lessee bears all of the risks and costs of drilling, producing, and getting the oil and gas to market. Hence, the lessee bears the risk of drilling a dry well. The lessee also bears the risk that the physical properties of any oil or natural gas discovered may be of a lesser quality or pressure than is desired.

Another corollary, default guideline implied into every oil and gas lease is just as clear: the lessor/owner of oil and gas rights is entitled to royalties, that is, a share of the profit gained from the oil and gas the lessee delivers to market. In West Virginia, those royalties are, by default, (1) based on the gross proceeds received by the lessee at the first point of sale to an unaffiliated third-party purchaser in an arm's length transaction, and (2) free from any deductions for the expenses incurred by the lessee getting the oil and gas to market.

Wellman involved another basic doctrine of contract law: the parties to an oil and gas lease can agree to disclaim any of the default, implied guidelines I just described, and contract for a different result. Our opinion plainly stated the default guideline, which is that that every oil and gas lease is built on a presumption that the lessee will bear both the responsibility and the cost of getting the minerals to an impartial marketplace. We ***230** ruled in *Wellman* that a lease can alter that presumption and provide that the lessor will bear a share of the costs of getting the oil and gas to market, but only if those costs were (1) actually incurred by the lessee, and (2) reasonable. Syl. pts. 4 and 5, *Wellman*, 210 W. Va. at 202, 557 S.E.2d at 256.

In *Tawney*, we reiterated and expounded on *Wellman*. We determined that, to vitiate the presumption that the lessee bears the costs of getting the minerals to market, and to shift some share of the costs onto the lessor, the lease between the parties needs to identify with particularity the specific deductions for post-production marketing costs that the lessee intends to take from the lessor's royalties, and it must indicate the method of calculating those deductions. *See* Syl. pt. 10, *Tawney*, 219 W. Va. at 268, 633 S.E.2d at 24. As the majority opinion makes clear, when a lessee seeks to deduct post-production expenses from the gross proceeds received in the sale of oil or gas to calculate a lessor's royalty, *Tawney* continues to require that the lease expressly provide that the lessor shall bear some part the costs incurred between the wellhead and the point of sale (that is, the first sale to an unaffiliated third-party purchaser in an arm's length transaction); identify with particularity the specific deductions the lessee intends to take from the lessor's royalty; and indicate the method of calculating the amount to be deducted from the royalty for such post-production costs. *Id.*

Stated simply, *Wellman* created accountability in oil and gas leases, by clearly stating that oil and gas lessees cannot make deductions to royalties for any post-production costs of marketing unless those costs are (1) clearly shifted onto the lessor in the lease; (2) actually incurred, and (3) reasonable. Syl. pts. 4 and 5, *Wellman*, 210 W. Va. at 202, 557 S.E.2d at 256. *Tawney* created transparency, by requiring oil and gas companies to explain with particularity in the lease the deductions they intend to take from the lessor's royalties, and to state with reasonable precision how those deductions will be calculated. Syl. pt. 10, *Tawney*, 219 W. Va. at 268, 633 S.E.2d at 24. Together, the cases are the foundation of what legal scholars call the "marketable-product rule," because they explain the default position, in every lease, that oil and gas companies bear the cost of preparing and shipping the product they've taken out of the lessor's ground to market. Only if the parties plainly and unambiguously agree to something different will the lessee/company be permitted to shift some of those "post-production" costs onto the lessor.

After this Court issued *Tawney* and *Wellman*, and several other state courts adopted the marketable-product rule as well, a few legal commentators offered criticism. One said that the cases were schemes "to provide the lessor with a larger piece of the gas-production pie."[4] Another said the cases were written in a way that "results in an even bigger windfall for lessors."[5] One oil and gas lawyer called the marketable-product rule nothing more than "a massive shifting of post-production costs from lessors to lessees," and "a judicially directed wealth transfer from lessees to lessors that contradicts the bargained-for exchange struck by the parties."[6] Essentially, these commentators cast this Court's efforts as some modern-day, wealth-redistribution scheme to rewrite oil and gas leases to take money from the lessee and give it to the lessor.

These critiques are biased nonsense. First, the marketable-product rule is not a "modern-day" concept, rather, it dates back over eight decades. Scholarly texts outlined the boundaries of the rule as early as 1940, when Professor Maurice Merrill (a well-known leader in the development oil-and-gas law) said:

> If it is the lessee's obligation to market the product, it seems necessarily to follow that his is the task also to prepare it for market, if it is unmerchantable in its natural ***231** form. No part of the costs of marketing or of preparation for sale is chargeable to the lessor.

Maurice H. Merrill, *The Law Relating to Covenants Implied in Oil and Gas Leases* § 85, at 214-15 (2d ed. 1940). Another titan of oil and gas law, Professor Eugene Kuntz, advocated for the marketable-product rule as early as 1962:

> [T]here is a distinction between acts which constitute production and acts which constitute processing or refining of the substance extracted by production. Unquestionably, under most leases, the lessee must bear all costs of production ... It is submitted that the acts which constitute production have not ceased until a marketable product has been obtained.

Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 40.5 (1962). *See also*, Owen L. Anderson, *Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically? Part 2*, 37 Nat. Resources J. 611 (1997) ("[A]bsent an express lease provision to the contrary, lessees should not have to pay royalty on any value added to production by reason of incurred 'post-production' activities. However, 'production' should not be regarded as having been completed until a first-marketable product has been obtained.").

Second, most critics of the marketable-product rule inherently, but wrongly, assume that the production of oil and gas is a shared adventure by a lessor and a lessee. But the facts usually show that lessor/land-and-mineral owners and lessee/oil-and-gas companies are not partners on anything close to resembling an equal footing. The imbalance in the relationship between lessor and lessee is most obvious in the take-home profits. That is, in most leases, the lessor only receives a small percentage of the final profit in the form of rents and royalties (usually 1/8) while the lessee oil-and-gas company retains much more (usually 7/8 of the gross profit).

But the differences between the parties to a lease go far deeper. In this case the parties are arguing over whether the lessor should pay a share of the "charges" incurred by the lessee for compressing, dehydrating, and transporting oil, gas, or coalbed methane. The lease gives the lessee exclusive control over whether, when, and how to incur those charges, and the lessor has no input. The lessor does not choose the method used for compression, dehydration, or transportation. The lessor does not choose whether, when, or how much to spend when a new building, warehouse, office, or compression station is constructed. These physical structures can be depreciated or written off of the lessee-owner's taxes, but the lessor does not share the benefit of those tax write-offs. Moreover, at some point, those physical assets may be divested or leased-out by the lessee/oil-and-gas company for a profit which is not shared with the lessor. The lessee may buy equipment like a pickup truck to improve operations; the purchase of the truck is a post-production "charge" that the lessee might insist be shared by the lessor/land-or-mineral owner, and its use to travel to a lunch destination or an industry convention an operational "charge," but the sale of the truck would just be a "profit" or return of capital to the lessee alone. Put simply, the lessors of minerals are *not* equal partners with the lessees.

Further, as I noted earlier, critics of the marketable-product rule proffer that it creates a "windfall" for mineral-rights owners. These owners sign a lease expecting a royalty calculated as a percentage of the market price received by the lessee. The *Merriam-Webster Dictionary* defines a "windfall" as "an unexpected, unearned, or sudden gain or advantage." I am bewildered when critics construe paying a mineral-rights owner their rightful rent or royalty as an unexpected, unearned gain. Restaurants and other businesses often pay their landlords rent based on a percentage of the business's gross sales; no one ever complains when a landlord gains higher rents after the restaurant or business hired more people, bought more equipment or stock, did more business, and earned more profits.[7] When a lessee obtains a higher market ***232** price for the oil and gas it took from the lessor by dehydrating, compressing, and transporting the mineral, the lessee pockets a higher profit. Yet, somehow, if the mineral owner receives their contractually set percentage share of those higher profits as a royalty, critics declare that to be an unfair windfall. The disingenuousness of this position is stinging.

The royalties due to mineral owners/lessors stay the same under the marketable-product rule (usually 1/8); they never receive a larger piece of the gas-production pie, and there is no judicially directed wealth transfer. In the perpetually unequal oil-and-gas relationship, the owners of minerals allow lessees to extract those minerals from the ground in exchange for a share of the market price. That share stays the same whether the market price rises or drops. Of course, no owner of mineral rights signs a lease anticipating the term "market price" will be an opportunity for gamesmanship; market price means the price garnered in a sale to an unaffiliated third-party purchaser in an arm's length transaction. "The lessee's duty of good faith and fair dealing would require that the first market be real, existing, and substantial, and not a market created in bad faith to limit the royalty obligation." Anderson, 37 Nat. Resources J. at 686-87. What the lessee choses to do to those minerals to increase the market price is solely within the lessee's discretion and control. Accordingly, the lessee bears the full burden of the costs incurred getting the mineral to market, unless the parties' lease clearly and unambiguously specifies otherwise.

A third problem I see with critics of *Wellman*, *Tawney*, and the marketable-product rule is their refusal to recognize that it is, for all intents and purposes, the majority rule in America. "A large group of jurisdictions – a group that accounts for far more than half of the nation's oil and gas production – follows a marketable-condition rule that requires the lessee to bear the cost of putting oil and natural gas into a marketable condition." John Burritt McArthur, *Oil and Gas Implied Covenants for the Twenty-First Century*, 237 (2014). At least five jurisdictions have adopted a variation of the marketable-product doctrine by appellate court decision: Arkansas,[8] Colorado,[9] Kansas,[10] Oklahoma,[11] and West Virginia.[12] Critics often complain that these decisions espouse varying interpretations of the doctrine, without recognizing ***233** that the common law of each state differs, and the leases and facts of each case differ wildly as well.[13] Additionally, at least three states have adopted the rule and banned the deduction of post-production marketing costs by statute.[14] Importantly, the marketable-product rule has been adopted by the largest owner of mineral interests in the country: the United States government. Federal regulations provide that, for leases on federal land, any gas produced must be marketed "at no cost to the Federal government."[15]

Moreover, the Legislative and Executive branches of West Virginia have adopted the marketable-product doctrine. Regarding the Legislature, as the majority opinion notes, in *Leggett v. EQT Production Company*, 239 W. Va. 264, 800 S.E.2d 850 (2017), this Court refused to extend the *Wellman* and *Tawney* marketable-product doctrine to "flat-rate" leases governed by state law. Within a year, the Legislature overruled *Leggett*, amended state law, and provided that royalties on flat rate leases must be paid "free from any deductions for post-production expenses, received at the first point of sale to an unaffiliated third-party purchaser in an arm's length transaction for the oil or gas so extracted, produced or marketed." W. Va. Code § 22-6-8 (2018).

As to the Executive branch, it too hews to the marketable-product rule for leases of oil and gas on State lands. The State's leases expressly provide that a lessee may not deduct the cost of putting oil and natural gas into a marketable condition from royalties due to the State of West Virginia:

> Production & Post-Production Costs. Neither Lessee, nor any Affiliate of Lessee, may reduce Lessor's royalty for any post-production expense, including, but not limited to, pipelines, surface facilities, telemetry, gathering, dehydration, transportation, fractionation, compression manufacturing, processing, treating, or marketing of the Granted Minerals, or any severance or other taxes of any nature paid on the production thereof. Royalties under this Lease shall be based on the total proceeds of sale of the Granted Minerals, exclusive of any and all production and/or post-production costs.[16]

Hence, it is a far stretch for any litigant to insist that this Court adopt a rule wholly at odds with the policies adopted by the Legislature and Executive.

Fourth and finally, I feel compelled to discuss a case that was not addressed by the majority opinion: *Young v. Equinor USA Onshore Properties, Inc.*, 982 F.3d 201 (4th Cir. 2020). The *Young* court was asked on appeal to review a complicated "work-back" method used by an oil-and-gas lessee to make deductions to a lessor's royalty payment. The district court had found the lease language describing the deductions to be insufficient because it " 'merely state[d] that the lessee will deduct post-production costs,' yet '[said] absolutely nothing as to how those costs would be calculated, other than to leave the amount of the deduction wholly to the ***234** lessee's discretion.' " *Id.* at 207-08. On appeal, the *Young* court relied upon the now-defunct analysis used by this Court in *Leggett* to reverse the district court and approve the lease's language. The *Young* court rejected any notion that a lease should have a clear, mathematical formula to calculate how deductions will be taken:

> *Tawney* doesn't demand that an oil and gas lease set out an Einsteinian proof for calculating post-production costs. By its plain language, the case merely requires that an oil and gas lease that expressly allocates some post-production costs to the lessor identify *which* costs and *how much* of those costs will be deducted from the lessor's royalties. These conditions may be satisfied by a simple formula[.]

Id. at 208 (emphasis in original).

I question the *Young* court's statement that *Tawney* only requires a lease to contain a "simple formula" and not "an Einsteinian proof" describing how a lessee's post-production costs of getting oil and gas to market will be deducted from a lessor's royalty. This statement is correct only if the oil-and-gas lessee is actually taking simple, clear, and unambiguous deductions from the royalties. The problem that I see demonstrated by the case law is that oil-and-gas lessees insist on taking estimated costs or vague, malleable, impossible-to-measure deductions from royalties – in essence, using Einsteinian methods that are incomprehensible to all but the most clever industry accountants. Lessees are using accounting-based chicanery and devising deductions designed to completely consume the lessor's royalty through a "death by a thousand cuts" strategy.[17] *See generally*, Adam H. Wilson, *Without A Leggett to Stand on: Arguing for Retroactive Application of West Virginia's Amended Flat-Rate Well Statute*, 124 W. Va. L. Rev. 259, 282 (2021) ("At first blush, the net-back method may sound like an equitable way to allocate costs between lessor and lessee; however, lessees use the net-back method to fleece lessors of their valuable minerals. Gas companies ... best effectuate this by creating wholly-owned subsidiary companies that charge the mineral owner with what would be otherwise impermissible deductions."). Frankly, if the lease does not contain a clear explanation of any and all deductions or how those deductions are calculated, understandable by both the oil-and-gas lessee and the mineral owning lessor, then no contract has been formed and the deductions cannot be taken.

The rules of contract formation are taught in the first weeks of law school. "It is elementary that mutuality of assent is an essential element of all contracts." *Bailey v. Sewell Coal Co.*, 190 W. Va. 138, 140, 437 S.E.2d 448, 450 (1993). For this mutuality to exist, "it is necessary that there be a proposal or offer on the part of one party and an acceptance on the part of the other." *Id.* "The contractual concept of 'meeting of the minds' or 'mutual assent' relates to the parties having the same understanding of the terms of the agreement reached." *Messer v. Huntington Anesthesia Grp., Inc.*, 222 W. Va. 410, 418, 664 S.E.2d 751, 759 (2008).

For an oil-and-gas lease to be an enforceable contract, there must be mutuality of assent. Both parties must have the same understanding of the terms of their agreement. Yet leases wrongfully continue to be drafted with ambiguous definitions of the post-production marketing expenses the oil-and-gas lessee intends to deduct from the lessor's royalties. Moreover, lessees deduct estimates of expenses, or make other vaguely characterized deductions, from royalties without clearly explaining how those deductions are within the terms of the lease. If lessees would simply follow *Wellman* and *Tawney*, there would be far less uncertainty in lessor-lessee relations and, concomitantly, less litigation. The details of deductions should be discussed and agreed-upon when the lease is negotiated and signed; when they are not, or the lessee gives the lease terms a new interpretation beyond that discussed by the parties, then litigation over the lease is sure to follow.

Accordingly, I respectfully concur with the majority's opinion.

Walker, J., dissenting,

***235** The district court certified four questions to this Court, but we only need to answer the first: whether *Tawney* is "still good law"? The answer is yes in the sense that we have not yet overruled it, but no in the sense this Court wrongly decided it and its predecessor *Wellman*. Five years ago when this Court decided *Leggett*, we highlighted the flawed reasoning in *Wellman* and *Tawney* when we were "compelled to further illustrate the faulty legs upon which [they] and [their] iteration of the marketable product rule purports to stand."[1] *Tawney* was the next step in the illogical path blazed in *Wellman*, and we should take this opportunity to overrule them both.

Before "deregulation," oil and gas sales occurred at the wellhead.[2] After deregulation, lessees started enhancing the "sour" gas removed from lessors' property, transporting it to an off-site location, and selling the "sweetened" gas for more than the market value of the raw minerals.[3] We first addressed the effects of deregulation in *Wellman v. Energy Res., Inc.*,[4] which we later observed formed "the foundation of the current state of West Virginia's law on deduction of post-production costs."[5] And as the law stands under *Wellman*, lessees bear all post-production transportation and enhancement expenses and pay royalty owners based on the proceeds of the enhanced product.[6] So, because of *Wellman*, lessees compensate royalty owners for value beyond the raw minerals that they own, unless they contract otherwise.[7] The *Wellman* Court supported the default rule based on the implied covenant to market, but the decision appears "to arise more from an unwillingness to accept the realities of deregulation in the natural gas market than from implied covenant law."[8]

Tellingly, the *Wellman* Court did not acknowledge the new industry landscape wrought by deregulation. Instead, it focused on what it viewed as

> an attempt on the part of oil and gas producers in recent years to charge the landowner with a *pro rata* share of various expenses connected with the operation of an oil and gas lease such as the expense of transporting oil and gas to a point of sale, and the expense of treating or altering the oil and gas so as to put it in a marketable condition.[9]

The Court blamed the trend on lessees' efforts "[t]o escape the rule that the lessee must pay the costs of discovery and production ... [,]"[10] in other words, to escape the implied covenant to market. Before *Wellman*, the implied covenant to market required that "the lessee exercise reasonable diligence to market the products, defined as 'whatever, in the circumstances, would be reasonably expected of all operators of ordinary prudence, having regard to the interests of both lessor and lessee.' "[11] Although the *Wellman* Court chose not to acknowledge deregulation, one cannot ignore the obvious goal of the decision: to grant the benefits of deregulation to lessors while shifting the burden to lessees. And *Wellman* did that by removing the notion that lessees could regard their own interest and, instead, expanded the implied covenant to market to require lessees to bear all expenses of enhancing already discovered and produced minerals and compensate lessors ***236** based on the value added post-production. The approach "[is] nothing more than a re-writing of the parties' contract to take money from the lessee and give it to the lessor."[12]

Wellman based its interpretation of the implied covenant to market on a section from a 1951 treatise that says

> From the very beginning of the oil and gas industry it has been the practice to compensate the landowner by selling the oil by running it to a common carrier and paying to [the landowner] one-eighth of the sale price received. This practice has, in recent years, been extended to situations where gas is found ....[13]

But *Wellman* overlooked another section of the treatise that acknowledges that the implied covenant to market does not extend to minerals sold off-site and that lessees should pay royalties

> equal to one-eighth (1/8) of the proceeds received by the [l]essee from the sale of gas if measured and sold at the well, *but if not sold at the well but after transmission or commingling with gas from other properties, then equal to one-eighth (1/8) of the average prevailing price currently paid at the well in the same field by public utility companies* ....[14]

It is not clear whether the parties in *Wellman* put the latter rule to the Court. But what is clear is that the latter rule is the logical adaptation of the implied covenant to market in view of deregulation's realties. The *Wellman* Court looked past the realties, extended the implied covenant to market to obligate lessees to cover expenses incurred after discovery and production, and built our jurisprudence on faulty legs.

This Court compounded the flawed reasoning in *Tawney v. Columbia Nat. Res., L.L.C.*[15] There, the Court held that a lease must provide a "method of calculating" post-production expenses if a lessee wishes to contract away *Wellman*'s expanded implied covenant to market.[16] But no court should require parties to contract away an implied covenant, much less impose a heightened burden for doing so. Instead, implied covenants are merely gap fillers courts can use "to implement the parties['] intentions where not otherwise stated[.]"[17] As Petitioners put it, "[t]he fundamental legal flaw underlying *Wellman* and *Tawney* is that they invert the roles of express contractual terms and implied covenants." So, when express terms state that parties will calculate royalties based on minerals' value at the wellhead, courts should not supersede the express terms with an implied covenant, which are "only justified on grounds of legal necessity" and should not be at issue where express terms cover the point.[18] And by adding unprecedented impediments to lessees' freedom of contract—like creating an ambiguous "method of calculating" requirement—it seems this Court doubts this State's mineral owners' ability to contract for themselves. The heightened requirements undermine the basic underpinning of contract law that "[i]t is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them."[19] In other contexts, this Court has lamented impediments to contractual freedom and deemed the public policy to outweigh countervailing policy concerns:

> [Persons] of full age and competent understanding shall have the utmost liberty of contracting, and ... their contracts, when entered into freely and voluntarily, shall be ***237** held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract.[20]

Next, the question is whether the principle of stare decisis limits our ability to correct what I believe are the errors of the past. And this Court's approach to precedent supports correcting the flawed reasoning that started in *Wellman* and continued in *Tawney*. As we have explained, stare decisis is flexible when this Court erroneously decided cases or when an outmoded rule should not apply to changed circumstances:

> Stare decisis is not a rule of law but is a matter of judicial policy .... It is policy which promotes certainty, stability and uniformity in the law. It should be deviated from only when urgent reason requires deviation. However, stare decisis is not an inflexible policy. In the rare case when it clearly is apparent that an error has been made o[r] that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from that policy is warranted.[21]

We follow the guidance of Supreme Court of the United States, which provided factors to consider:

> [1] the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; [2] the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and [3] the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.[22]

In this instance, that nature of the certified questions from the district court highlights the ambiguous and unworkable standards that *Wellman* and *Tawney* created. The doctrine established by the cases is so unsound that courts cannot determine whether the cases remain binding precedent or, much less, apply novel concepts like the "method of calculating" requirement. And, here again, this Court refuses to answer the certified question about what the unprecedented term of art means. Instead, the majority further convolutes the doctrine by punting the question as if answering it may accidentally allow lessees to contract away *Wellman*'s baseless default rule.

With such unclear and unfounded standards, it is impossible for lessees and lessors to confidently plan their affairs, which leads to unneeded litigation. For example, the parties to this case agreed that the lessee would pay the lessor royalties based on the sale price "less any charges for transportation, dehydration, and compression paid by the [the lessee] to deliver the oil, gas, and/or coalbed methane gas marketed ...."

In any other context, there would be little room to dispute the unambiguous contract terms: the lessee pays the lessor royalties based on the proceeds minus the listed expenses. But under *Wellman* and *Tawney*'s novel standard, a dispute exists as to whether the express contract terms crack *Tawney*'s undefined code to negate an implied covenant. We could remove all confusion by wiping the slate clean of *Wellman* and *Tawney* and allowing parties to govern their own affairs—as we do in other commercial relationships. We do not need to protect parties from their own contracts.

For these reasons, I respectfully dissent.

All Citations

875 S.E.2d 216

Footnotes

1 This Court would like to acknowledge the participation in this case of the following amici curiae: the West Virginia Land and Mineral Owners Association, the West Virginia Association for Justice, the American Petroleum Institute, the Gas and Oil Association of WV, Inc., the West Virginia Chamber of Commerce, the National Association of Royalty Owners, Appalachia, the West Virginia Royalty Owners' Association, the West Virginia Farm Bureau, Bounty Minerals LLC and Siltstone Resources, LLC. We have considered the arguments presented by the amici curiae in deciding this case.

2 West Virginia Code § 22-6-8 was crafted for the explicit purpose of converting so-called flat rate oil and gas leases into leases which pay a royalty based on the volume of oil and gas produced or marketed. "Flat rate" leases are leases wherein the lessors are paid an annual fee based solely on the existence of a producing well on the property. *See id.; see also* *Leggett*, 239 W. Va. at 267, 800 S.E.2d at 853. The Legislature, perceiving that these leases provided inadequate compensation to lessors, crafted a mechanism to convert these leases into volume-based royalty leases. Essentially, under this statute, any lessee seeking a permit to drill, redrill, deepen, fracture, stimulate, pressurize, convert, combine, or physically change a well under a flat rate lease is required to file an affidavit certifying that the lessee will pay to the lessor a minimum one-eight royalty of the gross proceeds from the sale of oil and as produced from those wells. W. Va. Code § 22-6-8(d)-(e).

3 The *Leggett* Court's primary criticism of these cases was that "the use of the implied covenant to market to reach the issue of [post-production] cost allocation is highly questionable." 239 W. Va. at 275 n.15, 800 S.E.2d at 861 n.15. In making this statement, the majority in that case cited to cases from jurisdictions which have not extended their implied covenants in this way, but glossed over the fact that at least four states other than West Virginia have done precisely the opposite. The highest courts of Colorado, Kansas, Oklahoma, and Arkansas have all recognized, just as we did in *Wellman*, that the implied duty to market necessarily encompasses a duty to render the product marketable, which includes bearing the cost of doing so absent a lease provision to the contrary. Despite this, the *Leggett* Court parroted one author's concern that the implied covenant to market has exceeded its original intent and "should be confined to its original purpose: to require the lessee to diligently seek a market for gas reserves that are shut in." *Id.* (citing Owen L. Anderson, *Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically?* Part 2, 37 Nat. Res. J. 611, 683 n. 89 (1997)). The problem with this assertion is that it is not clear that the implied duty to market was ever truly limited in such a way. *See, e.g.,* *Warfield Nat. Gas Co. v. Allen*, 261 Ky. 840, 88 S.W.2d 989, 991 (1935) (recognizing that, where a lease was silent on this issue, a lessee bore the expense of producing and marketing oil and gas as consideration for its entitlement to seven-eighths of the proceeds from the sale thereof). Rather, the implied covenant to market is reasonably construed to require a lessee to bear marketing costs, which is the very basis of the marketable product rule we employ today.

In this vein, the *Leggett* majority also contended that *Wellman* failed to recognize interstate variations in the marketable product rule. To the contrary, *Wellman* analyzed the rules surrounding the sharing of post-production costs employed by other states—including Texas, Louisiana, Colorado, Kansas, and Oklahoma. In several of those states, much like in West Virginia, it has long been recognized—even before deregulation of the gas industry in the 1990s—that a lessee impliedly covenants to market the oil and gas it produces under the lease. The basic rules employed by those states simply explained that "the implied duty to market means a duty to get the product to the place of sale in marketable form." *Wood v. TXO Prod. Corp.*, 854 P.2d 880, 882 (Okla. 1992); *see also* *Davis v. Cramer*, 808 P.2d 358, 362 (Colo. 1991) (explaining that the covenant to market requires a lessee to exercise reasonable diligence to market production from the well.); *Sternberger v. Marathon Oil Co.*, 257 Kan. 315, 894 P.2d 788, 799 (1995) ("The lessee has the duty to produce a marketable product, and the lessee alone bears the expense in making the product marketable."). Even in states that do not employ the marketable product rule today, it was once recognized that the lessee may be impliedly obligated to bear certain costs in marketing oil and gas. *See, e.g., Warfield,* 88 S.W.2d at 991. West Virginia has long applied the same rule. *See* Robert Tucker Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia* §§ 70 & 104 (1951) (stating that in West Virginia a lessee impliedly covenants he will market oil and gas produced). The only question for us in *Wellman* was whether that rule necessarily required a lessee to bear post-production costs until the gas was marketed. The logical conclusion that it did, unless otherwise provided in the lease, was amply supported by the common law of this State, as well as the guidance of other states employing virtually identical rules.

1 "An oil and gas lease (or other mineral lease) is both a conveyance and a contract." Syl. pt. 1, in part, *McCullough Oil, Inc. v. Rezek*, 176 W. Va. 638, 346 S.E.2d 788 (1986).

2 *See* *St. Luke's United Methodist Church v. CNG Dev. Co.*, 222 W. Va. 185, 191-92, 663 S.E.2d 639, 645-46 (2008) ("This Court has recognized the unfairness of allowing a lessee to effectively tie up land when others stood ready to develop the same."); Syl. pt. 1, in part, *McCullough Oil, Inc. v. Rezek*, 176 W. Va. 638, 346 S.E.2d 788 (1986) (An oil and gas lease "is designed to accomplish the main purpose of the owner of the land and of the lessee (or its assignee) as operator of the oil and gas interests: securing production of oil or gas or both in paying quantities, quickly and for as long as production in paying quantities is obtainable."); *United Fuel Gas Co. v. Smith*, 93 W. Va. 646, 117 S.E. 900, 904 (1923) ("[T]here 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."); *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S.E. 433, 435 (1903) ("[A] lease calls for the right, not to oil in place, but to extract it."); *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W.Va. 583, 42 S.E. 655 (1902) (recognizing as universal the principle of law "which discourages tying up and rendering unproductive the vast fields of mineral wealth, construes every contract and lease as to both lessor and lessee so as to best promote production, development and progress, and frowns upon every attempt to evade it as being in contravention of both good morals and public policy.").

3 *See generally*, Keith B. Hall, *Implied Covenants and the Drafting of Oil and Gas Leases*, 7 LSU J. Energy L. & Resources 401, 418 (2019) ("The implied covenant to market requires a lessee to diligently seek purchasers at a reasonable price for any oil or gas that is found in paying quantities."); Nancy Saint-Paul, 2 *Summers Oil and Gas* § 18:11 (3d ed. 2021) ("In order to carry out the purposes for which an oil and gas lease is made, that is, the ... production and sale [of oil and gas] so as to yield a profit to the lessee and a return to the lessor in the form of rents and royalties, it is necessary that the oil or gas produced from the land be marketed.").

4 David E. Pierce, *Royalty Jurisprudence: A Tale of Two States*, 49 Washburn L.J. 347, 369 (2010).

5 Brian S. Wheeler, *Deducting Post-Production Costs When Calculating Royalty: What Does the Lease Provide?*, 8 Appalachian J.L. 1, 27 (2008).

6 John W. Broomes, *Waste Not, Want Not: The Marketable Product Rule Violates Public Policy Against Waste of Natural Gas Resources*, 63 U. Kan. L. Rev. 149, at 149 and 174 (2014).

7 Douglas Hale Gross, *Calculation of rental under commercial percentage lease*, 58 A.L.R.3d 384, § 2 (1974) ("Percentage leases of commercial retail premises, having originally been employed many years ago, are by now widely used. Between 1910 and 1925, percentage leases were coming into increasing use, just as they are today, in situations where a landowning lessor improved his premises with a building erected to meet the specifications of potential business lessees; the lessor could borrow on the strength of potential percentage rent payments plus minimum rental obligations of the lessee. While at first percentage leases were used primarily to lease valuable downtown retail locations, today they are used in neighborhood and shopping center store leases as well.").

8 *Hanna Oil & Gas Co. v. Taylor*, 297 Ark. 80, 759 S.W.2d 563, 565 (1988) (holding that the lessee was "not entitled to deduct compression costs" when the lease based royalties on "the proceeds received by Lessee").

9 *Garman v. Conoco, Inc.*, 886 P.2d 652, 659 (Colo. 1994) ("In our view the implied covenant to market obligates the lessee to incur those post-production costs necessary to place gas in a condition acceptable for market. Overriding royalty interest owners are not obligated to share in these costs.").

10 *Sternberger v. Marathon Oil Co.*, 257 Kan. 315, 894 P.2d 788, 799 (1995) ("The lessee has the duty to produce a marketable product, and the lessee alone bears the expense in making the product marketable.").

11 *Wood v. TXO Production Corp.*, 854 P.2d 880, 882 (Okla. 1992) ("In our view, the implied duty to market means a duty to get the product to the place of sale in marketable form."); *TXO Production Corp. v. State ex rel. Commissioners of the Land Office*, 903 P.2d 259, 262 (Okla. 1994) ("Clearly, under *Wood*, [the lessors] were not chargeable with a portion of the costs of compression because such costs are borne by the lessee under its duty to obtain a marketable product.... If the processes of dehydration and gathering are necessary to prepare the product for market, then the costs of these processes may not be deducted under the royalty provision of the subject lease.").

12 One scholar suggests that while a comparable number of states have adopted wildly different versions of the "at the wellhead" doctrine, those states' decisions are often contradictory or conflict with decisions that suggest the states might actually follow some form of the marketable-product rule. *See*, *e.g.*, John Burritt McArthur, *Some Advice on Bice, North Dakota's Marketable-Product Decision*, 90 N. D. L. Rev. 545, 549-563 (2014).

13 Appellate judges are not monks studying law in ivory towers and deriving perfect legal principles from the ether. The written opinions of appellate courts are a direct extension of the quality of the briefing and advocacy presented by the parties, both to the appellate courts and to the trial courts below.

14 States adopting marketable-product rules by statute include Michigan (Mich. Comp. Laws § 324.6503b(1) (1999)); Nevada (Nev. Rev. Stat. § 522.115 (2000)); and Wyoming (Wyo. Stat. Ann. § 30-5-304(iv) (1999)).

15 30 C.F.R. § 1206.146(a) provides that a lessee "must place gas, residue gas, and gas plant products in marketable condition and market the gas, residue gas, and gas plant products for the mutual benefit of the lessee and the lessor at no cost to the Federal government." *See also* 30 C.F.R. § 206.152(i) (2010) ("The lessee must place gas in marketable condition and market the gas for the mutual benefit of the lessee and the lessor at no cost to the Federal Government."); Thomas F. Reese & Drake D. Hill, *Wyoming's Powder River Basin: A Study in Federal Royalty Valuation*, 4 Wyo. L. Rev. 629, 630 (2004) (discussing royalty calculation issues on production from leases on federal lands).

16 *See* West Virginia Department of Commerce, Mineral Development Properties, executed lease agreement between the State of West Virginia and SWN Production Company, underlying portion of the Ohio River within MM60 to southern end of MM70, being approximately 320.44 acres, at https://wvmineraldevelopment.org/mineral-development-properties (last visited June 14, 2022).

17 *See Amicus Curiae Brief on Behalf of West Virginia Royalty Owners' Association, West Virginia Farm Bureau, Bounty Minerals LLC, and Siltstone Resources, LLC (in Support of Respondents Charles Kellam, et al.)* at 17.

1 *Leggett v. EQT Prod. Co.*, 239 W. Va. 264, 276, 800 S.E.2d 850, 862 (2017).

2 *Id.* at 271, 800 S.E.2d at 857.

3 *Id.* at 271-72, 800 S.E.2d at 858-59.

4 210 W. Va. 200, 557 S.E.2d 254 (2001).

5 *Leggett*, 239 W. Va. at 272, 800 S.E.2d at 858 (citing *Wellman*, 210 W. Va. 200, 557 S.E.2d 254).

6 *See Leggett*, 239 W. Va. at 276-77, 800 S.E.2d at 862-63 (citation omitted).

7 *Id.*

8 *Id.* at 277, 800 S.E.2d at 863 (quoting John W. Broomes, *Waste Not, Want Not: The Marketable Product Rule Violates Public Policy Against Waste of Natural Gas Resources*, 63 U. Kan. L. Rev. 149, 170–71 (2014)).

9 *Wellman*, 210 W. Va. at 210, 557 S.E.2d at 264.

10 *Id.*

11 *Leggett*, 239 W. Va. at 272-73 n.12, 800 S.E.2d at 858-59 n.12 (quoting *Rogers v. Westerman Farm Co.*, 29 P.3d 887, 903 (Colo. 2001)).

12 *Leggett*, 239 W. Va. at 277, 800 S.E.2d at 863 (quoting David E. Pierce, *Royalty Jurisprudence: A Tale of Two States* 374 (2010)).

13 *Wellman*, 209 W. Va. at 210, 544 S.E.2d at 263 (quoting Robert Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia* § 104 (1951)).

14 Donley, *supra* at § 159 (emphasis added).

15 219 W. Va. 266, 633 S.E.2d 22 (2006).

16 *See* Syl. Pt. 10, *Id.* at 266, 633 S.E.2d at 22.

17 *Leggett*, 239 W. Va. at 275, 800 S.E.2d at 861.

18 *See Id.* (quoting *Allen v. Colonial Oil Co.*, 92 W. Va. 689, 115 S.E.2d 842, 844, 115 S.E. 842 (1923)).

19 Syl. Pt. 3, *Cotiga Dev. Co. v. United Fuel & Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962).

20 *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 38, 614 S.E.2d 680, 685 (2005) (quoting *State v. Mem'l Gardens Dev. Corp.*, 143 W. Va. 182, 191, 101 S.E.2d 425, 430 (1957)).

21 *Adkins v. Francis Hosp. of Charleston*, 149 W. Va. 705, 718, 143 S.E.2d 154, 162 (1965) (internal citation omitted).

22 *Meadows v. Meadows*, 196 W. Va. 56, 64, 468 S.E.2d 309, 317 (1996) (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970)).

End of Document