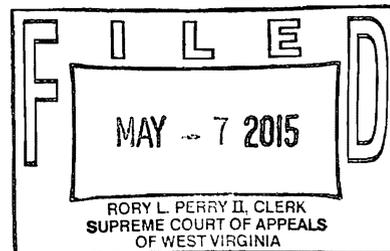


**IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**



Docket No. 15-0122

**ON APPEAL FROM THE
CIRCUIT COURT OF LEWIS COUNTY**

RUBIN RESOURCES, INC.,
A West Virginia corporation,
Petitioner

v.

GAROLD "GARY" W. MORRIS, II,
Respondent.

PETITIONER RUBIN RESOURCES, INC.'S BRIEF

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May 7, 2015

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**TO THE HONORABLE JUSTICES OF THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA:**

ASSIGNMENTS OF ERROR

- I. The Circuit Court erred in finding that Rubin's settlement with CNX precludes any finding that its damages in the amount of \$32,455.81 were proximately caused by Morris's negligence.
- II. The Circuit Court erred in finding that because there was no final judicial determination of whether Rubin adversely possessed the minerals, it cannot be said that the amount Rubin voluntarily paid to CNX to settle the claim flowed as a result of Morris's negligence.
- III. The Circuit Court erred in finding that Rubin's claim for damages in the amount of \$246,000, which is the amount Antero Resources agreed to pay Rubin for the subject Property prior to the discovery of the title defect, is not recoverable because the damages were not proximately caused by Morris's negligence.
- IV. The Circuit Court erred in finding that Rubin's claim for damages in the amount of \$246,000, which is the amount Antero Resources agreed to pay Rubin for the subject Property prior to the discovery of the title defect, is "not recoverable as a matter of law due to the fact that they are remote, conjectural, speculative, and not reasonably certain."

STATEMENT OF THE CASE

I. BACKGROUND

Petitioner and Plaintiff below, Rubin Resources, Inc. ("Rubin" or "Petitioner"), appeals the January 6, 2015 final order ("Order") issued by the Circuit Court of Lewis County, West Virginia ("Circuit Court"), granting summary judgment against Rubin and in favor of Respondent and Defendant below, Garold "Gary" Morris, II ("Morris" or "Respondent"), in a legal malpractice case where liability was admitted and actual, out-of-pocket damages directly resulting from the negligence were ascertained. (*See* Order at JA 0229-0240; *see* Transcript from 8/4/14 Hearing at JA 0241-0283.)

This straightforward legal malpractice action originated from a defective title opinion that Morris prepared for Rubin concerning an 121-acre tract from which Rubin acquired an oil and gas leasehold estate from Jackson Smith Enterprises, d/b/a West Virginia Energies ("WVE") in

reliance upon Morris's title opinion (the "Property"). (See Joint Stipulations at JA 0047-0053; see Title Opinion dated 7/24/2000 at JA 0012-0033; see Assignment at JA 0127-0132.) Morris did not dispute Rubin's allegations of negligence, and the specific facts concerning liability were stipulated. (JA 0047 ¶ 1.)

Among those stipulations were key facts concerning the character of Morris's error and the nature of Rubin's interest in the Property, both of which are critically relevant to the determination of damages in this case. See *Keister v. Talbot*, 182 W. Va. 745, 749, 391 S.E.2d 895, 899 (1990) (considering proximate cause and damages in a malpractice action involving a title search and holding that, "[w]here a client has been injured by an attorney's negligence in certifying or examining title to real estate, the exact nature of damages may depend on the nature of the client's interest in the property, the character of the attorney's error, and the other facts of the case").

The character of Morris's fundamental error (and Rubin's reliance upon it) was apparent and undisputed. Rubin hired Morris in connection with the WVE Agreement for the express purpose of determining whether Rubin would acquire good and marketable title and the exclusive right to drill upon the leasehold. (JA 0012-0024.) As stipulated in the proceeding below, that purpose was defeated because a preexisting Declaration of Pooling affecting the Property and two adjoining parcels was recorded in 1986 by CNG Development Co. ("CNG") ("1986 Declaration"), but was not identified in the title opinion Morris prepared for Rubin in 2000. (JA 0048 ¶¶ 4-6.) Instead, in rendering his title opinion, Morris certified the precise opposite, that Rubin had "good and marketable title" and "the exclusive right to drill upon the subject leasehold." (J.A. 0024.) Rubin, relying on Morris's erroneous title opinion, acquired the oil and gas leasehold from WVE, and thereafter, made valuable improvements on the Property

by investing millions to drill a producing well. (JA 0048 ¶¶ 8-9, 13-14.) In this case, the negligence was not a harmless error; rather, Morris's error concerned the very purpose for which he was hired, and because it was relied upon by Rubin to its actual detriment, the error is no longer capable of being cured.

The nature of Rubin's interest in the leasehold is another significant factor that the Circuit Court should not have overlooked, and further distinguishes the "facts of th[is] case" from the inapposite cases cited by Morris involving markedly dissimilar facts. *Keister*, 182 W. Va. at 749, 391 S.E.2d at 899. By the plain terms of the Assignment, all that Rubin acquired from WVE was its leasehold interests in the oil and gas, no surface or other property rights. (*See* Assignment at JA 0127-0132.) It was also undisputed that, after Rubin acquired the leasehold in reliance upon Morris's title opinion, Rubin made valuable improvements upon the leasehold by producing a multi-million-dollar oil and gas well. (JA 0059 ¶¶ 13-14.)

Perhaps most significantly, Rubin's interest in the Property was expressly contingent on its ability to devote the leasehold to its intended use for oil and gas production. To ensure that the leasehold would serve that purpose, the parties executed an additional Agreement (supported by separate consideration) to provide an express "right of substitution" or "make good" provision, as follows:

. . . . Upon legal examination of such leasehold(s), should the title be found to be defective, [WVE] shall, at their expense, perform any curative action that is necessary and required by [Rubin's] legal examiner. Should the title be found to be not a "good and marketable" leasehold then [WVE] hereby agrees to replace the lease with substitute property acceptable to [Rubin].

(*See* Stipulations at JA 0048 ¶ 9; *see* Agreement at JA 0133-34.) Under these circumstances, Morris's error prevented Rubin from acquiring the mineral interests, which otherwise it was contractually entitled to receive. *See Keister*, 182 W. Va. at 750, 391 S.E.2d at 391 ("The proper

method of determining whether a party's omission to perform an act imposed by a duty is a cause in fact of damage to another is to determine whether performance of that act would have prevented the damage.") (JA 0238 at Order ¶ 32.). As acknowledged and stipulated by the parties, "because Mr. Morris, as Rubin's legal examiner, did not report a title defect, Rubin Resources did not have the opportunity to exercise its contractual right to require WVE to substitute acceptable property," and in fact, did not exercise that right. (JA 0049 ¶¶ 10, 12.) These specific facts concerning the nature of Rubin's interest in the leasehold — all of which were undisputed — were directly pertinent to the Circuit Court's damages analysis under *Keister* and should not have been cursorily overlooked in assessing proximate cause.

The record below is equally certain with respect to damages. The parties stipulated that Rubin incurred the following damages: (i) Rubin's loss of an *agreed-upon* contract with Antero Resources, in the amount of \$246,000, upon the discovery of the title defect (*see* JA 0049-50 ¶¶ 15-19); and (ii) upon discovery of the recorded 1986 Declaration that was omitted from Morris's title opinion, Rubin's *out-of-pocket* settlement of \$32,455.81 to CNX, successor-in-title to CNG, for Rubin's impermissible extraction of gas from the Property due to the title defect. (JA 0050 ¶¶ 20-22.) Rubin's losses were both *actual* damages and "reasonably certain" in amount. Thus, the only issue for the Circuit Court's determination was whether Rubin's ascertained damages were the direct and proximate result of Morris's admitted negligence. (JA 0051 ¶ 23.)

However, in rendering its Order, the Circuit Court entered judgment in favor of Morris, dismissing Rubin's legal malpractice claim with prejudice. The Circuit Court held that Rubin's damages were not proximately caused by Morris's negligence, and that recovery of the Antero-related damages under the theory that Rubin would have exercised its contractual right of substitution is "too remote and speculative." (*See* Order at JA 0238-0239 ¶¶ 35, 37.) Rubin

respectfully asks this Honorable Court to review the Circuit Court's analysis in light of the assignments of error and applicable law, discussed herein, and to reverse and set aside the Circuit Court's Order. Viewing the undisputed facts and all reasonable inferences in the light most favorable to Rubin, summary judgment should not have been entered for Morris, whose motion deviated from the traditional causation test governing negligence claims in West Virginia, and otherwise relied on cases with facts very different from the undisputed record herein.

II. THE PARTIES' STIPULATIONS OF FACT

For all purposes in the proceeding below, Morris and Rubin ("the parties") jointly stipulated to the following facts, which are relevant, undisputed, and determinative of the issues on appeal:

1. Mr. Morris does not dispute Rubin's allegations of negligence.
2. The parties stipulated as to the authenticity and admissibility of all documents attached to the Complaint, which include the following documents:
 - a. Mr. Morris' opinion letter dated July 24, 2000, and
 - b. The Declaration of Pooling, recorded at Book No. 191, Page 862
3. The parties stipulated that in July 2000, Rubin asked Morris to perform a title examination and render a title opinion concerning the 121-acre tract of land, more or less, situated in Ritchie County, West Virginia, that is the subject of this action.
4. The parties stipulated that, within the scope of Morris' attorney-client relationship with Rubin in July 2000, Morris prepared a title opinion letter dated July 24, 2000, and that the letter did not note the existence of a Declaration of Pooling affecting the Property and two adjoining parcels.
5. The parties stipulated that the Declaration of Pooling attached as Exhibit B to the Complaint was recorded on or about October 3, 1986, and that in the Declaration of Pooling,

CNG Development Company (“CNG”) gave notice that it intended to pool specified acreage in three contiguous tracts, including the Property and an adjacent 180-acre tract.

6. The parties stipulated that at the time Morris undertook to perform the title search for Rubin, the aforesaid Declaration of Pooling was in existence and recorded.

7. The parties stipulated that, in 1990, CNG drilled a well on the adjoining 180-acre tract and, upon information and belief, gas has been produced from that well continuously from January 1990 to the present.

8. The parties stipulated that, in 2000, unaware of CNG’s Declaration of Pooling, Rubin entered into an agreement and related assignments with Jackson Smith Enterprises, d/b/a West Virginia Energies (“WVE”), whereby WVE assigned to Rubin its interest in the oil and gas underlying the subject Property.

9. The parties stipulated, upon information and belief, that the agreement between Rubin and WVE contained the following right of substitution:

For and upon receipt of Five Thousand (\$5,000.00) from [Rubin Resources] as payment for the leasehold estate(s) . . . , [WVE] hereby agrees to warrant title. Upon legal examination of such leasehold(s), should the title be found to be defective, [WVE] shall, at their expense, perform any curative action that is necessary and required by [Rubin’s] legal examiner. Should the title be found to be not a “good and marketable” leasehold then [WVE] hereby agrees to replace the lease with substitute property acceptable to [Rubin].

10. The parties stipulated that, because Morris, as Rubin’s legal examiner, did not report a title defect, Rubin did not have the opportunity to exercise its contractual right to require WVE to substitute acceptable property.

11. The parties stipulated that prior to entering into the agreement with WVE, Rubin examined the subject Property, and no producing wells were identified.

12. The parties stipulated that, unaware of the title defect, Rubin did not exercise its contractual right to require WVE to replace the lease with substitute property acceptable to Rubin.

13. The parties stipulated that, on or about September 6, 2000, Rubin filed an application with the West Virginia Office of Oil & Gas for a permit to drill a well (Maple No. 1) on the Property.

14. The parties stipulated that the permit was issued on September 18, 2000, and the well was drilled and produced oil and gas.

15. The parties stipulated that, in or about September 2012, Rubin entered into a letter agreement with Antero Resources Appalachian Corporation (“Antero”) in which Antero agreed to purchase Rubin’s Marcellus Shale rights in the subject Property for the purchase price of \$216,000.00 with a 2.375 override, with a present value of \$30,000.00, subject to Antero’s due diligence review.

16. The parties stipulated that in conducting due diligence, Antero investigated the status of the title to this leasehold estate, and concluded that the Property was held by production due to the existence of CNG’s well on the adjacent 180-acre tract, which along with the Property, was subject to the Declaration of Pooling.

17. The parties stipulated that the first notice of a title defect affecting the Property was received on or about October 19, 2012, when Rubin received a Title Defect Notice from Antero relating to the Property. Rubin was advised that CNG Producing Company, presently d/b/a CNX Gas Co. LLC, held an oil and gas lease recorded March 18, 1984 (10 year term); that CNG drilled a well on the property in 1990 that has been constantly producing, to present; and

that the allocated value of the title defect property was \$216,000 (120 acres at \$1,800 per net acre).

18. The parties stipulated that Antero notified Rubin that it will not go forward with its purchase of Rubin's Marcellus Shale rights unless the title defect is cured.

19. The parties stipulated that the title defect could not economically be cured.

20. The parties stipulated that upon discovery of the Declaration of Pooling, Rubin notified CNX, successor in title to CNG, concerning the existence of its subject Well on the Property.

21. The parties stipulated that, in March 2013, Rubin and CNX entered into a settlement agreement, whereby Rubin paid CNX compensation of \$32,455.81 (\$15,000 for a site location fee and \$17,455.81, value of 1/32nd overriding royalty interest through December 31, 2012).

22. The parties stipulated that, on or about July 12, 2013, Rubin and CNX entered into a Wellbore Assignment and Bill of Sale, assigning Rubin a wellbore interest in the subject Well.

23. The parties stipulated that the remaining controversy between the parties is the proper measure of damages, including, but not limited to, the question whether negligence on the part of Morris proximately caused Rubin's Antero-related damages. (*See* Stipulations at JA 0057-0061; *see also* Assignment at JA 0127-0132; Agreement at JA 0133-34; Settlement Agreement and Release at JA 0172-0176.)

SUMMARY OF ARGUMENT

This Court should vacate the Order below because, if affirmed, the ruling would dramatically alter well-settled West Virginia law on damages in a straightforward legal

malpractice case. In assessing damages, the Circuit Court's Order manifests two errors: one involving proximate cause and, the other, the computation of damages.

First, of the four assignments of error identified above, three arise from the Circuit Court's clear misapplication of the traditional proximate cause standard, which requires Rubin to establish an actual loss as a result of Morris' negligent act, nothing more. Syl. Pt. 3, *Keister*, 182 W. Va. at 746, 391 S.E.2d at 896 (“[A] plaintiff in a malpractice action has the burden of proving both his loss and its causal connection to the attorney’s negligence.”). As the record reflects, liability was admitted, the amount of damages was conceded, and yet the Circuit Court inexplicably determined that the direct and foreseeable damages suffered by Rubin were not caused by Morris's negligent title opinion. This ruling is wrong on the facts and the law: the very reason that Rubin hired Morris was so that Rubin (an oil and gas company) could obtain a title examination upon which it could rely to (i) produce the mineral interests of the Property, and/or (ii) sell the leasehold, as is typical and customary in the oil and gas industry. The negligent act of Morris — i.e., rendering a title opinion certifying that Rubin would have “good and marketable title” and the “exclusive right to drill upon the leasehold” — precisely precluded Rubin from achieving these two obvious and clear aims, and the damages that resulted were both direct and foreseeable. As described below, Rubin fully satisfied the requirements of the proximate cause standard, and it was error for the Circuit Court to grant Morris summary judgment on causation, especially where the stipulated facts and their reasonable inferences should have been viewed in the light most favorable to Rubin.

Second, as reflected in the fourth assignment of error, the Circuit Court misapplied the standard for proving damages in negligence cases and erroneously concluded that Rubin's Antero damages were “not recoverable as a matter of law due to the fact that they are remote,

conjectural, speculative, and not reasonably certain.” (JA 0238-0239 at Order ¶¶ 35-37.) This ruling is contrary to the undisputed record and applicable law. Rubin’s \$246,000 loss was based on undisputed evidence of an actual offer and acceptance from Antero, an identified purchaser, which sale Rubin lost *solely* on account of the 1986 Declaration that Morris negligently omitted from his opinion. (See JA 0171 (providing notice to Rubin of the 1986 Declaration title defect and, on that basis alone, advising Rubin that it would not go forward with its purchase agreement); see also JA 0049-0050 at Stipulations ¶¶ 15-19.) Moreover, under West Virginia law, proving damages with *absolute* certainty is not required; it is sufficient that the undisputed record established Rubin’s Antero loss with reasonable certainty. (JA 0236 at Order ¶ 24 (recognizing rule of law that “in order to sustain a recovery for damages there must be proof which furnishes reasonable certainty of damage and the amount thereof”).)

To the extent that the Circuit Court concluded that it would be “speculative” to presume that Rubin would have enforced its paid-for contractual right to receive substitute property, that finding of fact is contrary to the evidence, the plain terms of the Agreement, and the canons of contract interpretation.¹ In this instance, Rubin and WVE contractually agreed that WVE would “make good” with suitable substitute property. Under the circumstances of this case, it is not at all speculative to conclude that is exactly what the parties would have done had Morris provided notice of the title defect. It was error for the Circuit Court to make a material finding of fact contrary to Rubin and WVE’s mutual agreement and their expressed intent on this point. Accordingly, the Circuit Court’s conclusion of law that Rubin cannot recover its \$246,000 loss

¹ This Court has long been clear in its analysis of contracts: “A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” Syl. Pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 128 S.E.2d 626 (W. Va. 1963). In construing the plain, unambiguous terms of the Agreement, the Circuit Court’s overriding concern would be to ascertain and give effect to the intention of the parties. *Zimmerer v. Romano*, 679 S.E.2d 601, 610 (W. Va. 2009).

from an agreed-upon contract with Antero because “recovery under [the theory that Rubin would have exercised its contractual right to substitute property] is too remote and speculative” should be vacated. (JA 0238 at Order ¶ 35.) Rubin’s Antero damages were the direct result of Morris’s error and were proven with reasonable certainty.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests Rule 19 oral argument, which is appropriate in cases involving assignments of error in the application of settled law.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE FACT OF RUBIN’S SETTLEMENT WITH CNX PRECLUDES ANY FINDING THAT ITS DAMAGES IN THE AMOUNT OF \$32,455.81 WERE PROXIMATELY CAUSED BY MORRIS’S NEGLIGENCE.

The Circuit Court’s conclusion, that the mere fact that Rubin settled with CNX “precludes any finding that these claimed damages were proximately caused by Mr. Morris’s negligence,” should be vacated, both because the ruling is contrary to Rubin’s clear showing of proximate cause, and because such a bright-line rule that you “cannot settle and sue” violates basic principles of West Virginia tort law and has never been adopted by this Court. (JA 0235 at Order ¶¶ 18-20.)

A. Rubin’s CNX Damages of Were Proximately Caused by Morris’s Negligence.

Under well-settled West Virginia law, an attorney who violates the standard of care is liable for damages proximately caused by his negligence. *Keister*, 182 W. Va. at 748, 391 S.E.2d at 898. The proximate cause standard requires Rubin to establish an actual loss as a result of Morris’ negligent act, nothing more. *Id.* Syl. Pt. 3, 182 W. Va. at 746, 391 S.E.2d at 896 (“[A] plaintiff in a malpractice action has the burden of proving both his loss and its causal connection to the attorney’s negligence.”). Although damages in a legal malpractice case are

never presumed, the proximate cause requirement — typical of any negligence tort — is neither exceptional nor onerous. *See, e.g., Spencer v. McClure*, 618 S.E.2d 451, 456 (W. Va. 2005) (holding that proximate cause is a vital and an essential element of any actionable negligence).

In general, the proximate cause requirement does not operate as an automatic bar to a plaintiff's recovery, but rather, weeds-out only those legal malpractice claims where the client did not suffer an actual loss as result of the lawyer's negligent act, or where the lawyer's error, though negligent, was still capable of being cured² or was not actually relied on by the plaintiff. *See Keister*, 182 W. Va. at 749, 391 S.E.2d at 899 (quoting 1 Am. Jr. 2d, *Abstracts of Title*, §§ 19, 26) (“[A]n abstracter ‘is not liable for losses incurred otherwise than in reliance on the abstract,’ and that his liability extends only to losses ‘directly resulting from, or proximately caused by, his breach of duty to furnish a correct abstract.’”) (additional citations omitted).

This case, however, arises from circumstances markedly different from the facts described above where a sufficient nexus between the attorney's negligent act and the plaintiff's damage was lacking. Morris's negligent act was rendering a title opinion that certified that Rubin had “good and marketable title” and the “exclusive right to drill upon the leasehold.” (JA 0024.) The actual damages that resulted in reliance on the error were both direct and foreseeable: relying upon Morris' title opinion and unaware of its defect, Rubin promptly put the Property to its intended use of producing oil and gas (thereby violating the *identical* Declaration

² *See, e.g., Harrison v. Casto*, 165 W. Va. 787, 271 S.E.2d 774 (1980) (affirming dismissal of malpractice case against an attorney who failed to file a complaint on behalf of client where the statute of limitations on that action had not yet run at the time the malpractice action had been instituted). This Court has similarly found that an attorney's error that was cured before any loss occurred to the plaintiff does not satisfy the basic proximate cause requirement. *E.g., Calvert v. Scharf*, 217 W. Va. 684, 695, 619 S.E.2d 197, 208 (2005) (“If a lawyer is negligent in drafting a provision in a will, but the defect is cured so that the intended beneficiary receives his or her bequest pursuant to the will, then there is no causal connection between the attorney's negligence and the beneficiary's damages, because the beneficiary has not suffered damages proximately caused by the attorney's negligence.”).

of record that Morris omitted from his title opinion and incurring damages to CNX). Still unaware of the defect, Rubin later entered into a letter agreement to sell the leasehold to an actual buyer, Antero (which sale was terminated *solely* upon discovery of the title defect). The losses that Rubin suffered were actual and occurred as a direct result of Morris' negligent act. This is the essence, and totality, of proximate cause.

Based on the undisputed record, the causal nexus between Rubin's out-of-pocket damages to CNX and Morris's negligence is straightforward. There is an unbroken causal link beginning with Morris's negligent omission of the 1986 Declaration and Rubin's reliance on that defective opinion. Rubin acquired the Property and drilled the producing well, which then directly caused the damages that CNX claimed against Rubin for its production in violation of the recorded 1986 Declaration. Furthermore, at the time that Morris conducted the title examination and rendered his title opinion, he knew that Rubin intended to acquire "good and marketable title" to all development rights and "drill upon the subject leasehold." (*See* JA 0024.) The resulting damages are thus the foreseeable and predictable result of Morris's error in omitting the 1986 Declaration from his title opinion. Syl. Pt. 1, *Calvert*, 217 W. Va. at 685, 619 S.E.2d at 198. Accordingly, Rubin's incurred damage, in the ascertained amount of \$32,455.81, satisfies the requirement of an actual loss proximately caused by Rubin's reliance on Morris's negligent title opinion, and the Circuit Court erred as a matter of law in denying Rubin's recovery as to those out-of-pocket damages.

B. The Fact of Rubin's Settlement Does Not Alter the Proximate Cause Analysis

Instead of applying the traditional causation test, however, the Circuit Court's Order focused myopically on the mere fact of settlement and, in doing so, engrafted broad new burdens on parties who seek relief for legal malpractice. These heightened standards would effectively

preclude recovery of *direct* damages, like Rubin’s, in any case where the plaintiff did not litigate to final adjudication every conceivable affirmative defense arising from the lawyer’s negligence, or in which the plaintiff attempted to mitigate its damages, via reasonable settlement, by creating a bright-line rule that you “cannot settle and sue.” (JA 0235 at Order ¶ 18 (concluding that “Rubin’s voluntary settlement with CNX . . . precludes any finding that these claimed damages were proximately caused by Mr. Morris’s negligence”); *id.* ¶ 17 (concluding that the amount paid to CNX “*may* have been wholly avoided by operation of this state’s adverse possession laws,” and because “[t]here was no judicial determination of whether the minerals were adversely possessed by Rubin, . . . it cannot be said that the amount Rubin voluntarily paid to CNX flowed as a result of Mr. Morris’s negligence.”) (emphasis added). (See also JA 0233 at Order ¶ 10 (recognizing Morris’s reliance on *Calvert* in arguing that a voluntary settlement “severs” any causal link between the attorney’s underlying negligent act and the client’s recovery of damages for malpractice.)

In reaching its conclusions, the Circuit Court clearly misconstrued this Court’s holding in *Calvert v. Scharf*, which did not announce a bold, new prohibition that plaintiffs cannot settle and sue,³ but rather, rejected the suggestion (offered by the plaintiffs in that case) that the Court adopt a rule that “merely establishing that [plaintiffs] were sued in the declaratory judgment

³ Had this Court intended to change the established proximate cause analysis, the method of doing so would have been through a new syllabus point. See *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303, 313 (2014) (explaining that this “Court uses original syllabus points to announce new points of law or to change established patterns of practice by the Court.”)

Furthermore, a rule that would require plaintiffs like Rubin to litigate their position to final judgment and appeal in order to pursue a malpractice action would have stunning policy impacts, violating long-standing West Virginia law and policy that “favor[s] and encourage[s] settlements between parties to a controversy to avoid the vexation and expense of litigation.” *State ex rel. Showen v. O’Brien*, 89 W. Va. 634, 109 S.E. 830, 831 (1921); see also *Woodrum v. Johnson*, 210 W. Va. 762, 770, 559 S.E.2d 908, 917 (2001) (“As this Court has consistently made clear in the past, the law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation.”).

action should be sufficient to establish proximate cause.” 217 W. Va. 684, 695, 619 S.E.2d 197, 208 (2005). The *Calvert* Court thus rejected the plaintiffs’ position that the mere existence of litigation should be tantamount to a proximate cause substitute. The Court observed that such a rule, if adopted, would “require lawyers to draft litigation-proof documents” and would result in “an excessive potential for liability that would place an extraordinarily unreasonable burden upon the legal profession.” *Id.* The *Calvert* Court thus declined the invitation to deviate from the proximate cause standard, and reiterated the traditional test, as follows: “Instead, the Calverts are required to establish they suffered an actual loss and that the loss was proximately caused by negligence in the drafting of Erma’s will.” *Id.* (citing Syl. Pts. 2 & 3, *Keister*, 182 W. Va. 745, 391 S.E.2d 895).

In *Sells v. Thomas*, this Court again reaffirmed that standard the following year. 220 W. Va. 136, 140-41, 640 S.E.2d 199, 203-04 (2006) (“Ms. Sells must prove that she suffered loss that was caused by [her lawyer’s] actions.”). The Court recognized that “in order to secure some recovery, [the plaintiff, Ms. Sells] settled her underinsured motorist claim for \$50,000, \$25,000 less than the policy limit” and plaintiff claimed that she suffered a loss as a result of her attorney’s negligence. In evaluating the malpractice claim for damages, the *Sells* Court rejected the defendant lawyer’s argument that Ms. Sells’ claims were “speculative” and “that given plaintiff’s settlement with State Farm, there is simply no way to prove any negligence on his part that caused [plaintiff] to suffer a loss.” *Id.* In response, the *Sells* Court unequivocally stated, “[w]e disagree,” and reversed and remanded the case to the trial court. *Id.* (citing *Better Homes, Inc. v. Rodgers*, 195 F. Supp. 93 (N.D. W. Va. 1961) (applying West Virginia law and holding that damages arising from a lawyer’s failure to timely perfect an appeal were not “too remote, speculative and uncertain to receive cognizance”).) Accordingly, just as there is no short-cut to

establishing proximate cause, there is also no automatic bar (e.g., arising from the fact of settlement alone) to the recovery of direct damages where the proximate cause standard is met. The Circuit Court’s ruling precluding Rubin’s recovery of its out-of-pocket CNX damages by virtue of the fact that the claim was settled, not litigated to final appeal, is an error of settled law that requires reversal.

C. That Rubin Did Not Litigate, to Final Appeal, a Theoretical Affirmative Defense of Adverse Possession Does Not Defeat the Proximate Cause Analysis as to Rubin’s CNX Damages.

Perhaps the most mystifying aspect of Morris’s motion below and the Circuit Court’s ruling concerns adverse possession. In its ruling below, the Circuit Court held that because there was no final judicial determination of whether Rubin adversely possessed the mineral interest, it cannot be said that the amount Rubin voluntarily paid to CNX to settle the claim flowed as a result of Morris’s negligence. (JA 0235 at Order ¶ 17.) In other words, without actually deciding the merits of the defense, the Circuit Court found that the mere fact that Rubin elected to settle — instead of forcibly going to trial on an unmeritorious affirmative defense — means that the issue of adverse possession should be automatically adjudicated *against* Rubin here.⁴ This conclusion is far astray of the traditional proximate cause analysis. It would also impose upon any malpractice plaintiff the burden to expend enormous resources to resolve even the most trivial of theories before taking reasonable steps to mitigate actual damages flowing from the

⁴ Under West Virginia law, the doctrine of adverse possession requires each of the following six elements to be proven with clear and convincing evidence:

‘One who seeks to assert title to a tract of land under the doctrine of adverse possession must prove each of the following elements for the requisite statutory period: (1) That he has held the tract adversely or hostilely; (2) That the possession has been actual; (3) That it has been open and notorious (sometimes stated in the cases as visible and notorious); (4) That possession has been exclusive; (5) That possession has been continuous; (6) That possession has been under claim of title or color of title.’

Brown v. Gobble, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996).

negligence. As a matter of law and public policy, imposing such a *threshold* requirement on legal malpractice plaintiffs to litigate every conceivable affirmative defense to final adjudication prior to seeking relief for the malpractice is both unworkable and simply unfair.

Accordingly, to the extent the Circuit Court denied Rubin's recovery for its CNX damages based on the contention that Rubin should have pursued the CNX matter to trial and *possibly* could have avoided the settlement payment "by operation of this state's adverse possession laws," that conclusion was in error and should not have been a basis to deny Rubin's actual loss, proximately caused by Morris's negligence. In reality, with no reasonable prospect of prevailing on the theory of adverse possession, Rubin properly mitigated its damages *upon discovery* of its trespass by immediately cutting off its liability and reaching a favorable settlement wherein it was only required to pay \$32,455.81. This proactive settlement both eliminated the likelihood of a much larger judgment against Rubin at trial and eliminated the certainty of litigation costs. Such reasoned, measured decision-making is the very essence of mitigation of damages and the policies encouraging parties to settle their disputes and avoid the "vexation and expense of litigation." *Showen*, 89 W. Va. at 634, 109 S.E. at 831.

II. THE CIRCUIT COURT ERRED IN FINDING THAT RUBIN'S CLAIM FOR DAMAGES IN THE AMOUNT OF \$246,000, WHICH IS THE AMOUNT ANTERO RESOURCES AGREED TO PAY RUBIN FOR THE LEASEHOLD PRIOR TO THE DISCOVERY OF THE TITLE DEFECT, IS NOT RECOVERABLE BECAUSE THE DAMAGES WERE NOT PROXIMATELY CAUSED BY MORRIS'S NEGLIGENCE, OR WERE NOT REASONABLY CERTAIN.

The Circuit Court's conclusion that Rubin cannot recover its Antero damages because "Morris cannot be charged with th[at] loss" should be vacated because the record clearly established that Rubin's Antero damages were proximately caused by Morris's negligence, and that the ascertained damages were reasonably certain in amount.

A. Rubin's Antero Damages of \$246,000 were Proximately Caused by Morris's Negligence.

The causal link between Rubin's actual loss of the Antero purchase agreement (JA 0166-0170) and Morris's admitted negligence is direct and certain. Applying the proximate cause principles discussed above (*see supra* 11-12) to the undisputed facts of *this* case — including the nature of Morris's error and Rubin's interest in the leasehold (*see supra* 3-4) — leads to only one logical conclusion: Rubin's Antero damages are an actual loss as a result of Morris's negligence. *Keister*, 182 W. Va. at 748, 391 S.E.2d at 898.

To arrive to the opposite conclusion, that Rubin's Antero damages were not the result of Morris's negligence, the Circuit Court adopted wholesale the analysis in *Keister* (*see* Order ¶¶ 25-34), a case involving very different facts, arising from interests in coal (not migratory gas) and where no contractual "cure right" existed. 182 W. Va. at 750, 391 S.E.2d at 900. The basic rationale relied upon in *Keister* — that "[it was] not [the attorney's] fault that the land turned out to have no coal" — has no application here for at least two reasons. *Id.* First, unlike the land parcel in *Keister* which had no coal present, the Property at issue here does have the mineral present, as is evident from the production of the well drilled on the Property. But, because of the 1986 Declaration, the Property could not serve Rubin's intended purpose of acquiring "the exclusive right to drill upon the subject leasehold."

Second, whereas the plaintiff in *Keister* had no remedy to acquire property with coal from the seller, it is undisputed that Rubin's purchase of the Property from WVE was contingent upon a legal determination that the Property would serve the purpose intended, *i.e.*, that Rubin would acquire good and marketable title and the exclusive right to drill upon the leasehold. Otherwise, based on its express warranty, WVE was contractually obligated to cure, at its cost, or "replace the lease with substitute property acceptable to [Rubin]." Morris functioned as

Rubin's advisor to examine and identify any defects or potential defects that may affect the validity of the title. The fundamental purpose for which he was hired was defeated when Morris failed to discover the 1986 Declaration and advise Rubin that the Property could not serve Rubin's intended purpose. At that moment, Rubin should have invoked its contractual right pursuant to the warranty agreement. Instead, Morris rendered the exact opposite advice, assuring Rubin that "[b]y virtue of the good and marketable title . . . , Rubin has the exclusive right to drill upon the subject leasehold" (JA 0024.) Relying on the negligent opinion, Rubin lost its valuable contractual right and opportunity to demand that WVE cure the defect or "make good" with replacement property (JA 0049 Stipulations ¶¶ 10, 12), and thus, as a direct result of Morris's negligence, Rubin incurred the Antero damages.

Accordingly, in this case, it certainly was Morris's fault that Rubin accepted the leasehold and did not acquire substitute property suitable to its intended purpose, which it had a *contractual right* to receive. Also, unlike the plaintiff in *Keister*, Rubin made valuable improvements to the leasehold, drilling a multi-million dollar producing well. Based on the undisputed record, Morris's negligence "resulted in and was the proximate cause of loss" to Rubin. Syl. Pt. 1, in part, *Calvert*, 217 W. Va. at 684. That is all that *Keister*, or any other authority, requires: "it must appear that the client's damages are the direct and proximate result of [the attorney's] negligence." 182 W. Va. at 749. Because these obligations were met, the Circuit Court's ruling that Rubin cannot recover its Antero damages for lack of proximate cause was should be vacated. (JA 0238 at Order ¶ 34.)

B. Rubin's Antero Damages of \$246,000 Were Not "Remote, Conjectural, Speculative, and Not Reasonably Certain."

In its ruling, the Circuit Court recognized the rule of law that "[d]amages which are remote, conjectural, or speculative, cannot be recovered, and in order to sustain a recovery for

damages there must be proof which furnishes reasonable certainty of damage and the amount thereof. Syl. Pt. 5, *Commonwealth Tire Co. v. Tri-State Tire Co.*, 156 W. Va. 351 (1972).” (Order ¶ 24.) However, the Circuit Court erred in its application of these principles because, based on the undisputed record, Rubin’s \$246,000 loss from an agreed-upon contract with Antero (JA 0166-0170) fully satisfied the requirement of “proof which furnishes reasonable certainty of damage and the amount thereof.” *Id.*

The loss was clearly established, and the parties stipulated as to the amount of Rubin’s Antero damages. Rubin’s \$246,000 loss was based on undisputed evidence of an actual offer and acceptance from Antero, an identified purchaser, which sale Rubin lost *solely* on account of the 1986 Declaration that Morris negligently omitted from his opinion. (See JA 0171 (providing notice to Rubin of the 1986 Declaration title defect and, on that basis alone, advising Rubin that it would not go forward with its purchase agreement); see also JA 0049-0050 at Stipulations ¶¶ 15-19.) Rubin was not claiming unproven lost profits based on a contention that it would have been able to sell the Property to a hypothetical purchaser. Furthermore, as discussed above, to the extent that the Court concluded that it would be speculative to presume that Rubin would not have enforced its contractual warranty, that is a finding of fact contrary to the evidence, the plain terms of the Agreement, and the canons of contract interpretation. Under the facts of this case, it is neither remote nor speculative to conclude that Rubin would have enforced its bargained-for and paid-for contractual warranty, if given the opportunity.

Accordingly, the Circuit Court’s conclusion of law that Rubin cannot recover its \$246,000 loss from an agreed-upon contract with Antero because “recovery under [the theory that Rubin would have exercised its contractual right to substitute property] is too remote and speculative” should be vacated. (JA 0238 Order ¶ 35.) Rubin’s Antero damages were proven

with reasonable certainty, and Rubin is entitled to recover its damages proximately caused by Morris's negligence.

CONCLUSION

Based on the foregoing facts and authorities, Rubin Resources, Inc. respectfully requests that this Honorable Court vacate the decision of the Circuit Court and enter summary judgment in its favor awarding all reasonable damages proximately caused by Morris's negligence.

Respectfully submitted,

RUBIN RESOURCES, INC.

By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0122

RUBIN RESOURCES, INC.
a West Virginia corporation,

Plaintiff Below/Petitioner,

v.

(On Appeal from the Circuit Court of
Lewis County, CA No. 13-C-64)

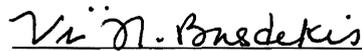
GAROLD "GARY" W. MORRIS, II,
Individually,

Defendant Below/Respondent.

CERTIFICATE OF SERVICE

I, Vivian H. Basdekis, counsel for Petitioner, Rubin Resources, Inc., do hereby certify that I have served *Petitioner Rubin Resources, Inc.'s Brief* on all parties by depositing a true and exact copy thereof, in the United States Mail, postage paid, addressed to counsel of record at the addresses listed below on this the 7th day of May 2015:

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