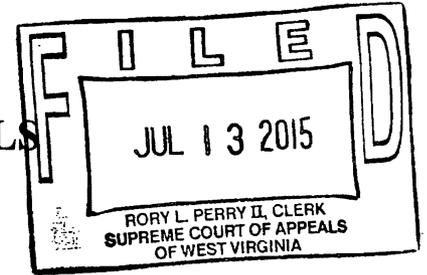


IN THE  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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Docket No. 15-0122

ON APPEAL FROM THE  
CIRCUIT COURT OF LEWIS COUNTY

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

v.

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

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PETITIONER RUBIN RESOURCES, INC.'S REPLY

---

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July 13, 2015

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Rubin Resources, Inc. (“Rubin” or “Petitioner”), by counsel, replies in support of its Petitioner’s Brief and in opposition to the Respondent’s Brief filed by Garold “Gary” W. Morris, II (“Morris” or “Respondent”). In support, Rubin respectfully states as follows:

### DISCUSSION

In an attempt to escape all consequences for his admitted negligence and deny Rubin its incurred damages, Respondent distorts, nearly beyond recognition, the basic legal principles governing mitigation of damages and proximate cause. The exacting standards that Morris seeks to impose — as a *threshold* requirement to any legal malpractice claim — are unprecedented and would upend West Virginia law governing compensatory damages.

Morris raises only two arguments in his brief. Both fail on their merits because (i) the duty to mitigate merely requires Rubin take “reasonable steps” to mitigate its damages, which it has accomplished; and (ii) the traditional proximate cause standard requires that Rubin establish an actual loss as a result of Morris’ negligent act, nothing more. For the reasons discussed in greater detail below, neither of Morris’ arguments is sufficient to deny Rubin the ascertained damages it incurred as a direct result of Morris’ admitted negligence.

**I. THIS COURT SHOULD REJECT MORRIS’ ARGUMENT THAT RUBIN IS NOT ENTITLED TO ITS CNX DAMAGES DUE TO ALLEGED “FAILURE TO MITIGATE.”**

The crux of Morris’ argument against Rubin’s recovery of its out-of-pocket CNX damages is an unlikely and unworkable theory: “*if* Rubin had sought to mitigate its damages by raising with CNX the [affirmative] defense of adverse possession, it *may have* entirely avoided any liability.” (Resp.’s Brief at 10 (emphasis added).) To start, Respondent does not dispute that Rubin’s CNX damages resulted when Rubin, relying on Morris’ negligent title opinion, put the Property to its intended use of production, thereby violating the *identical* Declaration of record

that Morris negligently omitted from his title opinion. The causal nexus between Morris' negligence and Rubin's CNX damages thus could not be more direct. Further, by focusing myopically on the settlement payment that Rubin actually paid, Morris completely ignores the substantially larger liability that Rubin successfully avoided. Notwithstanding those settled facts, Morris essentially argues that because Rubin failed to exhaust every conceivable defense and further reduce its CNX damages down to zero, the *mere possibility* that such a defense *might have prevailed* means that Rubin failed to adequately "mitigate" the loss and should be denied its recovery. That position is defeated by the "reasonableness" standard that has always governed the "duty to mitigate," and provides no viable basis to deny Rubin's ascertained damages. The simple fact is that Rubin did not act *unreasonably* with respect to its CNX damages, and it should not bear the cost of Respondent's negligence.

**A. The Duty to Mitigate Damages Is Governed by a "Reasonableness" Standard.**

West Virginia recognizes the traditional, equitable doctrine of mitigation of damages. *See, e.g., Cont'l Realty Corp. v. Andrew J. Crevolin Co.*, 380 F. Supp. 246, 255 (S.D. W. Va. 1974) (holding that the rule, however, "presupposes an ability to mitigate," and further, "the principle is one of equity and common sense. The duty is to exercise all reasonable exertions to render the injury as light as possible."). Although a plaintiff has a general duty to mitigate its damages, the doctrine merely requires plaintiffs to take "reasonable steps" within its ability to minimize losses caused by a defendant's negligence. 25 C.J.S. Damages § 184. Even when a plaintiff's efforts to mitigate fall short, a plaintiff's failure to take reasonable steps to mitigate "bars recovery, not in toto but only for the damages that might have been avoided by reasonable efforts." *Id.*

As to what constitutes "reasonable steps," it is hornbook law that:

A damaged party is *only expected to do what is reasonable under the circumstances and need not embark upon a course of action that may cause further detriment to him or her*. The doctrine of mitigation of damages does not permit damages reduction based on what could have been avoided through Herculean efforts, and a plaintiff's duty to mitigate damages does not extend to accepting a position that entails great hardship or personal embarrassment. *The general rule is that injured parties need not institute and prosecute lawsuits in order to mitigate damages as litigation is too uncertain and costly to impose such a duty on a party.*

25 C.J.S. Damages § 184.

These identical principles are discussed at length in the *Legal Malpractice* treatise Morris cites as guiding authority in his brief (*see* Resp.'s Brief at 18). Authors Mallen and Smith concur that the "duty to mitigate" is governed by a "reasonableness" standard: "The client is under a duty to take *reasonable steps* to mitigate damages. Reasonableness is determined by balancing the consequences to be avoided, the expenses involved, and the apparent prospects of success." Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* (2014 ed.) Vol. 3 ¶ 21:21, pp. 89-90 (emphasis added). Thus, the steps that a plaintiff should take are neither extraordinary nor exceptional: "*Measures need not be taken that are unreasonable, impractical or involve expense disproportionate to the loss to be avoided.*" *Id.* § 21:21 at 90 (emphasis added).

The "duty to mitigate" never imposes a requirement to undertake impractical or costly measures, like the pursuit of various legal defenses. This is so for two reasons: the uncertainty and the expense of litigation. "The law does not require a person to take affirmative legal action to prevent [the tortfeasor] from suffering the result of the tortious act." *Stadheim v. Becking*, 290 N.W.2d 273, 274 (S.D. 1980). "The general rule is that 'injured parties need not . . . institute and prosecute [law] suits' in order to mitigate damages." *Robinson v. Carney*, 632 A.2d 106, 108 (D.C.1993) (citing 2 Marilyn Minzer et al., *Damages in Tort Actions* § 16.22, at 16-34 & 35 (1992)); 25 C.J.S. Damages § 184. Furthermore, as noted in the *Legal Malpractice* treatise,

courts have “deemed it unreasonable to require the plaintiffs *to pursue every possible cause of action* they might have against the [third party] as a prerequisite to suing their attorneys,” concluding that “[s]ince the attorneys created the situation, they, not their clients, ultimately had to bear the result of a *rational choice not to pursue a possible remedy.*” *Id.* at 91 (internal citation omitted) (emphasis added); *see also id.* § 34:9 p. 1111 (“The courts agree that, if the attorney erred, *the client need not exhaust other remedies [such as futile litigation] as a condition precedent to suit.*”) (emphasis added).

Such a rule furthers the strong public policy favoring out-of-court resolution of disputes, which this Court articulated in Syllabus Point 1, in part, of *Sanders v. Roselawn Mem’l Gardens*, 152 W. Va. 91, 159 S.E.2d 784 (1968): “The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation[.]” *See State ex rel. Vapor Corp. v. Narick*, 173 W. Va. 770, 320 S.E.2d 345 (1984); *Floyd v. Watson*, 163 W. Va. 65, 254 S.E.2d 687 (1979); *Janney v. Virginian Ry. Co.*, 119 W. Va. 249, 193 S.E. 187 (1937).

**B. Rubin Took “Reasonable Steps” to Mitigate Its CNX Damages, Which Is All That Was Required.**

Applying the standard set forth above, it is clear that Rubin took “reasonable steps” under the circumstances to mitigate the CNX damages resulting from Morris’ negligence, and nothing more was required. The reasonableness test — balancing “the consequences to be avoided, the expenses involved, and the apparent prospects of success” — clearly supports the steps Rubin took to mitigate the resulting CNX damages by settling the claim, in full, on favorable terms. *Legal Malpractice* (2014 ed.) Vol. 3 ¶ 21:21, pp. 89-90. Having satisfied its duty to mitigate, Rubin is entitled to recover those damages it actually incurred.

1. *“The Consequences to be Avoided”*

The “consequences to be avoided” were real and substantial. Although Respondent persists in advocating the dubious position that Rubin should have concealed its ongoing trespass of CNX’s property rights, denied its liabilities, and avoided all measures to right the wrong, Respondent has never disputed that the CNX liability arose from the identical title defect for which Morris has admitted negligence. Promptly upon its discovery of the title defect, Rubin took measured and responsible steps to minimize the liabilities arising from the title defect, which is the essence of mitigation of damages.

Rubin’s “consequences to be avoided” included approximately \$30,000 in plugging expenses to abandon the Well, \$17,000 in royalty payments that Consol would still have demanded, and approximately \$100,000 and an undetermined amount of lost profits owed to the working interest owners of the Maple Well if it were plugged. Rubin also would have lost its own investment in producing the operating Well on the Property.<sup>1</sup> In total, Rubin’s overall exposure to liability arising from the material title defect was in excess of \$147,000.00.

2. *“The Expenses Involved”*

By contrast, the out-of-pocket expenses involved in Rubin’s settlement with CNX were comparatively slight: \$32,455.81. On favorable terms, Rubin negotiated and entered into a Settlement Agreement and Release with CNX, “in order to completely and finally settle and resolve any potential claims and/or causes of action that [CNX] may have against Rubin Resources, related to the Maple #1 Well” on the Property. (*See* JA 0172.) In consideration of

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<sup>1</sup> The cost to produce the Maple Well at issue was approximately \$200,000. Counsel wishes to advise the Court of the inadvertent error in Petitioner’s Brief, which mistakenly references the more substantial cost of drilling a horizontal well for production, not a vertical well such as the well at issue here. Either way, the costs involved in drilling and producing any oil and gas well — whether horizontal or vertical — far exceed the comparatively small settlement Rubin reached with CNX to resolve the dispute in full.

the terms of settlement, CNX agreed to a general release as follows: “CNX GAS has released, acquitted, and discharged, and by these presents do hereby forever release, acquit, and discharge RUBIN RESOURCES of and from any and all, claims, demands, controversies, damages, expenses, actions, and potential causes of action, including but not limited to any contractual, statutory, regulatory, derivative, equitable, or common law claims, of every kind and character related to the unauthorized drilling of the Maple #1 Well (API #47-85-8713).” (JA 0173-74.) Accordingly, the first two factors weigh decidedly in favor of a finding that Rubin took “reasonable steps” to mitigate the CNX damages arising from the title defect, and in fact, successfully did mitigate the damages to the benefit of Respondent.

3. *“The Apparent Prospects of Success”*

The final factor to be balanced is “the apparent prospects of success.” This factor is significant because the reasonableness standard does not impose a requirement on a plaintiff, like Rubin, to undertake impractical or costly measures to achieve all conceivable avenues of mitigation. *Legal Malpractice*, § 21:21 at 90 (“Measures need not be taken that are unreasonable, impractical or involve expense disproportionate to the loss to be avoided.”)

In this case, the analysis is straightforward. On the one hand, the favorable settlement terms that Rubin reached with CNX operate as a full and final resolution to all present liabilities arising out of the title defect. (JA 0173-74.) The “expense” of that result was \$32,455.81, and any potential for ongoing damages was successfully cut-off. On the other hand, the prospect of success on possible legal defenses (like the affirmative defense of adverse possession) was not only unlikely to prevail, but also would entail substantial cost and uncertainty. These concerns are the reason why “[t]he general rule [for mitigation of damages] is that injured parties need not institute and prosecute lawsuits in order to mitigate damages as litigation is too uncertain and

costly to impose such a duty on a party.” 25 C.J.S. Damages § 184. Even in the best case scenario, the pursuit alone of an affirmative defense like adverse possession (a claim requiring Rubin to establish six elements with clear and convincing evidence) would have generated fees exceeding the total settlement payment. And, unlike the settlement, the defense would not constitute a full and final resolution of *all* components of the CNX liability. Furthermore, given the reality that most cases in litigation resolve through settlement, the mere assertion of adverse possession (whatever its merits) would not foreclose the likely scenario of an eventual settlement between the parties — likely on worse terms those reached by Rubin and CNX *prior* to incurring the costs and emotional toll of protracted litigation. For all of these reasons, Rubin made “a rational choice not to pursue a possible remedy,” and the law provides that the attorney who created the harm should bear the result of that rational choice. *Legal Malpractice*, § 21:21 at 91.

Even considering, for the sake of argument alone, the merits of an adverse possession defense, it is far more likely that Rubin would not prevail and CNX would receive damages for the ongoing trespass. Under West Virginia law, the doctrine of adverse possession imposes a high bar and 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) (“[W]e hold that the burden is upon the party who claims title by adverse possession to prove by clear and convincing

evidence all elements essential to such title.”) (quoting Syl. Pt. 3, *Somon v. Murphy Fabrication and Erection Co.*, 160 W.Va. 84, 232 S.E.2d 524 (1977)).

At least two essential elements, adversity and exclusivity, would have been difficult for Rubin to prove with clear and convincing evidence in the hypothetical adverse possession trial. *See Brown*, 196 W. Va. at 565, 474 S.E.2d at 495. To maintain the leasehold, Rubin had to continue production and continually pay royalties to the individual mineral owner. At no time, was Rubin adversely “squatting” on the mineral interest, but rather, was paying the mineral owner for the right to be there. Further, the transfer of the property interest in the oil and gas underlying the Property by assignment from WVE to Rubin is not claimed to be invalid; rather, the title defect (and Rubin’s resulting damages) arises from Morris’ erroneous certification that Rubin “has the exclusive right to drill upon the leasehold.” (JA 0024.) Because Rubin possesses the minerals not adversely, but pursuant to a mineral lease and assignment, there is no adverse possession through which to acquire prescriptive title. For related reasons, the exclusivity requirement would likely fail. On the record below, it is undisputed that Rubin and CNX (successor to CNG) were simultaneously producing the minerals. The parties jointly stipulated, upon information and belief, that CNG began production in 1990, continuing to the present. (JA 0058.) In 2000, while CNG’s production continued, and unaware of the CNG’s recorded Declaration, Rubin drilled its Maple #1 Well on the Property and also began production. (JA 0059.) At no time has Rubin’s production of the minerals been “exclusive.”

In reality, with no likely prospect of prevailing on the theory of adverse possession, Rubin took reasonable steps to mitigate 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 defeats Respondent's contention that Rubin "failed to mitigate" its out-of-pocket damages paid to CNX.

Finally, a plaintiff's failure to take reasonable steps to mitigate "bars recovery, not in toto but only for the damages that might have been avoided by reasonable efforts." 25 C.J.S. Damages § 184. Morris has not shown that an alleged failure to raise a theoretical affirmative defense of adverse possession would have reduced the CNX damages to zero, and in fact, it would not have.

**II. THIS COURT SHOULD REJECT MORRIS' ARGUMENT THAT RUBIN IS NOT ENTITLED TO ITS ANTERO DAMAGES ON ACCOUNT OF BEING "TOO SPECULATIVE."**

**A. Standards for Damages.**

With respect to damages, West Virginia law recognizes 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." Syl. Pt. 1, *West Virginia Canine College, Inc. v. Rexroad*, 191 W. Va. 209, 210, 444 S.E.2d 566, 567 (1994) (emphasis added); *see also Rice v. Rose & Atkinson*, 176 F. Supp. 2d 585 (S.D. W. Va. 2001) (applying West Virginia law and holding, for purposes of legal malpractice claim, a client's damages are calculated on the basis of the value of the claim lost or judgment suffered by the alleged negligent attorney). In general, the aggrieved party may recover from the attorney those damages that are the natural consequences of the breach, provided such damages were reasonably foreseeable at the time of the legal representation. *See* 27 Am. Jur. Proof of Facts 3d 353 (Originally published in 1994) (initial citations omitted).

In determining damages, “[t]he measure of damage depends on the nature of the interest lost and the consequential damages.” *Legal Malpractice*, § 34:11, p.1125. Both direct and consequential damages are compensable. *Id.* § 21:1 pp. 3-4. “In a legal malpractice action, the direct damages are compensation for the loss of the expected benefits from the attorney’s services and any expenses incurred due to the attorney’s failure to achieve those benefits. The direct damage usually is the value of the lost benefit or of the detriment. The value of that benefit *is based on the circumstances existing at the time of the wrongful act or omission.*” *Id.* §21:1 p. 3 (emphasis added). Additional elements of “direct damages can be . . . expenses incurred to mitigate the loss of the intended benefit.” *Id.* at 4. Consequential damages are compensation “for those additional injuries that are a proximate result of the attorney’s negligence, which do not flow directly from or concern the objective of the retention.” *Id.* § 21:1 p. 4. Thus, a consequential injury is not the loss of the intended benefit of the attorney’s services but damages that occurred because the benefit was lost.” *Id.*

The measure of damages, however, need not be ascertained to a mathematical certainty. The *Legal Malpractice* treatise instructs that, “[i]n a legal malpractice action, a court may be tempted to characterize the plaintiff’s damage claim as speculative, because of the difficulty in liquidating the claim. This is because legal malpractice litigation often involves hypothetical questions that have real consequences . . . but difficulty or imprecision in calculating damages does not exculpate an attorney. Although damages cannot be calculated precisely, depending on the circumstances, they can be estimated . . .” *Id.* § 21:3 at 12-13. Instead, the authors conclude, “[t]hus, damages are speculative only if the uncertainty concerns the fact of whether there is a compensable injury rather than uncertainty concerning the measure of the damages for an ascertainable injury.” *Id.* at 13 (emphasis added). Furthermore, “where a property right consists

of injury to a claim, the measure of damages *is the value of the right, remedy or interest lost or impaired*. The damages may include lost profits, but the rule is that there should be sufficient proof to assure that the issue is not left to speculation.” *Id.* § 21:4 at 17 (emphasis added).

**B. Rubin Is Entitled to Recover \$246,000 from Its Loss of an Agreed-Upon Contract with Antero Due to Morris’ Negligence.**

In this case, application of these familiar damages standards to Rubin’s ascertained losses requires no speculation at all. Because there is no uncertainty concerning *the fact* of whether there is a compensable injury, Rubin is entitled to recover its \$246,000 loss from an *agreed-upon* sale contract with Antero. In assessing Rubin’s damages, the Circuit Court should have considered the “specific nature of [Rubin’s] interest in the property” and “the other facts of the case.” Syl. Pt. 1, *West Virginia Canine College, Inc.*, 191 W. Va. at 210, 444 S.E.2d at 567. In this case, those facts include “injury to a claim,” namely, the contractual right of substitution that Rubin lost by virtue of the negligence. In the case of malpractice “where a property right consists of injury to a claim, the measure of damages is the value of the right, remedy or interest lost or impaired,” which is determined at the time of the injury. *Legal Malpractice*, §21:1 p. 3; § 21:4 at 17.

In his brief, Morris makes the conclusory assertion that Rubin should be denied recovery of its Antero damages because “such damages” are not recoverable in a legal malpractice action arising from an attorney’s negligence in certifying title. (Resp.’s Brief at 28.) Putting aside the vagueness of that argument, the only authority Defendant offers for this proposition is *Keister v. Talbott*, a case arising from very different facts. 182 W. Va. 745, 391 S.E.2d 895 (1990). Defendant’s reliance on the *Keister* case is misplaced. Whereas the plaintiff in *Keister* had no right or remedy to acquire property with coal from the seller, it is undisputed that Rubin obtained WVE’s express warranty that it would either “cure,” at its cost, or “make good” with suitable

replacement property, if any title defect was discovered that would prohibit the intended use of the Property. *See Keister*, 182 W. Va. at 750, 391 S.E.2d at 900. (*See* JA 0133.)

In making his argument, Respondent disregards the plain, unambiguous terms of the written agreement and contends that the make-good provision that Rubin obtained from WWE is “an evidentiary house of cards” requiring the Court to “stack one wholly speculative inference on top of another.” (Respondent’s Brief at 32.) That contention is false and misleading because, here, no speculative inferences at all are needed. The unambiguous language of WWE’s express contractual warranty must be applied according to its plain terms and the parties’ clear intent, and nothing else. (*See* JA 0133.) Construing the unambiguous terms of a contract is an exercise any court is well-equipped to perform, and it certainly would not involve any great leap of speculation to conclude that, if given the opportunity, Rubin would have enforced its bargained-for and paid-for contractual warranty and pursued all rightful remedies. Thus, although it is not Respondent’s fault that the Declaration of Pooling existed on the record, it certainly was his fault that Rubin accepted that particular 121-acre parcel and did not acquire different property suitable to its intended purpose, which it had a contractual right to demand and receive. *Id.* Any factual finding contrary to the plain terms of the express written agreement should not have been rendered *against* Rubin on summary judgment.

Accordingly, Respondent’s *Keister* argument does not alter the basic fact that Rubin’s claim to recover its Antero-related damages fully satisfies both requirements that (i) Rubin’s loss was proximately caused by Morris’ negligence, and (ii) Rubin suffered an ascertained loss (the *fact* of which is not in dispute). 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.” *Keister*, 182 W. Va. at 749. These obligations are met.

1. *Proximate Cause*

First, the “causal link” between Rubin’s actual loss of the Antero sale and Defendant’s admitted negligence could not be more direct. Rubin’s purchase of the subject 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. (*See* JA 0059 ¶ 10, JA 0133.) 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 Resources].” (*See* JA 0133.)

As contemplated by the parties’ Agreement, Rubin hired Morris as its legal examiner. In that capacity, Morris functioned as Rubin’s trusted advisor to carefully examine and identify any defects or potential defects that could affect the validity of the title. (*See Legal Malpractice*, § 34:9 p. 1109.) However, the fundamental purpose for which he was hired was defeated when Respondent failed to discover the Declaration of Pooling and advise Rubin that the Property could not serve the intended purpose. (JA 0048-49.) At that moment, Rubin should have invoked its contractual right pursuant to the warranty agreement. (*See* JA 0133.) Instead, Morris rendered the exact opposite advice, assuring Rubin that “[b]y virtue of the good and marketable title . . . , Rubin Resources has the exclusive right to drill upon the subject leasehold . . . .” (*See* JA 0024.) Relying on the negligent Opinion Letter, Rubin lost its contractual right and opportunity to demand that WVE cure the defect or “make good” with suitable replacement property. (JA 0048-49.) Under these circumstances, it *is* the attorney’s “fault” that specific damages at issue occurred, and Rubin is entitled to recover the value of its right that was lost. *Keister*, 182 W. Va. at 750, 391 S.E.2d at 900.

## 2. *Reasonably Certain Damages*

Second, there is nothing speculative about Rubin's measure of damages. Contrary to Morris' assertions, Rubin is not claiming unproven "lost profits" or a speculative "lost opportunity" based on a contention that it would have been able to sell the property to some hypothetical purchaser. (See JA 0166-70.) Instead, its loss is based on undisputed evidence of an *actual offer and acceptance* from Antero, an identified purchaser, which sale Rubin lost *solely* on account of *the precise* Declaration that Morris negligently omitted from the Opinion Letter. (See JA 0171) (providing notice to Rubin of the Declaration of Pooling title defect and, on that basis alone, advising Rubin that it would not go forward with its purchase agreement).)

Accordingly, when the proper standards governing proximate cause and compensatory damages are applied, the only fair and equitable conclusion is that Rubin is entitled to recover its ascertained damages proximately caused by Defendant's negligence in the amount of \$246,000.00.

### **CONCLUSION**

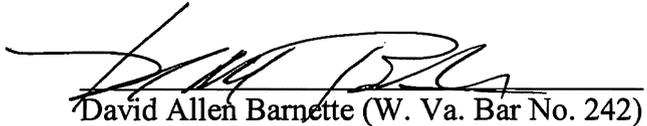
Based on the foregoing, Rubin respectfully requests that the Court grant the relief sought in Petitioner's Brief and vacate and reverse the Order below.

Respectfully submitted,

**RUBIN RESOURCES, INC.**

By Counsel

**Jackson Kelly PLLC**

A handwritten signature in black ink, appearing to read "David A. Barnette", is written over a horizontal line.

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Counsel for Petitioner Rubin Resources, Inc.

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 Reply* 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 13<sup>th</sup> day of July 2015:

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