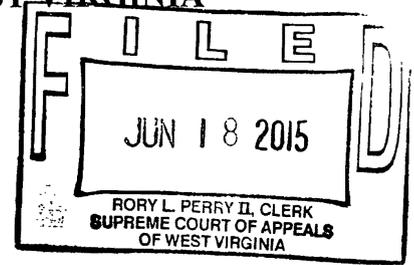


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CASE NO. 15-0122

(Lewis County Civil Action No. 13-C-64)

RUBIN RESOURCES, INC.
A West Virginia corporation,

Plaintiff Below, Petitioner,

v.

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

BRIEF OF RESPONDENT, GARY W. MORRIS, II

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RUBIN RESOURCES, INC.,
A West Virginia Corporation,

Plaintiff/Petitioner,

v.

Appeal No. 15-0122
(Lewis County Civil Action No. 13-C-64)

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

Defendant/Respondent.

BRIEF OF RESPONDENT

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

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, respondent, Garold "Gary" W. Morris, II ("respondent", or "Mr. Morris"), by his counsel, David D. Johnson, III, and the law firm of Winter & Johnson PLLC, respectfully tenders to the Court his Brief in opposition to the Brief of petitioner, Rubin Resources, Inc. ("petitioner", or "Rubin"). Rubin appeals from the "Order Denying Plaintiff's Motion For Summary Judgment And Granting Defendant's Motion For Summary Judgment" (subsequently, "the summary judgment Order", or "the Order") which was entered by the Hon. John L. Henning on December 30, 2014, and filed by the Circuit Clerk of Lewis County, West Virginia, on January 6, 2015.¹ For the reasons which follow, and for all reasons stated in Mr. Morris's Motion for Summary Judgment ("Motion"), his supporting Memorandum of Law ("Memorandum"), his Reply in further support of his Motion

¹Judge Henning was appointed to preside in this civil action by Administrative Order of this Court dated October 18, 2013, after the Hon. Kurt W. Hall recused himself *sua sponte*.

("Reply"), and his Response In Opposition To Plaintiff's Motion For Summary Judgment ("Response"), Mr. Morris and his counsel respectfully submit that the summary judgment Order should be affirmed in all respects.

I. STATEMENT OF THE CASE²

A. Procedural Posture Of The Case

This civil action was initiated when Rubin filed its Complaint in April, 2013. The Complaint asserts that Mr. Morris was negligent in performing a title examination and preparing a title report for Rubin, and that as a direct result of that negligence, Rubin incurred monetary damages. An Answer and Affirmative Defenses were filed on behalf of Mr. Morris, in which he admitted all of the factual allegations asserted in the Complaint which were necessary to establish negligence on his part in conducting the title examination and preparing the title report. Both parties later engaged in written discovery through interrogatories and requests for production of documents.

During a Scheduling Conference before Judge Henning on March 24, 2014, counsel for both parties agreed with the Court that the facts material to Rubin's claims against Mr. Morris were largely, if not entirely, undisputed, and that it was probable that this civil action could be resolved through summary judgment practice. Counsel for Mr. Morris confirmed to the Court that Mr. Morris would not dispute that he was negligent in performing the title examination and preparing the title report for Rubin. Counsel for both parties confirmed to the Court that they would

²As permitted by Rule 10(d), W.Va. R. App. P., respondent has elected to submit his own Statement of the Case to the Court in order to address inaccuracies and omissions in the Statement of the Case contained in petitioner's opening Brief. Respondent's Statement of the Case is taken, in part, from the Statement of Facts contained in the Memorandum in support of his Motion for Summary Judgment, which appears in the Joint Appendix beginning at page 86 (references to the Joint Appendix will subsequently appear in the format, "JA-86").

jointly prepare and file stipulations as to all or substantially all of the material facts, and that through summary judgment motions, both parties would seek a ruling from the Court concerning the damages which Rubin is, or is not, entitled to recover from Mr. Morris. Counsel for the parties later jointly prepared and filed the Plaintiff's And Defendant's Stipulations which, in large part, support the Statement of Facts which follows in this Brief. See JA-47, and Exhibit 1 attached to Mr. Morris's Motion, JA-57.

Rubin, at page 4 of its Brief, states that in the Stipulations, “[t]he parties stipulated that Rubin incurred the following damages” Rubin then goes on to list the components of the damages which it seeks to recover in this civil action. Also see the Brief at page 9, stating that “the amount of damages was conceded” However, if this Court reviews the parties' Stipulations, at JA-47 and 57, it will see that, contrary to Rubin's representation, the parties did not stipulate that Rubin incurred any *damages*. Indeed, in ¶ 23 of the Stipulations, JA-51 and 61, the parties expressly and specifically stipulated that what remains to be decided in this case, that is to say, what remains in controversy, is precisely the question of what damages, if any, may properly be recovered by Rubin under the stipulated *facts*, including the question whether any such damages were proximately caused by Mr. Morris. What the parties *did* stipulate to were simply the facts which underlie Rubin's *claimed* damages, because those facts are not in dispute. However, at the very heart of Mr. Morris's defense in this case is the proposition that none of the damages *claimed* by Rubin are ones which the law will permit this petitioner to recover.

Pursuant to the agreement between counsel and the Court, summary judgment Motions were subsequently filed on behalf of both parties. Both Motions came on for hearing before Judge Henning on August 4, 2014, at which time counsel presented oral arguments lasting slightly

more than one hour. The hearing transcript appears at JA-241. Thereafter, Judge Henning drafted his own Summary Judgement Order which was entered by the Court on December 30, 2014, and filed by the Circuit Clerk of Lewis County on January 6, 2015. *See*, JA-229. A Notice of Appeal was then timely filed on behalf of Rubin.

B. Statement Of Facts

Rubin is a West Virginia corporation which was organized in 1983. From that time until the present, Rubin has been engaged in the oil and gas production industry. *See* the Complaint, ¶ 2, JA-4.³ During the period from January, 2000, until August, 2013, Rubin owned or operated approximately two-hundred, twenty-five (225) oil or gas wells. *See* Rubin's answer to Mr. Morris's Interrogatory No. 16, attached as Exhibit 2 to his Motion, JA-64.

Mr. Morris is a practicing attorney who was retained by Rubin in 2000 to conduct a title examination and prepare a title opinion letter pertaining to the oil and gas leasehold estate in a 120-acre tract of land in Ritchie County, West Virginia ("the subject property", or "the 120-acre tract"). Complaint, ¶¶ 3 and 6, JA-5-6. Mr. Morris prepared such a title opinion letter, dated July 24, 2000, and submitted it to Rubin. *Id.*, ¶¶ 7-8. *See* Exhibit A to the Complaint, JA-12. The title opinion letter failed to identify a Declaration of Pooling which was of record at that time in Ritchie County, and which affected the 120-acre tract. *Id.*

The Declaration of Pooling had been recorded by CNG Development Co. (subsequently, "CNG") on October 3, 1986, and it affected the 120-acre tract and two adjacent tracts, one of which consisted of approximately 180 acres ("the 180-acre tract"). Complaint, ¶¶ 7-8.

³Although many of the citations here are to the Complaint, the vast majority of Mr. Morris's statements of fact are also supported by the parties' Stipulations.

See Exhibit B to Rubin's Complaint, JA-34. At the time CNG recorded the Declaration of Pooling, it was the owner of the oil and gas leasehold estate in each of the three pooled tracts. In 1990, CNG drilled a well on the 180-acre tract, and that well has been producing natural gas continuously since that time. *Id.*, ¶ 9, JA-6. The legal effect of CNG's recording of the Declaration of Pooling, and then drilling a producing gas well on the 180-acre tract, was that CNG thereby continued to hold by production the leasehold estate in all three of the pooled tracts, including the 120-acre tract, even after CNG's lease for the 120-acre tract would otherwise have expired under its own terms.

In 2000, Jackson L. Smith Enterprises, Inc., d/b/a West Virginia Energies ("WVE"), presumably unaware of CNG's Declaration of Pooling, purported to lease the oil and gas underlying the 120-acre tract.⁴ Rubin, unaware of CNG's Declaration of Pooling and the existence of a producing well on the 180-acre tract, then purchased WVE's interest in the leasehold estate of the 120-acre tract for the consideration of \$5,000.00, plus royalties. Complaint, ¶¶ 10-11, JA-6. The Agreement between Rubin and WVE provided, in relevant part, that Rubin could procure a title examination and report concerning the tract; and, in the event it was determined that WVE did not hold good and marketable title to the leasehold estate, WVE would substitute other property acceptable to Rubin. *Id.* Rubin then retained Mr. Morris to perform a title examination, and he later certified that Rubin, by acquiring WVE's leasehold interest, would have the sole and exclusive right to produce oil and gas from the subject property.

In September of 2000, Rubin, still unaware of the Declaration of Pooling, drilled its own well on the 120-acre tract and has been producing gas from that well continuously since that

⁴Because CNG continued to hold the 120-acre tract by production under its Declaration of Pooling, WVE could in reality not effectively acquire the leasehold estate.

time. Complaint, ¶ 16, JA-7. In its Brief, Rubin states that it spent *millions of dollars* to drill its well. *See* the Brief, p. 3, stating that Rubin “invest[ed] millions to drill a producing well”; and that Rubin “produc[ed] a multi-million-dollar oil and gas well.” *Also see, id.*, p. 19, saying that Rubin “drill[ed] a multi-million dollar producing well.” However, this is apparently a gross exaggeration. During oral argument in the Circuit Court, Rubin’s counsel stated repeatedly that the cost to Rubin of drilling its well on the subject property was more in the neighborhood of \$200,000.00. *See* the hearing transcript, JA-245, 247, and 250. Rubin’s inclusion of these assertions in its Brief is puzzling in any event, because petitioner has previously made clear that it is not seeking to recover from Mr. Morris the cost of drilling its well on the 120-acre tract. *See, e.g.*, the statement to that effect by Rubin’s counsel during oral argument in the Circuit Court, JA-248. *Also see* a letter from Rubin’s counsel to the undersigned counsel dated December 5, 2013, identifying the damages which Rubin *does* seek to recover, and making no mention of the cost of drilling its well. JA-79.

Rubin suggests at page 9 of its Brief that it acquired this leasehold estate from WVE, at least in part, in order that it might later sell the leasehold to a third party for profit. However, there is no evidence, whatsoever, in the record of this case to support that assertion. Much to the contrary, it remains undisputed that within three months of its acquisition of the leasehold from WVE in 2000, and within two months of its receipt of Mr. Morris’s title opinion letter, Rubin obtained a permit, drilled its well on the property, and began production of natural gas for sale to a third party. Rubin has produced gas from its well continuously since that time, and continues to do so today.

Rubin initially sold the gas from its well to Enron Corporation. *See* Rubin’s answer to Mr. Morris’s Interrogatory No. 17, Exhibit 2 to the Motion for Summary Judgment, JA-64-65.

However, no later than 2001, Rubin began to sell all gas produced from the subject property to Dominion Transmission, Inc. (“Dominion”). *Id.* Mr. Morris and his counsel ask the Court to take judicial notice of the notorious demise of Enron beginning in late 2001, amidst a massive accounting fraud scandal, which apparently led Rubin to cease selling gas to Enron, and to begin selling its gas to Dominion. *See* Rule 201(d), W.Va. R. Evid., this state’s judicial notice rule, and *Carpe v. Aquila, Inc.*, 2005 WL 1138833, *4, n. 7 (W.D.Mo., March 23, 2005) (Missouri federal court takes judicial notice of the demise of Enron in late 2001 in Texas).

Mr. Morris and his counsel also ask the Court to take judicial notice of the fact - reflected in records maintained in the Office of the West Virginia Secretary of State - that Dominion is a successor by merger to one of the CNG companies. *See* Exhibit 3 to the summary judgment Motion, page 3 of 5, JA-73, *etc.* A court may take judicial notice of records maintained by the Secretary of State. *See, e.g., State ex rel. Wilson v. Truby*, 167 W.Va. 179, 186, 281 S.E.2d 231, 234, n. 4 (1981); *Teller v. McCoy*, 162 W.Va. 367, 374, 253 S.E.2d 114, 120 (1978); and, *State v. Heston*, 137 W.Va. 375, 383, 71 S.E.2d 481, 486 (1952). From 2000 until the present, Rubin’s total income from the production and sale of gas from the subject well has been in excess of \$272,555.78. *See* Rubin’s answer to Mr. Morris’s Interrogatory No. 17, Exhibit 2 to Mr. Morris’s Motion, JA-64-65.

In September, 2012, twelve years after Rubin first acquired the leasehold estate for the 120-acre tract and drilled its well, Antero Resources Appalachian Corporation (“Antero”) agreed to purchase Rubin’s right to produce gas from the Marcellus shale underlying the 120-acre tract for the sum of \$216,000.00, together with an overriding royalty of 2.375%, having a present value of approximately \$30,000.00 (subsequently, “the Antero Agreement”). (The Marcellus Shale is located

much deeper in the earth than is the stratum from which Rubin's well produces gas.) Complaint, ¶ 17, JA-7. However, Antero conducted a title examination and discovered that the oil and gas leasehold estate in the 120-acre tract had been held by production by CNG since 1990. Antero gave notice to Rubin of this title defect, and advised that it would not go forward with its purchase of Rubin's Marcellus rights. *Id.*, ¶¶ 18-19. This was the first time Rubin learned of the Declaration of Pooling.

Rubin chose to notify CNX, an entity which was the successor to CNG and a member of the same family of companies as CNG and Dominion, that Rubin had drilled a well on the 120-acre tract in 2000 without knowing that the tract had been held by production by CNX's predecessor, CNG, since 1990. Complaint, ¶ 22, JA-8. CNX then informally asserted claims against Rubin based on Rubin's production of gas from the well on the 120-acre tract. *Id.*, ¶¶ 22-23, JA-8. Rubin asserted no defenses to CNX's claims. In discovery in this civil action, Rubin has said that it had no available defenses which could have been raised in opposition to CNX's claims. *See* Rubin's answer to Mr. Morris's Interrogatory No. 24, subparagraphs (b) and (c), JA-68-69. Instead, Rubin agreed to voluntarily pay CNX the sum of \$32,455.81 to resolve those claims, in exchange for which CNX agreed to assign to Rubin a so-called "wellbore interest" in the subject well, in order that Rubin could continue to operate the well going forward. Complaint, ¶ 24, JA-8. Rubin continues to operate the well, selling the gas to Dominion, a company related to CNX.

The damages claimed by Rubin in this civil action include the following: (1) the sum of \$32,455.81 which it paid to settle the CNX claims and to obtain CNX's consent for Rubin to continue to operate the well on the 120-acre tract; (2) the sum of \$216,000.00 which Antero had offered to pay Rubin for its right to produce gas from the Marcellus Shale underlying the subject

property, before Antero learned of the Declaration of Pooling; (3) the sum of \$30,000.00 as the present value of the overriding royalties on gas produced from the Marcellus Shale, which Antero would have paid to Rubin over time; and (4) the attorneys fees and legal costs incurred by Rubin in prosecuting this civil action, which amounted to approximately \$50,000.00 at the time of the hearing on the parties summary judgment Motions in August, 2014. *See* the statement by Rubin’s counsel in the hearing transcript, JA-252.⁵

II. SUMMARY OF ARGUMENT

A. CNX Damages

The Circuit Court correctly held that petitioner’s failure to raise the doctrine of adverse possession as a defense to CNX’s claim for Rubin’s trespass on the leasehold estate of the 120-acre tract, and Rubin’s decision to instead voluntarily settle with CNX by paying the sum of \$32,455.81 in damages, precludes any finding that those damages flowed from and were proximately caused by Mr. Morris’s negligence in preparing his title opinion report. *See* the summary judgment Order, JA-234-36. Nowhere in petitioner’s Brief, or in its summary judgment filings in the Circuit Court, did Rubin dispute that it is settled law in this state “that one generally has a duty to mitigate damages” *Chesser by Hadley v. Hathaway*, 190 W.Va. 594, 600, 439 S.E.2d 459, 465 (1993) (internal citations omitted). It therefore remains undisputed that Rubin, confronted with CNX’s claims, which Rubin asserts existed due to Mr. Morris’s negligence, had a duty to mitigate its

⁵Judge Henning’s Summary Judgment Order awarded summary judgment in favor of Mr. Morris and against Rubin on Rubin’s claim to recover its attorney’s fees and costs incurred in prosecuting this civil action. *See* the Order, JA-239. Mr. Morris and his counsel note that Rubin did not include that ruling in its Assignments of Error for this appeal, and the ruling is not challenged in the body of Rubin’s Brief. *See* the Brief, generally, and at p. 1. Rubin has therefore tacitly conceded the correctness of Judge Henning’s ruling with respect to fees and costs, and does not appeal from that ruling.

damages. The Circuit Court correctly concluded that if Rubin had sought to mitigate its damages by raising with CNX the defense of adverse possession, it may have entirely avoided any liability. See the summary judgement Order, JA-235.

The Circuit Court's summary judgment Order stated that because there was no judicial determination of whether Rubin adversely possessed the minerals underlying the subject property, it cannot be said that the sum which Rubin voluntarily paid to CNX flowed from or was proximately caused by Mr. Morris's negligence. See the Order, ¶¶ 17 and 18, JA-235. However, the critical point is not the absence of a final judicial determination of this issue, but rather Rubin's failure to raise the doctrine of adverse possession in mitigation of CNX's claims. Indeed, because the material facts establishing Rubin's adverse possession were entirely undisputed, it is very possible, if not probable, that CNX may have conceded this point, thereby obviating any need for a judicial determination, or for a settlement by Rubin.

Although Rubin argued in the Circuit Court that it could not have occupied the leasehold estate in the subject property *adversely* because it took the property pursuant to a lease which was assigned to it by WVE, and also because Rubin believed in good faith that it had acquired the sole and exclusive right to produce oil and gas from the property, Rubin has abandoned that flawed argument on appeal by not incorporating it in its opening Brief. However, out of an abundance of caution, Mr. Morris's Brief will nonetheless explain why Rubin's argument necessarily fails, because Rubin held the leasehold estate under color of title. *Somon v. Murphy Fabrication & Erection Co.*, 160 W.Va. 84, 90, 232 S.E.2d 524, 528 n. 4 (1977).

The Circuit Court's Summary Judgment Order does not explicitly refer to *mitigation of damages*. Nonetheless, Rubin's failure to mitigate by failing to raise the defense of adverse

possession was extensively briefed on behalf of Mr. Morris in support of his Motion for Summary Judgment. *See, e.g.*, Mr. Morris's Memorandum, beginning at p. 14, JA-98, and his Reply, beginning at p. 2, JA-211. Moreover, at the heart of Judge Henning's discussion of Rubin's claim to recover its CNX damages is his observation that "this amount may have been wholly avoided by operation of this state's adverse possession laws." *See* the Order, ¶¶ 17 and 18, JA-235. The Court further ruled that Rubin's failure to raise the doctrine of adverse possession as a defense to CNX's claim "precludes any finding that these claimed damages were proximately caused by Mr. Morris's negligence." *Id.*

The Circuit Court's reasoning in this regard is the very essence of the doctrine of mitigation of damages. When a plaintiff has the ability to avoid injury entirely through mitigation, as was true of Rubin in its dealings with CNX, the plaintiff's failure to mitigate becomes the proximate cause of any injury which mitigation might have avoided. *See, e.g., Preston v. Keith*, 217 Conn. 12, 16-17, 584 A.2d 439, 441-42 (1991) ("the theoretical foundation for the plaintiff's duty to mitigate damages is that the defendant's negligence is not the proximate, or legal, cause of any damages that could have been avoided had the plaintiff taken reasonable steps to [mitigate]").

Finally, the Circuit Court also correctly supported its ruling with respect to the CNX damages by invoking the decision of this Court in *Calvert v. Scharf*, 217 W.Va. 684, 619 S.E.2d 197 (2005). *Calvert* arose from a will dispute among the potential beneficiaries of a testator's estate. Before the action was litigated to a conclusion, and with the question of the attorneys' negligence and the question of proximate causation still undecided, the parties settled their differences, and one group then sued the attorneys who had drafted the testator's will, in an effort to recover the sums which were paid in connection with the settlement. This Court, rejecting the plaintiffs' assertion that

the attorneys' negligence proximately caused their monetary damages, held: "These damages, which the Calverts have either voluntarily paid or voluntarily agreed to pay, simply bear no causal relationship to any negligence on the part of the attorneys who drafted [the] will. * * *

Thus, as a matter of law, no cause of action [for legal malpractice] exists." See the Circuit Court's Summary Judgment Order, JA-234, quoting from *Calvert*, 217 W.Va. at 696, 619 S.E.2d at 209 (bracketed language added by the Circuit Court).

B. Antero Damages

The Circuit Court correctly decided that this Court's holding in *Keister v. Talbott*, 182 W.Va. 745, 391 S.E.2d 895 (1990), controls Rubin's claim to recover the sums which Antero would have paid in order to acquire the right to produce gas from the Marcellus Shale underlying the 120-acre tract. In *Keister*, the defendant/attorney failed to discover during a title examination that the right to mine coal from property which the plaintiffs planned to purchase had already been conveyed away in a prior out-conveyance. The trial court rejected the plaintiffs' argument that they were entitled to recover from the attorney the value of the coal underlying the property, and this Court affirmed:

Had Mr. Talbott correctly examined the title, his discovery of the prior outconveyance would not have altered [the fact that Mrs. Brown had no title to the coal under her property]. Thus, the plaintiffs were not deprived of the coal rights as a proximate result of Mr. Talbott's negligence. Consequently, the plaintiffs' damages for the loss of their bargain, i.e., the failure to acquire ownership of the coal, cannot be charged against Mr. Talbott. What they did lose as a result of his negligence was the opportunity to rescind the purchase contract.

See the summary judgment Order, JA-238, quoting from *Keister*, 391 S.E.2d at 900 (bracketed language inserted by the trial court).

In the Circuit Court, Rubin tried to circumvent the holding in *Keister* by arguing that

if Mr. Morris had discovered the Declaration of Pooling in June, 2000, it would have been able to enforce the *substitute property* provision in its agreement with WVE. However, the Circuit Court correctly concluded that Rubin's argument, to the effect that if Mr. Morris had discovered the Declaration of Pooling in 2000, Rubin (a) could have exercised its contractual right to require WVE to substitute appropriate property in place of the 120-acre tract, and (b) would have been able, twelve years later, to sell the Marcellus Shale rights in the theoretical substitute property to Antero, was inherently speculative. *See* the summary judgment Order, JA-238-39. Rubin's argument concerning what it in theory might have done more than fourteen (14) years ago inevitably collapses under the weight of the many speculative assumptions which it requires.

Inherent in Rubin's argument are the following assumptions: (a) that Rubin is able to say now, in 2015, that over fourteen (14) years ago, in the fall of 2000, when the Marcellus Shale boom was not yet even a gleam in the eye of natural gas producers, if Mr. Morris had discovered CNG's Declaration of Pooling, Rubin would have demanded that WVE substitute in place of the 120-acre tract a piece of substitute property acceptable to Rubin, rather than simply walking away from the its deal with WVE in search of another; (b) that, over fourteen years ago, WVE in fact held, or might have acquired, the leasehold estate for a piece of property which it might have agreed to substitute in place of the 120-acre tract; (c) that WVE would have been willing in 2000 to substitute the other property, rather than simply put Rubin to the test of trying to enforce its agreement; (d) that Rubin would have found this theoretical and unidentified substitute property acceptable; (e) that the substitute property would have contained approximately the same acreage as the 120-acre tract;⁶ and

⁶Antero's offer of \$216,000.00 to Rubin for its Marcellus rights in the 120-acre tract was calculated on the basis of \$1,800.00 per net acre. JA-60.

(f) that a dozen years later, in the fall of 2012, Antero would have found the theoretical substitute property of sufficient interest to make Rubin the same offer which was made to acquire the Marcellus rights in the 120-acre tract.

Rubin offered the Circuit Court not one piece of evidence, by affidavit or otherwise, to support any of those assumptions. The Court therefore correctly concluded 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.” See the Summary Judgment Order, JA-236, quoting from *Commonwealth Tire Co. v. Tri-State Tire Co.*, 156 W.Va. 351, 193 S.E.2d 544 (1972), Syl. Pt. 5.

In support of their Motion for Summary Judgment, Mr. Morris and his counsel also argued that the Circuit Court could have rejected Rubin’s claim to recover its Antero damages based on what was arguably the central holding by this Court in *Keister*, namely, that “in an action for malpractice against an attorney who has overlooked an outconveyance of property which results in the purchaser receiving less than he had contracted to buy, damages are ordinarily determined by subtracting the value of the property actually received from the purchase price paid.” *Id.*, 182 W.Va. at 749-50, 391 S.E.2d at 899-900. This was the conclusion reached by this Court in *Keister* after determining that plaintiffs in that case were not entitled to recover the value of coal underlying the subject property.

Although the Circuit Court thoroughly analyzed and discussed *Keister*, it did not expressly embrace the aforesaid holding before moving on to its conclusion that Rubin’s Antero argument was impermissibly speculative and conjectural. Nonetheless, it is settled law “that a grant of summary judgment may be sustained on any basis supported by the record.” *Subcarrier`*

Communications, Inc. v. Nield, 218 W.Va. 292, 297, 624 S.E.2d 729, 734 (2005) (internal citation and quotation marks omitted).⁷

Applying the rule announced in *Keister* to the facts of this case, the Declaration of Pooling is the functional equivalent of an out-conveyance of the sort which was overlooked during a title examination in *Keister*. The purchase price paid by Rubin for WVE's assignment of the oil and gas leasehold estate was \$5,000.00. See the Complaint, page 3, ¶ 11, JA-6. The actual value of the leasehold estate which Rubin purchased from WVE in reliance on Mr. Morris's incorrect title opinion letter is perhaps best reflected in the income which has been generated for Rubin from its production of oil, gas or other products from the subject tract since the fall of 2000, namely, \$272,555.78 (as of August 26, 2013, see JA-64), adjusted so as to take into account the costs of production. Rubin will continue to receive such income for years into the future, adjusted for the royalties which Rubin will pay to CNX pursuant to Rubin's voluntary settlement with CNX. Accordingly, because the value of the leasehold estate far exceeds the price paid by Rubin, petitioner is entitled to no recovery on its claim for Antero damages, just as plaintiffs were awarded no damages in *Keister*.⁸

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Mr. Morris and his counsel agree with Rubin that oral argument pursuant to Rule 19(a), W.Va. R. App. P., is appropriate in this case, because Rubin's appeal involves assignments

⁷"Thus, it is permissible for us to affirm the granting of summary judgment on bases different or grounds other than those relied upon by the circuit court." *Id.*

⁸In Rubin's Summary of Argument, at p. 10 of its Brief, including in footnote 1, Rubin appears to suggest that the Circuit Court improperly construed or interpreted an unambiguous agreement between Rubin and WVE. However, even a cursory review of the summary judgment Order will reveal that the Circuit Court did no such thing. Rubin's contention is therefore a red herring.

of error in the application of settled law. Mr. Morris and his counsel further believe that this appeal is appropriate for disposition through a memorandum decision pursuant to Rule 21, W.Va. R. App. P.

IV. ARGUMENT

A. Standard Of Review

It is settled that “[a] circuit court’s entry of summary judgment is reviewed *de novo*.” *Frederick Management Co., L.L.C. v. City National Bank of West Virginia*, 228 W.Va. 550, 723 S.E.2d 277 (2010), Syl. Pt. 1 (internal citations and quotation marks omitted). In conducting its *de novo* review, this Court “appl[ies] the same standard utilized in the circuit court.” *Id.*, 723 S.E.2d at 285. The standard applied in the circuit courts requires that a summary judgment motion “should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. Of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

Nonetheless, summary judgment is mandated where a plaintiff fails to make an adequate showing on even one essential element of a claim on which it seeks to recover. *Painter v. Peavy*, 192 W. Va. 189, 192-93, 451 S.E.2d 755, 759 (1994). As the United States Supreme Court has observed, “the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This Court has said that “[s]ummary judgment is not a remedy to be exercised at the circuit court’s option; it must be granted when there is no genuine disputed issue of a material fact”. *Powderidge Unit Owners Ass’n v.*

Highland Properties, Ltd., 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996).

Moreover, a circuit court considering a summary judgment motion should hold the party having the burden of proof to the same substantive evidentiary burden they would have to meet at trial. *See, e.g., Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 62, 459 S.E.2d 329, 339 (1995). This rule of law is important in the present case because Rubin’s burden at trial, and in opposing Mr. Morris’s summary judgment Motion, is to prove proximate causation by a preponderance of the evidence, and in particular, with evidence that is not speculative or conjectural, and to prove damages with reasonable certainty, that is, with evidence that transcends mere speculation. *Hill v. Stowers*, 224 W.Va. 51, 680 S.E.2d 66 (2009), Syl. Pt. 4; *Spencer v. Steinbrecher*, 152 W.Va. 490, 164 S.E.2d 710 (1968), Syl. Pt. 2 (internal citation omitted); *Commonwealth Tire Co. v. Tri-State Tire Co.*, 156 W.Va. 351, 360, 193 S.E.2d 544, 549 (1972) (internal citation omitted); and *Westfield Ins. Co. v. Azumah*, 2012 WL 5857314, *3 (W.Va. S. Ct. App., Nov. 19, 2012) (Memorandum Decision).⁹

**B. Rubin’s Failure To Mitigate Its CNX Damages By Not Raising
The Doctrine Of Adverse Possession As A Defense To CNX’s Claims,
And Its Decision To Instead Voluntarily Settle With CNX, Precludes
Any Finding That Mr. Morris’s Negligence Proximately
Caused The CNX Settlement Damages**

As noted before, Rubin’s Complaint alleges that “[u]pon discovery of the Declaration of Pooling, Rubin . . . promptly notified CNX . . . concerning the existence of its subject Well on the Property.” Complaint, page 5, ¶ 22, JA-8. Rubin has said in discovery that CNX then asserted claims against it for having improperly placed its well on the 120-acre tract in 2000. *See*

⁹From Judge Henning’s Summary Judgment Order, it is apparent that he utilized the appropriate summary judgment standard. *See* the Order, JA-231.

Exhibit 2 to Mr. Morris’s Motion, Rubin’s answer to Interrogatory No. 24, JA-68-69. Rubin asserted no defenses to the claims of CNX, and has said in discovery that it knew of no defenses that were available to it. *Id.* Instead, “[t]o resolve any claims of CNX against Rubin . . . related to the subject Well, Rubin . . . agreed to pay CNX compensation of \$32,455.81.” Complaint, page 5, ¶ 23, JA-8. Rubin now seeks to recover that sum from Mr. Morris. *Id.*, page 6, ¶ 34(b), JA-9.

In West Virginia, it is settled “that one generally has a duty to mitigate damages” *Chesser by Hadley v. Hathaway*, 190 W.Va. 594, 600, 439 S.E.2d 459, 465 (1993) (internal citations omitted). The duty to mitigate applies to plaintiffs such as Rubin who sue attorneys for legal malpractice. *See*, Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* (2014 Ed.), Vol. 3 § 21:21, pages 89-90, and Vol. 4, § 34:9, page 1112, and § 34:11, page 1126 (subsequently, “*Legal Malpractice*”): “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.”¹⁰

Rubin clearly acted entirely voluntarily in notifying CNX that it had drilled its well on the subject property when it was not legally entitled to do so. Although Rubin has said that it had no possible defense to CNX’s claims, this is not correct. Indeed, by the time Rubin voluntarily settled with CNX, it had long since gained fee simple title to the oil and gas underlying the 120-acre tract through adverse possession.

West Virginia Code § 55-2-1 (1882) provides, in pertinent part, that “[n]o person shall make an entry on, or bring an action to recover, any land, but within ten years next after the

¹⁰This is a legal malpractice treatise cited often by this Court. *See, e.g., Humphries v. Detch*, 227 W.Va. 627, 631, 712 S.E.2d 795, 799 (2011) (a legal malpractice case arising from a criminal action).

time at which the right to make such entry or to bring such action shall have first accrued” *Id.* This statute is applicable to mineral interests as well as to the surface of land. *See, e.g., U.S. v. 298.25 Acres of Land, More or Less, Situate In Wayne Co., W.Va.*, 587 F.Supp. 1510, 1515 (S.D.W.Va. 1984). This state also recognizes the common law doctrine of adverse possession. *Brown v. Gobble*, 196 W.Va. 559, 566, 474 S.E.2d 489, 496 (1996). More than ninety years ago, this Court recognized that where minerals have been separated from the surface of the land by conveyance, one can acquire fee simple title to the minerals by showing that his extraction of the minerals for the requisite period of ten years “has been actual, open, notorious, continuous, exclusive, and hostile, under color of title.” *Syl., Thomas v. Young*, 93 W.Va. 555, 117 S.E. 909 (1923) (involving the extraction of coal).

The same principle applies to adverse possession of oil and gas. *Welch v. Cayton*, 183 W.Va. 252, 255, 395 S.E.2d 496, 499 (1990):

To possess the oil and gas, H.P. Williamson would have had to take oil and gas out of the land, such as by drilling a producing oil well. This Court said in *Kiser v. McLean*, “[t]hough he own the surface and all other strata, he does not own the oil and gas. His possession of the surface cannot constructively extend to them He can only take possession of them by drilling wells.” *Kiser v. McLean*, 67 W.Va. 294, 297, 67 S.E. 725, 726 (1910).

Id. Accord, Gassaway v. Dominion Exploration and Production, Inc., 2011 WL 8193596, **3-5 (W.Va. S. Ct. App., Oct. 11, 2011) (Memorandum Decision), affirming “the circuit court’s thorough and well-reasoned summary judgment order” which concluded that petitioner could not sustain her claim for adverse possession of oil and gas because she failed to take actual, hostile possession of the minerals by drilling a producing well.

The Complaint alleges that Rubin believed in good faith that it had acquired its

interest in the minerals underlying the 120-acre tract through Assignments of a lease from WVE in 2000. Complaint, page 3, ¶ 10, JA-6. Rubin then applied for a permit to drill a well on the subject property; the permit was granted; and the well was drilled and has produced gas ever since. Stipulations, ¶¶ 13-14, JA-49; Complaint, page 4, ¶ 16, JA-7. Rubin discovered its title defect in October, 2012. Stipulations, page 4, ¶ 17, JA-50; Complaint, page 4, ¶ 19, JA-7. At that point, more than twelve (12) years had passed since Rubin recorded its Assignments from WVE, publicly applied for a well permit, and drilled its well on the 120-acre tract. It is undisputed that throughout that entire period of a dozen years, Rubin extracted natural gas from the property and did so openly, notoriously, continuously, exclusively, hostilely, and under color of title. *Thomas v. Young, supra*, Syl.

Indeed, at the time Rubin discovered the title defect and self-reported to CNX, and for over ten years before that, Rubin had been selling gas from its well to a company which was part of the CNX/CNG family of companies, namely, Dominion. *See* the discussion, *infra*, at pp. 6-7. *Also see*, Rubin's answers to Interrogatories 17 and 25, JA-64-69, identifying Dominion as the entity to which Rubin was selling gas; and Exhibit 6 to Mr. Morris's Motion, a letter from Rubin to Dominion on December 3, 2001, clarifying that Rubin was terminating its agreements for the sale of gas to Enron, and would commence selling gas to Dominion, JA-84. That letter was produced by Rubin in response to Mr. Morris's Requests for Production of Documents.

In short, by October, 2012, Rubin held fee simple title to the gas underlying the 120-acre tract through adverse possession. At that point, any claim by CNX against Rubin for having trespassed against the leasehold estate in the subject property was clearly time-barred pursuant to W.Va. Code § 55-2-1 (1882). Rubin therefore had no duty to self-report to CNX; CNX had no valid

and viable claim against Rubin; and Rubin was under no compulsion to enter into any settlement with CNX. By settling, and by not raising its available defenses to any claim by CNX, Rubin failed entirely to mitigate this component of its damages. Rubin's failure to mitigate presents an affirmative defense for Mr. Morris, and he is entitled to judgment as a matter of law on Rubin's claim to recover the cost of its settlement with CNX.

During oral argument in the Circuit Court, Rubin's counsel argued, in essence, that the principals of Rubin self-reported their trespass to CNX in 2012 because it was clearly *the right thing to do*. See the hearing transcript, JA-257. Mr. Morris and his counsel certainly do not question the integrity of Rubin's owners, and have no doubt that Rubin is a good corporate citizen, well respected in the oil and gas industry. If Rubin paid settlement damages to CNX because it wanted "to do the right thing" (*id.*), or at least what it believed was the right thing, this was clearly its prerogative. However, doing what it considered the right thing *vis a vis* CNX does not as a matter of law enable Rubin to recoup its gratuitous settlement payment from Mr. Morris.

The relationship between a plaintiff's failure to mitigate, on the one hand, and proximate causation of the plaintiff's harm, on the other, is clear. When a plaintiff has the ability to avoid injury entirely through mitigation, as was true of Rubin in its dealings with CNX, the plaintiff's failure to mitigate becomes the proximate cause of its injury. In such a case, "the theoretical foundation for the plaintiff's duty to mitigate damages is that the defendant's negligence is not the proximate, or legal, cause of any damages that could have been avoided had the plaintiff taken reasonable steps to [mitigate]." *Preston v. Keith*, 217 Conn. 12, 16-17, 584 A.2d 439, 441-42 (1991) (bracketed language added).

Rubin has not disputed Mr. Morris's contention that West Virginia law requires a

plaintiff to act reasonably to mitigate its damages. Rather, Rubin argues only that it was exposed to great potential liability to CNX, and that its settlement with CNX therefore *did* constitute reasonable mitigation. *See, e.g.*, Rubin’s Brief, pp. 16-17. Notably absent from the Brief is any direct or specific attack on Mr. Morris’s argument that Rubin, long before it voluntarily settled with CNX, had obtained fee simple title to the gas underlying the 120-acre tract through adverse possession. However, Rubin did challenge the applicability of the doctrine of adverse possession in the Circuit Court, and Mr. Morris will briefly address Rubin’s argument here.

Specifically, Rubin argued in the trial court that because it “possessed the land not adversely, but pursuant to a lease, there was no adverse possession through which to acquire prescriptive title.” *See* Rubin’s summary judgment Response, page 5, JA-187, citing *Brown v. Gobble*, 196 W.Va. 559, 474 S.E.2d 489 (1996), and *Atlantic Richfield Co. v. Tomlinson*, 859 P.2d 1088 (Ok. 1993). However, Rubin’s adverse possession argument is fundamentally incorrect.¹¹

Rubin correctly cites *Brown v. Gobble* for its holding that one who wishes to rely on the doctrine of adverse possession must establish the existence of each of six elements by clear and convincing evidence for the requisite statutory period of ten (10) years. One must prove:

- (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.

¹¹Rubin’s reliance on *Atlantic Richfield Co. v. Tomlinson* is puzzling. In that case, the Supreme Court of Oklahoma held that “[i]n order for a person to adversely possess a severed mineral estate, he must actually open a well on a tract of land and reduce the minerals under that tract to possession for the statutory period.” *Id.*, 859 P.2d at 1094. This is precisely what occurred in Rubin’s case.

Brown v. Gobble, 196 W.Va. at 566, 474 S.E.2d at 496. See Rubin’s summary judgment Response, p. 5, JA-187, and its Brief, p. 16. The only one of those elements which Rubin challenged in the Circuit Court is the requirement that one’s possession of the property in question must have been *adverse*. *Id.* Specifically, Rubin argued that because it possessed the subject property pursuant to a lease which had been assigned to it by WVE, its possession could not have been adverse. It is hardly surprising that Rubin abandoned this argument on appeal, because the argument is clearly incorrect.

If Rubin’s argument were correct, and possession of a mineral leasehold estate pursuant to a purported lease could never be *adverse* to the actual owner, then the sixth element stated in *Brown v. Gobble* would, in part, be rendered meaningless. That element requires that one claiming adverse possession (referred to as a *disseisor*) must have possessed the property either “under claim of title” or under “color of title”. 196 W.Va. at 566, 474 S.E.2d at 496. Claim of title, and color of title, are distinct legal concepts:

Some courts use the term ‘claim of right’ in lieu of claim of title. Both phrases are synonymous and are distinct from the principle of ‘color of title.’ The latter phrase denotes that the disseisor possesses some type of written title paper; whereas under the concept of claim of title or right, the disseisor has no title paper but a mere naked assertion of ownership. See 5 Thompson, Real Property, § 2549; 4 Tiffany, The Law of Real Property § 1147.

Somon v. Murphy Fabrication & Erection Co., 160 W.Va. 84, 90, 232 S.E.2d 524, 528 n. 4 (1977).

The Court further clarified this principle in *Somon*, as follows: “[C]olor of title’ imports there is an instrument giving the appearance of title, but which instrument in point of law does not. In other words, the title paper is found to be defective in conveying the legal title.” *Id.*, 160 W.Va. at 90, 232 S.E.2d at 529 (internal citation omitted). Clearly, a claim under color of title, such as Rubin’s

reliance on an Assignment of the leasehold estate from WVE, will suffice under our law to establish adverse possession.

At page 16 of its Brief, Rubin characterizes the Circuit Court's analysis and ruling pertaining to *Calvert v. Scharf*, 217 W.Va. 684, 619 S.E.2d 197 (2005), in the following manner:

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.

Id. (emphasis in the original). Rubin contends that the holding in *Calvert*, as interpreted in the trial court's summary judgment Order in the present case, would "impos[e] . . . a *threshold* requirement on legal malpractice plaintiffs to litigate every conceivable affirmative defense to final adjudication prior to seeking relief for the malpractice . . ." See the Brief, page 17. However, this is a gross mischaracterization of the summary judgment Order, and it betrays a basic misunderstanding of *Calvert*. See the summary judgment Order, JA-234-35, discussing *Calvert*.

This Court spoke of the absence of a final judicial determination in *Calvert* because, unlike the present case, the settlement reached in that case occurred in the context of ongoing litigation, just as the trial court was on the verge of deciding cross-motions for summary judgment which may have determined the question of the attorneys' alleged malpractice. *Calvert*, 217 W.Va. at 688, 619 S.E.2d at 201. The settlement between the parties foreclosed any such ruling by the court. Hence the Court's reference to the lack of a final judicial determination.

In the present case, by contrast, there was no litigation between Rubin and CNX, for the obvious reason that Rubin elected to settle the CNX claims without contesting them in any way. Central to the Circuit Court's holding in this case was its recognition that Rubin "voluntarily entered into a settlement agreement with CNX * * * * in spite of the fact that [Rubin's] well was drilled and had been producing for more than the ten year statutory period for adverse possession." Summary judgment Order, JA-235, ¶ 17. In other words, key to the Circuit Court's ruling was its understanding that Rubin voluntarily settled with CNX rather than assert the defense of adverse possession in mitigation of CNX's claims. Rubin's failure to mitigate, and its voluntary settlement with CNX, were, together, the linchpin of the Circuit Court's decision in this case. Indeed, inasmuch as all of the facts necessary to establish adverse possession were beyond dispute at that point, it is by no means certain that - in the absence of a settlement - there would ever have been any litigation, much less a final judicial determination on the issue of adverse possession.

The *Calvert* opinion clearly stands for the proposition that a malpractice plaintiff's settlement of a third party's claim, a claim which was allegedly caused by an attorney's malpractice, destroys the plaintiff's ability to show that the settlement damages were proximately caused by the attorney's negligence. *Also see, Legal Malpractice*, Vol. 3, § 22.72, discussing *Calvert* and other cases. In a failed effort to refute this reading of *Calvert*, Rubin cites *Sells v. Thomas*, 220 W.Va. 136, 140-41, 640 S.E.2d 199, 203-04 (2006). *See* Rubin's Brief at page 15. Rubin asserts that both *Calvert* and *Sells* simply stand for the proposition that any plaintiff, including a malpractice plaintiff, need only prove a loss and that the loss was proximately caused by the defendant's negligence. *Id.* Rubin also observes that in *Sells*, this Court rejected the attorney-defendant's argument that the plaintiff's settlement-related damages were speculative. *Id.*, citing *Sells*, 220 W.Va. at 140-41, 640

S.E.2d at 203-04. However, *Sells* is sufficiently distinguishable from the present case as to be of no assistance to Rubin.

The present malpractice case arose from a non-litigation matter, a title examination. *Sells*, on the other hand, arose from the defendant-lawyer's prior representation of the plaintiff in litigation over a motor vehicle accident. 220 W.Va. at 137-38, 640 S.E.2d at 200-01. It was undisputed that the defendant-lawyer had entered into a settlement with one insurance carrier on behalf of plaintiff for less than policy limits. It was also undisputed that this settlement was in clear violation of a *policy exhaustion* provision contained in a second insurance policy, issued by another carrier, which provided under-insured motorist ("UIM") coverage. *Id.* It was further undisputed that the lawyer knew of the UIM policy at the time of the settlement. *Id.* When the plaintiff hired another lawyer to replace her original attorney, her new counsel settled a claim against the UIM policy for less than policy limits, and then sued the original lawyer. The new counsel argued that the decision to settle the first claim in violation of the UIM policy caused plaintiff to have to settle the UIM claim for less than policy limits. *Id.* This Court rejected the defendant-lawyer's argument that plaintiff's claim was unduly speculative. Specifically, this Court concluded that there were genuine issues of material fact concerning whether the plaintiff's UIM claim would have had greater settlement value, were it not for the defendant-lawyer's negligence in violating the *policy exhaustion* clause. *Id.*, 220 W.Va. at 141, 640 S.E.2d at 204.

Clearly, *Sells* bears no factual resemblance to the present case. Nor does *Sells* support Rubin's skewed interpretation of *Calvert*. This Court's opinion in *Calvert* did nothing more than apply settled law, to the effect that a malpractice plaintiff must prove both his loss and proximate causation, to the particular factual scenario presented by that case; namely, a scenario in

which the malpractice plaintiffs contended that their lawyers' negligence caused them to incur potential liability to third parties, which, in turn, caused them to have to settle with the third parties at considerable expense. This is the same scenario which is presented in the case at bar. Rubin asserts that Mr. Morris's negligence caused it to incur potential liability to CNX, which, in turn, caused Rubin to have to settle with CNX at great expense. Just as was true in *Calvert*, Rubin's voluntary settlement with CNX, and its failure to raise the defense of adverse possession, precludes any determination that the cost of its settlement was proximately caused by Mr. Morris's negligence.

Rubin asserts that a rule which precludes a malpractice plaintiff from settling with a third party and then suing his lawyer for allegedly having caused him to be liable to the third party is at odds with this state's policy which favors and encourages the resolution of disputes through settlements. See Rubin's Brief, page 14, n. 3, citing and quoting from *State ex rel. Showen v. O'Brien*, 89 W.Va. 634, 109 S.E. 830, 831 (1921). The *Showen* case was also cited and discussed by Judge Henning in his summary judgment Order. JA-235.

However, Rubin ignores, and omits from its Brief entirely, the very language quoted from *Showen* by the Circuit Court which clarifies that the law favors settlements *only* when the settlement will not "delay, hinder, or defeat enforcement of the rights of others vitally interested in the subject-matter of the controversy." *Id.* In other words, the rule favoring settlements applies "only where the rights and interests of the parties immediately concerned . . . have in good faith been observed and respected." *Id.* Mr. Morris was obviously vitally interested in the subject matter of the controversy which was settled between Rubin and CNX, because Rubin was and is contending that his negligence caused it to be embroiled in the controversy. As the Circuit Court correctly observed, Rubin's voluntary and wholly gratuitous settlement "infringe[d] on his interest in being

held liable for only those damages proximately caused by his negligence.” Order, ¶ 20, JA-236.

C. Rubin Is Not Entitled To Recover Its Claimed Antero Damages

Rubin complains that it entered into an agreement with Antero in September, 2012, pursuant to which Antero agreed to pay \$216,000.00 as consideration for an assignment of Rubin’s Marcellus rights in the subject property, together with an overriding royalty having a present value of \$30,000.00, but that Antero backed out of that deal when it discovered that Rubin did not own the Marcellus rights. Complaint, ¶¶ 17-19, JA-7. Rubin seeks to recover those sums from Mr. Morris as damages, totaling \$246,000.00. *See* Exhibit 4 to the Motion for Summary Judgment, JA-79, second paragraph. However, such damages are not recoverable in a legal malpractice action arising from an attorney’s negligence in certifying title. *See Keister v. Talbott, supra*, 182 W.Va. at 749-50, 391 S.E.2d at 899-900, citing and relying on *Nilson-Newey & Co. v. Ballou*, 839 F.2d 1171, 1175-77 (6th Cir. 1988) (applying Kentucky law).

The *Keister* case arose from the purchase by plaintiffs, the Keisters, of a piece of property in Webster County, West Virginia, in 1986. *Keister*, 182 W.Va. at 747-48, 391 S.E.2d at 897-98. The Keisters retained counsel, Mr. Talbott, to search the title to the property in order to confirm that the seller owned both the surface and the minerals underlying the property. *Id.* It was plaintiffs’ intent to lease to a third party, for a substantial profit, the right to mine coal from the property. *Id.* Mr. Talbott certified that the sellers did, in fact, own both the surface of the property and the underlying minerals. *Id.* The Keisters closed on their purchase, and then asked Mr. Talbott to assist with leasing the mining rights to another party. In the process of working on the lease, Mr. Talbott discovered for the first time that, because a deed had been incorrectly recorded and indexed, his title examination had missed an out-conveyance of the coal which occurred in 1946. *Id.* The

Keisters sued Mr. Talbott and the County Clerk.

Negligence on the part of lawyer Talbott was not contested on appeal. 182 W.Va. at 748, 391 S.E.2d at 898. Prior to trial, defendants moved *in limine* “to limit the amount of recovery to the difference between the purchase price and the fair market value of the Keister tracts without the coal.” *Id.* The Circuit Court granted the motion, holding that “plaintiffs could not establish a causal connection between their loss of the coal rights and the alleged negligence of the defendants.” *Id.* Specifically, the Court excluded any and all evidence of either (a) the profit lost by the Keisters as a result of not being able to lease out the right to mine coal, or (b) the value of the coal in place. *Id.*

In affirming the trial court, this Court began by observing that even where an attorney’s negligence is admitted, “it must also appear that the client’s damages are the direct and proximate result of such negligence.” 182 W.Va. at 749, 391 S.E.2d at 899 (internal citations omitted). Further, the Court observed that “[d]amages arising from the negligence of an attorney are not presumed, and the plaintiff in the malpractice action has the burden of proving both his loss and its causal connection to the attorney’s negligence.” *Id.* (internal citations omitted).

Noting that the parties had not cited any legal authorities on point, this Court identified, and found persuasive, the Sixth Circuit’s opinion in *Nilson-Newey, supra*. Relying on that decision, this Court held that in a malpractice action against an attorney arising from the client’s acquisition of a property interest in reliance on the attorney’s negligent certification of title, where the client received less than he had bargained for, “damages are ordinarily determined by subtracting the value of the property actually received [by the client] from the purchase price paid.” 182 W.Va. at 749-50, 391 S.E.2d at 899-900. The Keisters had argued on appeal that they were, instead,

“entitled to recover the benefit of their bargain, i.e., the value of the property with the coal.” 182 W.Va. at 750, 391 S.E.2d at 900. This Court rejected that argument, citing and quoting from *Nilson-Newey*: “It is not [the attorney’s] fault that the land turned out to have no coal, but it is [his] fault that the plaintiff bought the land. Had it not been for the attorney’s negligence . . . , [the plaintiff] would not have bought the land at all.” *Id.* (quoting from *Nilson-Newey*, 839 F.2d at 1176).

The Court’s opinion in *Keister* controls Rubin’s claim in the present case which seeks to recover lost opportunity damages arising from the aborted Antero Agreement. Rubin alleges that it went through with its purchase from WVE of the oil and gas leasehold estate in the 120-acre tract in reliance on Mr. Morris’s title opinion letter which certified, incorrectly, that WVE had good title to those minerals. Rubin complains that because of Mr. Morris’s negligence in not discovering CNG’s Declaration of Pooling, it was deprived of the value of its Marcellus rights in the subject tract which Antero had agreed to purchase for a total consideration of \$246,000.00. Rubin now seeks to recover those damages from Mr. Morris. However, as was true of lawyer Talbott in the *Keister* case, it is simply not Mr. Morris’s fault that Rubin was deprived of the Marcellus shale rights in the 120-acre tract. Rather, it is his fault that Rubin entered into the Agreement with WVE, at all. *See, Keister v. Talbott*, 182 W.Va. at 749-50, 391 S.E.2d at 899-900. *Also see* the Complaint, page 6, ¶ 31, JA-9: “Had it not been for Mr. Morris’ negligence, Rubin Resources would not have acquired its interest in the oil and gas underlying the subject Property at all.”

Rubin, perhaps having recognized that *Keister* is fatal to its claim to recover the Antero damages, seeks to sidestep the rule announced in *Keister* by arguing that the case is factually distinguishable from the present case, to an extent which renders it inapposite. *See* Rubin’s Brief, page 18, stating that “unlike the land parcel in *Keister* which had no coal present, the Property at

issue here does have the mineral present . . .” *Id.*, quoting a statement which appears in the *Keister* opinion, that “[it was] not [the attorney’s] fault that the land turned out to have no coal” *Id.* When Rubin made this same argument in the Circuit Court, Mr. Morris and his counsel pointed out in their summary judgment Reply that Rubin had misread the *Keister* opinion, because in that case, the land in question most certainly did have coal present. *See* the Reply at p. 11, JA-220. The language indicating that “the land turned out to have no coal” was originally contained, not in the *Keister* opinion, but in the *Nilson-Newey* opinion. As this Court said in *Keister*:

Moreover, the plaintiffs overlook the proximate cause issue in this case. As the court stated in *Ballou*, the attorney’s negligence did not cause the loss of the mineral rights. “It is not [the attorney’s] fault that the land turned out to have no coal, but it is [his] fault that the plaintiff bought the land. Had it not been for [the attorney’s] negligence . . . , [the plaintiff] would not have bought the land at all.”

Keister, 182 W.Va. at 750, 391 S.E.2d at 900, quoting from *Nilson-Newey*.

Accordingly, the damages recoverable by Rubin are not measured by the value of the Marcellus Shale gas underlying the 120-acre tract, as determined by the total price which Antero was prepared to pay to Rubin. Rather, Rubin’s damages are “determined by subtracting the value of the property actually received from the purchase price paid.” *Keister*, 182 W.Va. at 749-50, 391 S.E.2d at 899-900. The purchase price paid by Rubin for WVE’s assignment of the oil and gas leasehold estate was \$5,000.00. *See* the Complaint, page 3, ¶ 11, JA-6.¹² The value to Rubin of the leasehold estate which it purchased from WVE in reliance on Mr. Morris’s incorrect title opinion letter is reflected in the income which has been generated for Rubin from its production of oil, gas or other products from the subject tract since the fall of 2000, namely, \$272,555.78 (as of August

¹²The Assignments from WVE to Rubin, produced by Rubin in discovery, also specified that Rubin was to pay WVE an overriding royalty for all oil or gas produced from the 120-acre tract.

26, 2013, *see* JA-64-65), adjusted so as to take into account the costs of production. Rubin will obviously continue to receive that income in future years, adjusted for the royalties which Rubin will have to pay to CNX due to Rubin's voluntary settlement. Accordingly, because the value of the leasehold estate far exceeds the price paid by Rubin, petitioner is entitled to no recovery on its claim for Antero damages, just as plaintiffs were awarded no damages in *Keister*.

In an attempt at an end-run around the rule of law established in *Keister*, Rubin alleged in its Complaint that if Mr. Morris's title examination in the summer of 2000 had discovered CNG's Declaration of Pooling, Rubin could have exercised its contractual right under its Agreement with WVE "to require WVE to replace the lease [for the 120-acre tract] with substitute property acceptable to Rubin" *See* the Complaint, page 6, ¶ 32, JA-9. *Also see* a letter from Rubin's counsel to Mr. Morris's counsel, dated March 15, 2013, attached as Exhibit 5 to the Motion for Summary Judgment, page 1, ¶ 2, JA-81.

In order to accept Rubin's argument, the Circuit Court - or a jury - would have been required to stack one wholly speculative inference on top of another, creating an evidentiary house of cards which would necessarily collapse under its own weight. Inherent in Rubin's argument are the following assumptions: (a) that Rubin is able to say now, in 2015, that over fourteen (14) years ago, in the fall of 2000, when the Marcellus Shale boom had not yet even begun in this state, if Mr. Morris had discovered CNG's Declaration of Pooling, Rubin would have demanded that WVE substitute in place of the 120-acre tract a piece of substitute property acceptable to Rubin, rather than simply walking away from its deal with WVE in search of another; (b) that, over thirteen years ago, WVE held, or might have acquired, the leasehold estate for a piece of property which it could have agreed to substitute in place of the 120-acre tract; (c) that WVE would have been willing in 2000

to voluntarily substitute the other property, rather than simply put Rubin to the test of trying to enforce its agreement; (d) that Rubin would have found the hypothetical, offered property acceptable as a substitute; (e) that the substitute property would have contained approximately the same acreage as the 120-acre tract;¹³ and (f) that a dozen years later, in the fall of 2012, Antero would have found the hypothetical, unidentified substitute property of sufficient interest to make Rubin the same offer which was made to acquire the Marcellus rights in the 120-acre tract.

To survive a summary judgment motion, “the nonmoving party must show there will be enough competent evidence available at trial to enable a finding favorable to the nonmoving party.” *Williams v. Precision Coil, Inc., supra*, 194 W.Va. at 60-61, 459 S.E.2d at 337-38. Moreover, “unsupported speculation is not sufficient to defeat a summary judgment motion.” *Id.* (Internal citation and quotation marks omitted.) And, “self-serving assertions without factual support in the record will not defeat a motion for summary judgment.” *Id.* (Internal citation omitted.) *Accord, Merrill v. West Virginia Department of Health and Human Resources*, 219 W.Va. 151, 161, 632 S.E.2d 307, 317 (2006).

At the risk of saying what is obvious, Rubin cannot offer evidence of what it would have done in the year 2000 had it known of the Declaration of Pooling, except through self-serving and inherently speculative assertions. *Williams, supra*, 194 W.Va. at 60-61, 459 S.E.2d at 337-38. Rubin did not even attempt to present such evidence to the Circuit Court, by affidavit or otherwise. Nor can Rubin offer evidence that fourteen (14) years ago, WVE held the leasehold estate for a piece

¹³Antero’s offer of \$216,000.00 to Rubin for its Marcellus rights in the 120-acre tract was calculated on the basis of \$1,800.00 per net acre. Exhibit 1, ¶ 17.

of comparable property which it could have substituted for the 120-acre tract.¹⁴ Rubin can obviously not produce evidence that in 2000, WVE would have agreed to substitute other property, rather than simply put Rubin to the test of trying to enforce its Agreement. Nor can Rubin say, other than through self-serving and conclusory statements, that the hypothetical substitute property would have been acceptable to Rubin, or of interest to Antero in 2012; or that this unidentified property would have had sufficient acreage to generate an offer from Antero equal, or even close, to the offer made for Rubin's Marcellus rights in the 120-acre tract. Again, Rubin did not even attempt to present any such evidence to the Circuit Court, by affidavit or otherwise.

In short, Rubin cannot prove its entitlement to the Antero lost opportunity damages with reasonable certainty, that is, with evidence that transcends mere speculation. *Hill v. Stowers*, *supra*, Syl. Pt. 4; *Spencer v. Steinbrecher*, *supra*, Syl. Pt. 2; *Commonwealth Tire Co. v. Tri-State Tire Co.*, *supra*, 156 W.Va. at 360, 193 S.E.2d at 549; and *Westfield Ins. Co. v. Azumah*, *supra*, 2012 WL 5857314, at *3. Much to the contrary, Rubin's claim for its Antero damages is wholly dependent on assumptions as to what WVE, Antero, and Rubin might have done or refrained from doing under facts which are at this juncture unknown and unknowable. Rubin has offered no legal authority which supports the idea that such assumptions are acceptable in establishing a plaintiff's damages.

On the other hand, there is abundant legal authority which supports the conclusion

¹⁴Mr. Morris asked Rubin in discovery to identify any such substitute property which was held by WVE in 2000, and Rubin refused to answer, saying that the requested information was "[n]ot applicable." See Exhibit 2 to Mr. Morris's Motion, Interrogatory No. 22, JA-66. When Mr. Morris's counsel pressed for a responsive answer, Rubin's counsel responded that the principals of Rubin "believe that there were substantial available leasehold estates or substitute property" See Exhibit 4, JA-79 (emphasis added). However, Rubin identified no such substitute properties.

that “contingent events” have no place in the determination of a plaintiff’s damages. *See, e.g., Lee v. Marsh & McLennan Cos., Inc.*, 2007 WL 4303514, *9 (S.Ct. Nassau County, NY, Dec. 7, 2007), *aff’d by, Hribar v. Marsh & McLennan Cos., Inc.*, 900 N.Y.S.2d 449 (2010), rejecting “damages based on speculative reliance and causality scenarios, which are contingent in part on what a person, in retrospect, could or might have done if the historical record had been different.” *See also, Hoang v. Hewitt Ave. Associates, LLC*, 177 Md. App. 562, 595, 936 A.2d 915, 935 (2007), holding that “[l]osses that are speculative, hypothetical, remote, or contingent either in eventuality or amount will not qualify as ‘reasonably certain’”

In *Resolution Trust Corp. v. Stroock & Stroock & Lavan*, 853 F.Supp. 1422, 1426 (S.D.Fla. 1994), a legal malpractice case brought by the RTC against the lawyers who had represented a failed savings and loan institution, the Court rejected as too speculative damages based on the RTC’s claim that, but for the lawyers’ negligence, the institution might have purchased certain profitable bonds: “Thus, even if the problem of measuring damages could be overcome, the level of uncertainty as to causation would prevent recovery” Similarly, in *Olson v. Aretz*, 346 N.W.2d 178, 182 (Minn. App. 1984), a legal malpractice action brought by plaintiff against his former attorney for negligence in not concluding the client’s divorce action more expeditiously, the Court rejected the client’s argument that he was entitled to recover the profit he could have realized by investing in two pieces of real property, which investment he was unable to make due to the lawyer’s dilatory prosecution of the action: “Because it would have been impossible for a jury to have determined with any accuracy that Olson would have bought the bungalows, the evidence is too speculative to support Olson’s claim for damages.” *Id.* (Internal citation omitted.)

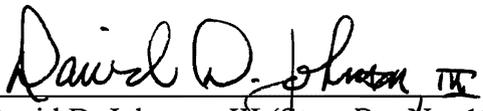
West Virginia law is in complete harmony with these authorities. *See, e.g., Taylor*

v. *Elkins Home Show, Inc.*, 210 W.Va. 612, 620, 558 S.E.2d 611, 619 (2001), stating our rule “which requires proof of damages with reasonable certainty”, and rejecting damages for the cost of repairing a block wall, when the wall had not, in fact, been repaired, and it was entirely speculative whether it ever would be. Rubin’s bare statement, unsupported by any record evidence, that “it is neither remote nor speculative to conclude that Rubin would have enforced its bargained-for and paid-for contractual warranty [by WVE], if given the opportunity” is therefore entirely insufficient to resist summary judgment.

V. CONCLUSION

For all of the foregoing reasons, and for all reasons stated in Mr. Morris’s summary judgment papers filed in the Circuit Court, this Court should affirm the Circuit Court’s summary judgment Order in all respects. As was noted before, Rubin has wisely abandoned on appeal its claim to recover all attorneys’ fees and costs incurred in pursuing this civil action. Nonetheless, out of an abundance of caution, Mr. Morris and his counsel incorporate by reference here all of the arguments and legal authorities addressing that issue which were contained in their summary judgment Memorandum and Reply.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RUBIN RESOURCES, INC.,
A West Virginia Corporation,

Plaintiff/Petitioner,

v.

Appeal No. 15-0122
(Lewis County Civil Action No. 13-C-64)

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

Defendant/Respondent.

CERTIFICATE OF SERVICE

I, David D. Johnson, III, counsel for Defendant/Respondent, Garold "Gary" W. Morris, II, do hereby certify that I have served the foregoing **BRIEF OF RESPONDENT** upon opposing counsel by depositing same in the United States Mail, first class postage pre-paid, and addressed to:

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