BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

S&A PROPERTY RESEARCH, LLC,
a West Virginia limited liability company,

Plaintiff, Appellee,

v. No.: 35523

EURENERGY RESOURCES CORPORATION, a foreign corporation,

Defendant, Appellant.

BRIEF ON BEHALF OF APPELLANT EURENERGY RESOURCES CORPORATION

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

Your Appellant, EurEnergy Resources Corporation, respectfully represents unto this Honorable Court that it is aggrieved by the Order entered on May 19, 2009, and final Judgment Order entered July 28, 2009, by the Circuit Court of Wood County, West Virginia. The May 19th Order granted Appellee's Motion to Enforce Settlement Agreement. The July 28th Judgment Order awarded Appellee damages, including attorney's fees.

Your Appellant asserts that both of the Circuit Court's orders are unsupported by the evidence adduced through the motions and at the hearings, and are directly contrary to the law of West Virginia. Therefore, Appellant prays for the reversal of the orders entered May 19, 2009 and July 28, 2009.

SUMMARY OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

On December 5, 2008 S&A Property Research, LLC ("S&A"), the plaintiff below and Appellee herein, initiated this civil action against EurEnergy Resources Corporation ("EER"), the defendant below and Appellant herein, in the Circuit Court of Wood County, West Virginia (the "circuit court"), contending that EER failed to pay S&A approximately $666,662 for work allegedly performed pursuant to a contract between the parties.[1]

S&A attempted to achieve service of process on EER through the West Virginia Secretary of State (the "SOS"). At the time, EER was not registered to do business in West Virginia. Thus EER had no agent registered with the SOS to accept service of process. At the direction of S&A, the SOS mailed the Summons and Complaint to the general address of EER, which is an address shared by approximately 20 other business entities. S&A did not address the Summons and Complaint to EER's corporate secretary pursuant to W. Va. Code §31D-5-504(b). Celeste Moomaw signed for this mailing. Ms. Moomaw was an administrative assistant employed by New Concept Energy ("NCE"). Ms. Moomaw was not an employee of EER, nor was she authorized to accept service of process on its behalf.[2]

EER did not file an Answer to the Complaint within 30 days. Thereafter, S&A moved for and received a Default Judgment Order, entered January 29, 2009, for $690,153.52, plus costs, fees, and interest. Two weeks after entry of default judgment, EER learned of the order and retained counsel in West Virginia. EER immediately qualified to do business in the State of West Virginia on February 12, 2009, and filed its Motion To Void

1 See Doc. No. 1, Complaint
2 See Doc. No. 00014, Affidavit of Celeste Moomaw, attached as Exhibit A to Motion to Void or Vacate Default

Or Vacate Default Judgment ("EER's Motion") on February 18, 2009 for denial of procedural due process.

On March 26, 2009, S&A filed its Motion To Enforce Settlement Agreement (S&A's Motion"). S&A based this motion on a meeting between party representatives held on January 9, 2009 (before S&A moved for default judgment). EER responded to S&A's Motion on April 7, 2009. A hearing was held before the Honorable Judge J. D. Beane on April 9, 2009, at which time the parties presented arguments on EER's Motion (To Void Or Vacate Default Judgment) and S&A's Motion (To Enforce Settlement Agreement).[3]

The circuit court granted S&A's Motion in an Order dated May 19, 2009. The circuit court held that there was a meeting of the minds regarding settlement between the parties during the January 9, 2009 meeting. Further, that sufficient consideration existed to support a complete, binding, and enforceable settlement agreement in the total amount of $600,000.00. The circuit court did not rule on EER's Motion and to this day has not ruled on that Motion.

On July 1, 2009, S&A moved for the entry of a judgment order. EER responded to that motion and S&A replied. The circuit court granted S&A's motion and entered its Judgment Order on July 28, 2009. The Judgment Order awarded S&A $606,202.00, which included $6,202.00 of attorney's fees.

EER filed its petition for appeal on November 24, 2009. EER's appeal was accepted by this Court on April 5, 2010.

Judgment on Behalf of Eurenergy Resources Corporation.

[3] See Doc. No. 00031, Transcript of hearing.

STATEMENT OF FACTS

EER is a Nevada corporation with its principal place of business in Dallas, Texas. EER is an affiliate of NCE, which brought Carl E. Smith Inc. out of bankruptcy.[4] In June 2008, EER entered into a Master Land Services Contract (the "Contract") with S&A.[5] Per the Contract, S&A agreed to perform certain services that are customarily referred to as "Landman" services.[6]

The Contract provides that S&A will perform only those services specified in written Work Orders. Article 1, Paragraph B of the Contract states, "The specific services to be performed in connection with any particular project shall be specified in a written Work Order...."[7] EER paid S&A for all work performed pursuant to a written work order.[8]

In the fall of 2008, a dispute developed between the parties under the Contract.[9] S&A significantly increased the Landman services it performed, without written work orders.[10] In October 2008, S&A or its counsel sent invoices to Mr. David Morgan in the amount of $376,069.24.[11] Mr. Morgan is a consultant for EER and can be given authority by its Board of Directors to contract on behalf of EER, but is not an officer or director of EER.[12]

Mr. Morgan investigated the invoices and determined some were unauthorized and seemingly excessive. On October 29, 2008, Mr. Morgan sent an email to

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[4] See *In re Carl E. Smith, Inc.*, Case No. 03-22274 (Bankr. S.D. W.Va.).
[5] Doc. No. 00031 at pg 7; See Doc. No. 00013, Memorandum of Law in Support of Motion to Void or Vacate Default Judgment, Exhibit A. Although it entered into this Contract, EER was not registered to do business in the State of West Virginia until February 12, 2009.
[6] See Doc. No. 00013, Exhibit A; Doc. No. 00031 at pg 3.
[7] See Doc. No. 00013, Exhibit A.
[8] Doc. No. 00031 at pgs 11 and 28.
[9] Doc. No. 00031 at pg 3.
[10] Doc. No. 00031 at pg 3.
[11] Doc. No. 00031 at pg 4; See Doc. No. 00020, Defendant's Response to Motion to Enforce Settlement Agreement, Exhibit A.
[12] See Doc. No. 00020, Exhibit A.

S&A's counsel to report his determination that the "approved amount" of the invoices was $182,974.84.[13] Mr. Morgan then received another letter from S&A's counsel dated November 13, 2008 claiming an amount due of $545,506.78. The letter of November 13, 2008 did not provide supporting documentation for this amount.[14]

On December 5, 2008, S&A filed a civil action to recover amounts allegedly due under the contested invoices. S&A attempted to achieve service of process through the SOS, but did not direct the SOS to address the Summons and Complaint to ERR's corporate secretary, as required by W.Va. Code §31D-5-504(b).[15] Instead, S&A directed the SOS to blindly mail the Summons and Complaint to EER's general address in Dallas Texas. EER shares this address with approximately 20 other business entities.[16] Although the Complaint was received at EER's office in Dallas, Texas, it was signed for by Celeste Moomaw, NCE's administrative assistant at the time. Ms. Moomaw was not an employee of EER and was not authorized to accept service of process on its behalf.[17] Thus the unrebutted evidence establishes that (i) S&A did not direct the Summons and Complaint to EER's corporate secretary and (ii) S&A's Summons and Complaint was not received by an agent authorized to accept service for EER. Notwithstanding this, Plaintiff applied for and received a Default Judgment Order on January 29, 2009.[18]

Prior to January 29, 2009 and without knowledge that S&A had filed suit, Mr. Morgan traveled to West Virginia on January 9, 2009 to meet with S&A's representatives in an attempt to resolve the dispute.[19] When Mr. Morgan arrived at the meeting, he was

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[13] See Doc. No. 00020, Exhibit A.
[14] Doc. No. 00031 at pg 4; See Doc. No. 00020, Exhibit A.
[15] Doc. No. 00031 at pg 6.
[16] See Doc. No. 00014.
[17] See Doc. No. 00014; Doc. No. 00031 at pg 8.
[18] See Doc. No. 00007, Default Judgment Order.
[19] Doc. No. 00031 at pg 4; See Doc. No. 00020, Exhibit A.

presented with additional invoices totaling approximately $150,000.00.[20] Mr. Morgan did not have the ability to review records regarding these additional invoices.[21] Thus, by January 9, 2009, S&A had presented EER with invoices totaling approximately $690,000 for which (i) there was not written work order from EER and (ii) S&A failed to procure even one written lease for EER.[22]

Rather than adjourn the meeting without discussion, Mr. Morgan agreed to discuss potential settlement terms under the assumption that the invoices were valid.[23] Mr. Morgan made special note to S&A's counsel that the discussions were subject to "the rule."[24] Mr. Morgan was referring to Rule 408 of the Rules of Evidence, which is substantially the same under the West Virginia Rules of Evidence and the Texas Rules of Evidence, to wit: Conduct or statements made in settlement negotiations regarding a claim are not admissible as evidence to prove liability.

As part of the discussion, Mr. Morgan wrote a note suggesting potential settlement terms.[25] The note included amounts to be paid by EER and NCE, and clearly stated that "Rule 408 Applies." Mr. Doug Wight, the newly appointed President of NCE, attended the meeting with Mr. Morgan strictly as an observer because he had no knowledge of EER's relationship with S&A, nor the invoice dispute.[26]

The circuit court held that (1) Mr. Morgan's handwritten note was a written offer by EER and (2) S&A orally accepted the alleged offer. The circuit court made these determinations despite the fact that the note specified that "Rule 408 Applies."[27] Again,

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[20] Doc. No. 00031 at pg 11; See Doc. No. 00020, Exhibit A.
[21] Doc. No. 00031 at pg 12; See Doc. No. 00020, Exhibit A.
[22] Doc. No. 31 at pg. 22.
[23] Doc. No. 00031 at pg 12; See Doc. No. 00020, Exhibit A.
[24] Doc. No. 00031 at pg 4-5; See Doc. No. 00020, Exhibit A.
[25] See Doc. No. 00020, Exhibit B; Doc. No. 00031 at pg 4-5; See Doc. No. 00020, Exhibit A.
[26] See Doc. No. 00020, Exhibit A.
[27] See Doc. No. 00020, Exhibits A & B; Doc. No. 00031 at pg 4-5.

this is a clear reference to Rule 408 of the Rules of Evidence. Mr. Morgan clearly intended for his notation ("Rule 408 Applies") to preclude any suggestion that the note was a binding settlement offer.[28] Mr. Morgan considered the suggested payment by EER to be within his range of authority, but the terms involving NCE (a publicly traded company) would require approval by NCE's Board of Directors.[29] Mr. Morgan knew he could not bind NCE. He wrote the note and terms strictly to discuss settlement options in the event the invoices were proven to be valid after review and analysis of the supporting records.[30]

After the January 9 meeting adjourned, Mr. Morgan received a letter from S&A's counsel purporting to memorialize settlement terms.[31] The letter contained some terms discussed during the January 9 meeting, but also contained new terms, including entry of judgment against EER. Significantly, the letter recites that the settlement covers this civil action. Mr. Morgan sent S&A's counsel an email message rejecting the terms proposed in the letter.[32]

At the time it obtained a default judgment, S&A did not contend that a settlement had been reached. Only **after** EER challenged the default judgment and service of process did S&A allege that a settlement occurred. The circuit court granted S&A's Motion on May 19, 2009. In its July 28, 2009 Judgment Order, the circuit court awarded S&A $606,202.00. The circuit court charged EER with this entire amount even though the alleged settlement agreement only required EER to pay $100,000. The award also included $6,202.00 in attorney's fees. The attorney's fees were not limited to the work performed in enforcing the alleged settlement agreement. The circuit court again declined to rule on

[28] See Doc. No. 00020, Exhibit A; Doc. No. 00031 at pg 4-5.
[29] See Doc. No. 00020, Exhibit A.
[30] See Doc. No. 00020, Exhibit A.
[31] Doc. No. 00031 at pg 16-17; See Doc. No. 00020, Exhibit C.
[32] See Doc. No. 00020, Exhibit D.

EER's Motion To Void Or Vacate Default Judgment.

ASSIGNMENTS OF ERROR

EER respectfully submits the following assignments of error as its grounds for review:

1. The circuit court lacked jurisdiction to grant S&A's Motion for Enforcement of Settlement Agreement because S&A failed to achieve service of process on EER.

2. The circuit court erred in granting S&A's Motion for Enforcement of Settlement Agreement where S&A failed to prove that EER made an offer of settlement.

3. The circuit court erred in granting S&A's Motion for Enforcement of Settlement Agreement where S&A failed to prove that it accepted the alleged offer rather than making a counteroffer.

4. The circuit court erred in granting S&A's Motion for Enforcement of Settlement Agreement where S&A failed to prove that there was a meeting of the minds between the parties on the essential terms of the alleged settlement agreement.

5. Assuming arguendo that a settlement agreement existed, the circuit court erred in awarding S&A $600,000 where EER was only obligated to pay $100,000 under the alleged settlement agreement.

6. Assuming arguendo that a settlement agreement existed, the circuit court erred in awarding S&A legal fees incurred for efforts other than enforcing the alleged settlement agreement.

TABLE OF AUTHORITIES

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Stark Elec., Inc. v. Huntington Hous. Auth., 375 S.E.2d 772 (W. Va. 1988) 17

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Swaim v. Moltan Co., 73 F.3d 711, 719 (7th Cir.) 11

Triad Energy Corp. of West Virginia, Inc. v. Renner,

600 S.E. 2d 285 (W. Va. 2004) 14, 18

Walker v. West Virginia Ethics Commission, 492 S.E.2d 167 (W. Va. 1997) 10

Woodall v. International Bd. of Elec. Workers, Local 596,

453 S.E.2d 656, 661 (W. Va. 1994). 11

DISCUSSION OF LAW

I. Standard of Review

In *Messer v. Huntington Anesthesia Group, Inc.*, this Court set the standard of review to evaluate a lower court's order enforcing a settlement agreement.[33] The review "is approached with three standards in mind." The standards are summarized in syllabus point two of *Walker v. West Virginia Ethics Commission*:

> In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.[34]

This Court elaborated on this general review process in syllabus point one of *State ex rel. Cooper v. Caperton,* by stating that "findings of fact are reviewed for clear error and conclusions of law are reviewed *de novo*. However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*."[35]

II. The Circuit Court Lacked Jurisdiction To Enforce A Settlement Of This Civil Action Because S&A Failed To Achieve Service Of Process.

The circuit court's orders must be reversed because the circuit court never established jurisdiction over EER. "In order to render a valid judgment or decree, a court must have jurisdiction both of the parties and of the subject matter and any judgment or

[33] 664 S.E.2d 751 (W. Va. 2008).
[34] 492 S.E.2d 167 (W. Va. 1997).
[35] 470 S.E.2d 162 (W. Va. 1996).

decree rendered without such jurisdiction will be utterly void."[36] Further, jurisdiction "must affirmatively appear from the record."[37]

In the instant case, the circuit court lacked jurisdiction because S& A failed to achieve proper service of process on EER. "Valid service of process is a prerequisite to a district court's assertion of personal jurisdiction."[38] And "a judgment is void if the court that rendered judgment lacked jurisdiction over...the parties."[39] S&A claims it served EER under W. Va. Code § 56-3-33, but fail to address W. Va. Code § 31D-5-504(b). EER challenged the circuit court's jurisdiction in its Motion to Void or Vacate Default Judgment. While the circuit court held a hearing on EER's Motion, it never ruled on whether service was properly effected. Thus the circuit court never determined that EER was properly served. Jurisdiction over EER is not clearly reflected in the record of this case.

A. Service Of Process Was Not Valid Under The West Virginia Long-Arm Statute.

S & A contends that service of process was valid under the West Virginia long-arm statute set forth at W. Va. Code § 56-3-33. It further contends that blind service on the SOS without directing service on EER's corporate secretary in effect perfects service on EER. Given the undisputed facts in this case, these arguments fail. Here, the Summons and Complaint was received by an administrative assistant for NCE, an affiliate of EER. By directing the SOS to blindly mail process to EER's general address, without directing that the process be delivered to its corporate secretary pursuant to W. Va. Code §31D-5-504(b), S&A failed to take reasonable steps to insure that EER would get actual notice of process.

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[36] *Woodall v. International Bd. of Elec. Workers, Local 596*, 453 S.E.2d 656, 661 (W. Va. 1994).
[37] *Dixon v. Hesper Coal & Coke Co.*, 130 S.E. 663, 666 (W. Va. 1925).
[38] *Choice Hotels Intl., Inc. v. Bonham*, 1997 U.S. App. LEXIS 26909 at 3 (4th Cir. 1997), citing *Swaim v. Moltan Co.*, 73 F.3d 711, 719 (7th Cir.).
[39] *See Choice Hotels Intl., Inc.*, 1997 U.S. App. LEXIS 26909 at 3.

In *Mullane v. Central Hanover Bank & Trust Co.*, the Supreme Court articulated the standard for procedural due process under the United States Constitution:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the [defendant] might reasonably adopt to accomplish it.

339 U.S. 306 (314-315) (1950) (*citations omitted*).

Blind service on the SOS, without directing the process to be delivered to EER's corporate secretary is a 'mere gesture'.[40] In *Evans*, this Court held service of process on the Secretary of State ineffective when the service was returned to the Secretary of State and marked "insufficient address."

> Under the provisions of W. Va. Code §56-3-31, in order for a duly authorized agent to accept service of process on behalf of a non-resident defendant, there must be clear, unambiguous and expressed terms on the notice of service of process sent by the SOS to the nonresident defendant's duly authorized agent that the copy of the summons and complaint are not being served on the duly authorized agent in his individual capacity, but on the nonresident defendant. Further, the nonresident defendant's duly authorized agent must acknowledge on the return receipt signed by said individual that service of process has been accepted on behalf of the nonresident defendant. [41]

Here, there was nothing on the certified mailing to notify Celeste Moomaw that it was directed to EER's corporate secretary. Thus, service of process was not achieved because Ms. Moomaw was not EER's agent for service of process[42]

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[40] *Id. See also Evans v. Holt*, 457 S.E.2d 515 (W.Va. 1995); *Conner v. Pound, Conner, Lucas, Andrecozzi, Inc.*, 554 S.E.2d 120 (W.Va. 2001).
[41] *Evans*, Syllabus Pt. 3.
[42] See Doc. No. 00014.

B. W. Va. Code Section 31D-5-504 Requires That Process Must Be Addressed to the Corporate Secretary.

Service of process was not valid because S&A did not direct the SOS to address the process to EER's corporate secretary. W. Va. Code § 31D-5-504. Section 31D-5-504 specifically pertains to service on a corporation. It provides, in relevant part, as follows:

> (b) If a corporation has no registered agent, or the agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail, return receipt requested, **addressed to the secretary of the corporation** at its principal office.... (emphasis added).

Here, the evidence establishes that S&A did not address the process to EER's corporate secretary and the process was not received by EER's corporate secretary. Accordingly, service of process was not achieved on EER.

In opposing EER's Motion in the circuit court, S&A attempted to completely ignore W. Va. Code §31D-5-504, arguing that "West Virginia does not require actual notice for service of process to be valid where the statutory requirements for notification have been met," relying on *Federal Deposit Ins. Corp. v. Schaffer*.[43] In *Schaffer*, the complaint was served on the West Virginia Secretary of State pursuant to W. Va. Code §56-3-33(c). The SOS mailed the summons and complaint by certified mail to Schaffer at his home address. This certified mailing was receipted for by Schaffer's mother-in-law (Lipton), who resided with him. In an affidavit, Schaffer asserted that his mother-in-law did not deliver the registered letter to him or tell him it had been received. However, Schaffer did not produce an affidavit from his mother-in-law. On these facts, the 4th Circuit observed that

> [u]nder the West Virginia statute, Lipton, as a member of the household and who receipted for mail addressed for the defendant, constituted his "duly authorized agent." Shaffer's denial of receipt, not supported by any affidavit from Lipton or by any other member of the household indicating what

[43] Doc. No. 17 at pg 3 citing FDIC v. Schaffer, 731 F.2d. 1134 at 1137 (4th Cir. 1984).

> became of the certified mail, was insufficient to overcome the presumption of notice of delivery to the addressee.[44]

Here, by contrast, EER offered the Affidavit of Celeste Moomaw, who explained what became of S&A's certified mailing. Under West Virginia law, this overcomes the presumption of delivery to EER.

Since S&A did not achieve service of process, the circuit court never established jurisdiction over EER. Thus, jurisdiction is not reflected in the record. For these reasons, the circuit court's order should be reversed.

III. There Was No Agreement.

The circuit court erred in determining that the parties formed a settlement agreement. "Settlement agreements are to be construed as any other contract."[45] All the facts surrounding the parties' negotiation show that the requirements of a valid contract were not satisfied. First, there was no offer. Second, even if there was an offer, S&A did not accept, but instead submitted a counteroffer. Finally, no contract was formed, because the parties did not have a meeting of the minds on its terms.

A. EER Did Not Make A Written Offer Of Settlement.

The circuit court erred in finding that Mr. Morgan prepared a written offer of settlement during the January 9 meeting. The circuit court's error results from its failure to view the facts as a whole.

The circuit court relied on emails from Mr. Morgan to S&A's counsel prior to January 9 as evidence that Mr. Morgan made a settlement offer on January 9. Mr. Morgan wrote in the emails that he wanted to meet with S&A and work toward a settlement.[46] The

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[44] *Schaffer*, 731 F.2d at 1137-38.
[45] *See Triad Energy Corp. of West Virginia, Inc. v. Renner*, 600 S.E.2d 285, 288 (W. Va. 2004).
[46] See Doc. No. 00016, Exhibit A.

circuit court concluded that Mr. Morgan must have made a settlement offer at the January 9 meeting as he expressed a desire to settle. However, when Mr. Morgan arrived at the January 9 meeting, S&A's counsel presented an additional $150,000.00 of new invoices.[47] As noted in his Affidavit, Mr. Morgan obviously could not investigate and verify the invoices during the meeting.[48] Mr. Morgan certainly could not discuss the invoices with EER's Board of Directors and NCE to evaluate a settlement offer based on them. The circuit court held that "these invoices did not apparently need substantiated, otherwise Mr. Morgan's offer would have been lower." "Mr. Morgan's offer" refers to the note written by Mr. Morgan at the meeting. Apparently, the circuit court's reasoning is that if Mr. Morgan needed to investigate the new invoices, he would not have considered them in his written amount. This reasoning is clearly erroneous.

The dollar amount in Mr. Morgan's note is not evidence that the new invoices required no investigation. In fact, Mr. Morgan's note should not have been considered to be evidence of anything. The note contains no language indicating an intent to make an offer to settle; in fact, the words "offer," "settle," "compromise" are no where to be found on the note. To the extent that the note is evidence at all, it is evidence that no offer was made. When presented with the new invoices, Mr. Morgan knew the parties could not reach a settlement at the meeting. Mr. Morgan could have packed everything up and travelled back to Texas. Instead, he decided to explore what terms might be acceptable if the new invoices were substantiated. Thus, the note was written under the assumption that the new invoices were valid.

Mr. Morgan intended his note to be for discussion purposes and did not want

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[47] Doc. No. 00031 at pg 11; See Doc. No. 00020, Exhibit A.
[48] Doc. No. 20, Exhibit A.

it used against EER in the future. To indicate his intent, Mr. Morgan referenced Rule 408 of the Rules of Evidence on his note. He was under the impression that by adding "Rule 408 Applies" to the note, attorneys and courts would know the note was not a written settlement offer. The circuit court improperly discounted Mr. Morgan's use of the phrase "Rule 408 Applies," holding that according to Mr. Morgan's prior emails, his note was not intended for discussion purposes only. Here, the circuit court clearly erred by ignoring the fact that S&A submitted additional invoices in the amount of $150,000 at the January 9 meeting. It is simply not reasonable for the circuit court to assume that Mr. Morgan could be prepared to discuss a settlement which would include invoices which he had not been given a chance to review before the meeting. The circuit court erred in construing Mr. Morgan's handwritten note as a settlement offer.

In addition, Mr. Morgan was unable to make a binding offer on behalf of NCE. The hypothetical stated in the note would require NCE to sign a Promissory Note for $500,000.[49] Mr. Morgan did not have authority to make an offer of compromise on behalf of NCE as he is not an officer or director of NCE. More importantly, NCE was not a party to the Master Land Services Contract between S&A and EER, nor is it a party to this action. Because of this disconnect, the circuit court erred by finding that Mr. Morgan had the authority to bind NCE to pay any amount, and further by imputing that EER could be liable for an amount attributed to NCE. All the evidence leads to the contrary. This is further evidence that Mr. Morgan was simply discussing potential terms for a settlement.

For all the foregoing reasons, the circuit court erred in holding that EER made a written offer of settlement.

[49] See Doc. No. 00020, Exhibit B.

B. If There Was A Written Offer, S&A Did Not Accept But Instead Made A Counter Offer.

The circuit court ruled that S&A's sole member, Ms. Gough, orally accepted EER's written offer at the January 9 meeting. The circuit court further held that because of this acceptance, the letter from S&A's counsel to Mr. Morgan after the meeting was not a counteroffer. The court reasoned that (1) the amount of settlement and the method of payment were two separate issues, (2) the parties settled the first issue at the January 9 meeting, and (3) the letter from S&A's counsel proposing terms of payment (including entry of judgment against EER for $600,000) did not negate the settlement. The circuit court's reading of the note and the January 9 letter is clearly erroneous.

The January 9, 2009 letter proposed additional material terms and thus was a counteroffer to any alleged offer. "A proposition to accept [an offer] on terms varying from those offered is a rejection of the offer, and a substitution in its place of the counter proposition."[50] Additionally, such a rejection and substitution "puts an end to the negotiation so far as the original offer is concerned."[51] The letter sent by Plaintiff's counsel stated that EER must agree to entry of judgment. This is an additional material term that was not provided for in the alleged offer. The circuit court disregarded this fact, stating that the amount of settlement and method of payment are separate issues. The court indicated these separate issues can be settled separately. As was the case here, the issues must be settled together because the terms of one may affect the terms of the other. The proposition that EER would agree to entry of judgment materially changes the alleged settlement terms. Thus, the new term changed the negotiation and was effectively a counteroffer to any

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[50] *Stark Elec., Inc. v. Huntington Hous. Auth.*, 375 S.E.2d 772 (W. Va. 1988); *John D. Stump & Assocs. v. Cunningham Mem. Park*, 419 S.E.2d 699 (W. Va. 1992).
[51] *Stark Elec., Inc.*, 375 S.E.2d at 774; *John D. Stump & Assocs.*, 419 S.E.2d at 705.

alleged offer by EER.

The circuit court erred in failing to mention the new settlement term and failing to deem the proposition of that term a counteroffer. Thus, the circuit court's May 19 Order and its July 28, 2009 Judgment Order must be reversed.

C. The parties' minds never met on the term of a settlement.

The alleged settlement offer is unenforceable because there was no meeting of the minds. The circuit court determined there was a meeting of the minds between the parties, but only states that both parties understood what Mr. Morgan wrote on his note. The court did not address whether there was a meeting of the minds as to the effect of the note. Nor did the court address whether the parties' minds met on all terms, such as the entry of judgment. There was not a complete meeting of the minds and thus no settlement occurred.

An indispensible prerequisite to formation of a contract is a meeting of the minds of the parties.[52] This Court has specifically applied the "meeting of the minds" requirement to settlement agreements and held that a court may **only** enforce a settlement if there has been a **definite** meeting of the minds.[53] To satisfy the meeting of the minds requirement, the parties must have the same understanding of the terms of the agreement allegedly reached.[54]

In *Riner v. Newbraugh,* the parties agreed to settle their action at mediation. Subsequently the plaintiffs refused to sign the final agreement prepared by the defendants

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[52] *See Triad,* 600 S.E.2d at 288; citing syl. pt. 2, *Sanson v. Brandywine Homes*, 599 S.E.2d 730 (W. Va. 2004); syl. pt. 1, *Burdette v. Burdette Realty Improvement*, 590 S.E.2d 641 (W. Va. 2003); syl. pt. 4, *Riner v. Newbraugh*, 563 S.E.2d 802 (W. Va. 2002).
[53] *See Messer v. Huntington Anesthesia Group, Inc.*, 664 S.E.2d 751 at 759 (W.Va. 2008); citing *Triad*, , 600 S.E.2d at 288; *Riner*, 563 S.E.2d at 804; *State ex rel. Evans v. Robinson*, 475 S.E.2d 858 (W. Va. 1996); *Sprout v. Board of Educ. of County of Harrison*, 599 S.E.2d 764 (W. Va. 2004). *Burdette*, 590 S.E.2d at 645.
[54] *Messer*, 664 S.E.2d at 759.

because it included terms that were not previously discussed.[55] The defendants moved to enforce the agreement and the lower court granted the motion. This Court reversed, holding that the lower court committed error "by requiring the [plaintiffs] to sign an agreement that differed in substance from the agreement reached as a result of the mediation conference."[56] Further, this Court held (1) there was no meeting of the minds with regard to the additional terms and (2) the meeting of the minds contractual element was so critical and necessary that the plaintiffs could not be required to sign the agreement.[57]

Similarly, in the case at hand, there was clearly no meeting of the minds between the parties. First, Mr. Morgan did not intend his note to be a written offer.[58] Second, the letter from Plaintiff's counsel indicates that Plaintiff expected EER to agree to an entry of judgment.[59] This was an additional term not included in the alleged offer. Mr. Morgan's response email explicitly stated that such a term was unacceptable.[60] For the parties to disagree on such a material term indicates that they were not on the same page when the alleged contract was being discussed and thus there was no meeting of the minds. Therefore, the circuit court erred in finding the meeting of the minds contractual element was satisfied.

Significantly, S&A also did not consider that a settlement agreement had been reached. Pursuant to the alleged contract, the first payment in the amount of $100,000.00 was due January 15, 2009.[61] Subsequent payments in the same amount would have been due February 15 and March 15. Despite these large sums of money not being paid, S&A did

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[55] *Riner*, 563 S.E.2d at 804.
[56] *Riner*, 563 S.E.2d at 804.
[57] *Id.*
[58] See Doc. No. 00020, Exhibit A.
[59] See Doc. No. 00020, Exhibit C.
[60] See Doc. No. 00020, Exhibit D.

not seek enforcement of the alleged settlement agreement. S&A did not act as if an agreement was reached. Instead, S&A acted as if there was **no** settlement and filed a motion for default. When its motion was challenged, S&A sought another way around litigation on the merits by asserting that a settlement was reached. Thus, if there was any meeting of the minds, it was that there was **no** agreement.

For all the foregoing reasons, the circuit court erred in holding an agreement was reaching and in granting S&A's motion to enforce a settlement agreement. Thus, the circuit court's May 19 order must be reversed.

D. The Final Judgment Order Is Erroneous.

The circuit court's Order and Judgment Order enforcing the alleged Settlement Agreement must be reversed because it is inconsistent with the alleged settlement agreement. In its May 19 Order, the circuit court held that the parties formed a settlement agreement. The circuit court held that Mr. Morgan's note represented that settlement agreement. The circuit court recognized that Mr. Morgan's note required EER to pay $100,000 and required NCE to sign a promissory note for $500,000. But the circuit court's final Judgment Order charged EER with the entire $600,000. The final Judgment Order does not mention NCE. Further, NCE is not a party to the lawsuit and clearly not subject to the circuit court's jurisdiction. The circuit court cannot deem the alleged agreement valid in one order, and in a second order grant a judgment completely inconsistent with the alleged settlement agreement.

IV. S&A Is Not Entitled To Attorney's Fees.

The circuit court entered a final Judgment Order on July 28, 2009. The court awarded S&A $606,202 of which $600,000 was awarded pursuant to the alleged settlement

[61] See Doc. No. 00020, Exhibit B.

agreement. The lower Court also awarded $6,202 for S&A's attorney's fees. First, the court erred in holding that EER acted in bad faith when it challenged the validity of the settlement agreement. Then the circuit court erred when it awarded S&A legal fees incurred for reasons other than pursuing the settlement agreement.

A. EER Did Not Act In Bad Faith.

"As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement."[62] But a court may award a prevailing litigant his or her reasonable attorney's fees "when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons."[63] EER's conduct did not reach this high standard and therefore the S&A was not entitled to an award of attorney's fees.

This Court has twice in recent years addressed the issue of when an award of attorney's fees is proper in a case involving a breached settlement agreement. First, in 2004, this Court affirmed a circuit court's award of attorney's fees in *Sanson v. Brandywine Homes, Inc.*[64]: "Having determined that a valid settlement agreement was made, we do not believe the circuit court abused its discretion by ordering the [losing party] to pay [the prevailing party's] attorney's fees and costs incurred to enforce the settlement."[65] Four years later, a circuit court found an enforceable settlement agreement and granted the prevailing party an award of attorney's fees based on *Sanson*. However, this Court granted a writ of prohibition on the award.[66] In *Horkulic*, this Court drew a distinction between the simple facts of *Sanson* and the complicated facts of the case then at hand. In *Horkulic v.*

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[62] Syl. pt. 2, *Sally-Mike Properties v. Yokum*, 365 S.E.2d 246 (W. Va. 1986).
[63] Syl. pt. 3, *Sally-Mike Properties*, 365 S.E.2d 246.
[64] 599 S.E.2d 730 (W. Va. 2004).
[65] *Sanson*, 599 S.E.2d at 313.
[66] *See Horkulic v. Galloway*, 665 S.E.2d 284 (2008).

Galloway, this Court ultimately held that an award of attorney's fees is not automatic in a case involving a breached settlement agreement, but rather "an effort must be made to determine the extent to which the losing party acted [in bad faith, vexatiously, wantonly or for oppressive reasons]."[67]

The complexity of the current case is very similar to the complexity of *Horkulic*. Because of this complexity, the circuit court erred in holding that EER acted in bad faith and in granting S&A an award of attorney's fees. This Court defined the *Sanson* facts as a "very simple, uncomplicated course of events."[68] The defendant made a settlement offer. The plaintiffs' attorney communicated an acceptance of that offer. The defendant tendered a settlement agreement and check. Three months later, the plaintiffs returned the check and claimed a settlement agreement was never made. This Court stated that there was "apparently minimal opportunity in *Sanson* for misunderstanding, miscommunication, or a legitimate question regarding the parameters of the settlement contemplated by the parties."[69] To the contrary, this Court described *Horkulic* as "littered with examples of uncertainty with regard to the precise parameters of the settlement, its terms, and the consent of the integral parties."[70] In *Horkulic*, counsel for all parties held settlement discussions. Counsel for one of the parties objected to one of the proposed terms. The plaintiffs moved for, and were granted, enforcement of the settlement agreement. The lower court also granted an award of attorney's fees against a defendant, but this Court granted that defendant's writ of prohibition. The opinion highlighted the confusion surrounding the settlement and stated that no finding was made as to whether that defendant acted with a fraudulent or oppressive purpose or in bad faith, wantonly, or

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[67] *Id* at 298.
[68] *Horkulic*, 665 S.E.2d at 298.
[69] *Id.*

vexatiously.[71]

In the case at hand, Mr. Morgan discussed settlement terms under the hypothetical that all S&A's claims were valid. Mr. Morgan made a note on the proposed settlement document ("Rule 408 Applies"), which he thought indicated the discussions were for hypothetical purposes only and not to be used in court. Mr. Morgan proposed terms on behalf of a company (NCE) that he had no authority to bind, and that is not a party to this action. Then S&A demanded a settlement term the parties had never discussed. Finally, S&A filed for default judgment rather than immediately moving to enforce the alleged settlement agreement, which is evidence in and of itself that there was a legitimate question as to the existence or parameters of the settlement. The facts are far from simple, but rather rise to the level of *Horkulic*. They are uncertain with regard to the parameters of the settlement, its terms, and the consent of all integral parties.

In order to obtain an award of attorney's fees, S&A was required to prove that EER acted in bad faith, wantonly, vexatiously, or for oppressive reasons. EER did not act in any such way, but rather acted as if no settlement agreement was ever formed. The confusion surrounding the settlement shows that the settlement was far from simple and EER was justified in contending that there was no agreement. Thus, the circuit court erred in granting S&A's attorney's fees.

B. Even If Attorney's Fees Are Justified, S&A Is Not Entitled To Recover Fees Unrelated To The Settlement Enforcement.

Even if the circuit court was correct in determining that EER acted in bad faith, wantonly, vexatiously, or for oppressive reasons, the court erred in failing to limit the award to fees incurred while pursuing enforcement of the settlement. S&A filed a motion

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[70] *Horkulic*, 665 S.E.2d at 298.
[71] *Horkulic*, 665 S.E.2d at 299.

for default and a motion to enforce the settlement agreement. S&A received a default judgment, so EER filed a motion to vacate, to which S&A responded. The circuit court awarded S&A's attorney's fees related to all of the above-mentioned motions and responses, amounting to $6,202.00. Of that total amount, it appears only $1,359.75 was incurred while pursuing enforcement of the settlement.

Even if the circuit court correctly determined that S&A was entitled to reimbursement of attorney's fees, it should have limited that award to, at most, $1,359.75. In good faith, EER filed its motion to vacate the default judgment. While the circuit court never ruled on EER's motion, it awarded S&A's fees incurred by responding to the motion. EER's contest of the default hardly amounted to bad faith, vexatiousness, wantonness, or oppressive conduct. Thus, the award of attorney's fees was excessive and must be limited to the amount related to enforcement of the settlement.

CONCLUSION

The circuit court's order enforcing a settlement agreement must be reversed for multiple reasons. First and foremost, the circuit court never established jurisdiction over EER. Second, no binding offer was ever made. Even if EER made a formal offer, S&A never accepted this offer, but instead submitted a counteroffer that terminated its right of acceptance. Finally, S&A added an additional term after January 9, 2009 meeting that EER neither considered nor agreed to. Thus, the parties never had a meeting of the minds such that a contract was formed.

The circuit court's final Judgment Order must be reversed. The order charges EER with $600,000 even though the alleged settlement agreement only obligated EER to pay $100,000. The circuit court's grant of $6,202 in attorney's fees should also be set aside. Even if there was a settlement agreement, the complicated facts surrounding the

parameters and terms of the agreement show that EER was not acting in bad faith, vexatiously, wantonly, or with oppressive reasons when it argued that no settlement agreement was created. In addition, S&A is certainly not entitled to attorney's fees incurred while obtaining a default judgment and responding to EER's motion to vacate that judgment because EER was again not acting in bad faith, vexatiously, wantonly, or with oppressive reasons.

PRAYER FOR RELIEF

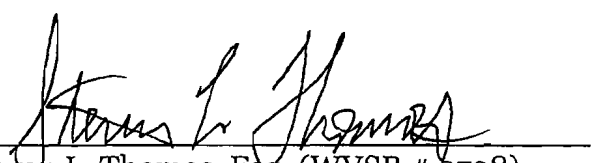
WHEREFORE, EurEnergy Resources Corporation prays that the Orders of the Circuit Court of Wood County, West Virginia dated May 19, 2009 and July 28, 2009 be reversed, that the judgment in favor of the S&A Property Research, LLC be vacated, and that this matter be remanded to the circuit court for a trial on the merits of the claim of S&A Property Research, LLC.

Dated: May 5, 2010

Respectfully submitted,

EURENERGY RESOURCES CORPORATION

by Counsel,



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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

S&A PROPERTY RESEARCH, LLC,
a West Virginia limited liability company,

Plaintiff, Respondent,

v. No.: 35523

EURENERGY RESOURCES CORPORATION, a foreign corporation,

Defendant, Petitioner,

CERTIFICATE OF SERVICE

I, **STEVEN L. THOMAS**, counsel for Petitioner, EurEnergy Resources Corporation, hereby certify that on this 5th day of May, 2010, I served a true copy of the attached **APPELLATE BRIEF ON BEHALF OF APPELLANT EURENERGY RESOURCES CORPORATION** upon counsel of record, as indicated below, by mailing a true copy thereof via the United States mail, in a postage paid envelope:

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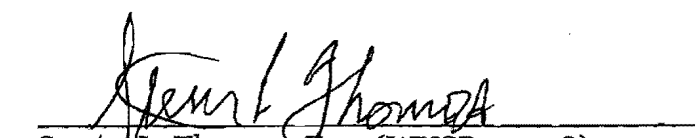

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