

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

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

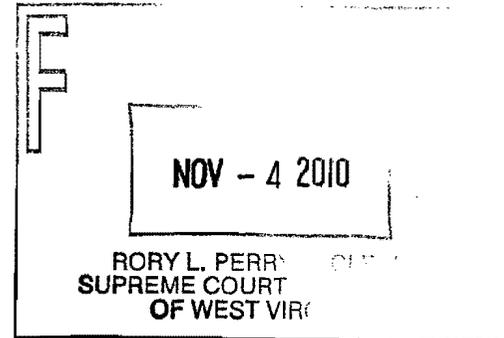
Plaintiff, Appellee,

v.

**EURENERGY RESOURCES
CORPORATION,** a foreign
corporation,

Defendant, Appellant.

Docket No.: 35523



**REPLY BRIEF ON BEHALF OF
APPELLANT EURENERGY RESOURCES CORPORATION**

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November 4th, 2010

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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 submits this Reply Brief in further support of its position that the Wood County Circuit Court's orders entered May 19, 2009 and July 28, 2009 are unsupported by the evidence adduced through the motions and at the hearings, and are directly contrary to the law of West Virginia. For the reasons stated herein and in Appellant's Brief, Appellant prays for the reversal of the orders.

INTRODUCTION

As the Court is aware, this dispute arose when S&A Property Research, LLC ("S&A" or "Appellee") unilaterally escalated the services it performed for EurEnergy Resources Corporation ("EER" or "Appellant") without proper written work orders. Appellee is correct that one written work order existed. But Appellee is wrong when contending EER did not pay the amount due under that single written work order.

The Appellee's and circuit court's understanding of the facts seems to run off track most significantly when discussing the January 9, 2009 meeting. EER's representative Dave Morgan emailed S&A's counsel on December 19, 2008 to say he would like to meet and settle the matter. The parties scheduled a meeting for January 9, 2009. To that point, S&A had presented Mr. Morgan with invoices totaling \$376,069.24. S&A's counsel actually claimed a total amount due of \$545,506.78. After researching the invoices, Mr. Morgan concluded that S&A was owed \$182,974.84.¹ Thus when Mr. Morgan expressed his intention to meet and settle the matter, he expected at gap of, at most, \$362,531.94.

Appellee and the circuit court place all emphasis on Mr. Morgan's intent prior to the January 9 meeting. They do not consider the factors that changed the purpose of that meeting. When Mr. Morgan arrived at the meeting, S&A surprised him with additional invoices totaling approximately \$150,000.00.² Mr. Morgan was not able to investigate these invoices as he had investigated the others. He was not about to pay thousands of extra dollars based on his adversary's unsubstantiated claim. As evidenced by this litigation, Mr. Morgan's best move would have been to pack up his things and return to Texas without uttering a word. Instead, he decided to stay and explore potential settlement terms that S&A may be willing to accept if their newly-presented invoices proved to be valid. Thus the January 9 meeting changed from a settlement conference to a hypothetical discussion.

When emphasizing what actually happened at the January 9 meeting, Appellee's and the circuit court's missteps are clear. EER never extended a written settlement offer. And logically, EER never attempted to rescind such a written settlement offer.

¹ See Doc. No. 00020, Defendant's Response to Motion to Enforce Settlement Agreement, Exhibit A.

² Doc. No. 00031, Transcript of hearing, at pg 11; See Doc. No. 00020, Exhibit A.

ARGUMENT

I. **The Circuit Court Lacked Jurisdiction To Enforce A Settlement Of This Civil Action.**

Appellee fails to recognize that the circuit court did not rule on jurisdiction. The circuit court's order granting Appellee's motion to enforce a settlement does not hold that the court established jurisdiction over EER. The circuit court did discuss jurisdiction in its default judgment order, but Appellee and the circuit court peculiarly act as if that order never existed. Even considering the default judgment order, EER filed a motion to vacate that order and challenged jurisdiction therein. The circuit court refused to rule on EER's motion. Thus the circuit court never conclusively established jurisdiction over EER and its order enforcing settlement must be reversed.

Appellee completely fails to address the fact that the method it chose to attempt to serve EER operated to deny due process. Appellee's semantical argument distinguishing 'service of process' from 'notice of service of process' completely ignores the point: the method it chose to attempt to serve EER was not reasonably calculated to inform EER of the commencement of this action. "Both federal and state due process clauses require that a party to a law suit be afforded adequate notice [reasonably calculated to reach him] and a realistic opportunity to be heard in his own defense."³ To that end, in this case, W. Va. Code § 31D-5-504(b) must be read *in pari materia* with W. Va. Code § 56-3-33. The fact that § 31D-5-504(d) provides that this "section does not prescribe the only means, or necessarily the required means, of serving a corporation" does not sanction the blind service attempted by Appellee. Service can be accomplished by personal delivery, and that would have certainly satisfied due process. As noted by the Supreme Court in *Mullane*, "Personal service of written notice within the jurisdiction is the classic form of notice always adequate

³ *State ex rel. Thomas v. Neal*, 171 W. Va. 412, 413, 299 S.E.2d 23, 25 (1982).

in any type of proceeding.”⁴ Today, in the age of the Internet, it takes only a minute to locate the name of Eurenergy's registered agent for service of process. To satisfy procedural due process, “the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”⁵ Quite simply, the means employed by Appellee does not satisfy this standard. Rather, blindly mailing process to a general address, without even taking the simple step of addressing the notice to EER's Corporate Secretary (as the statute requires) is a means employed by one seeking to ambush its opponent and not afford it a fair chance to appear and defend its interest.

II. There Was No Agreement.

Appellee and the circuit court ignore the critical fact that the so-called “offer” contained these words: “Rule 408 applies.” The circuit court committed clear error in concluding that a contract of settlement was formed based on this hand written document.

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

Appellee and the circuit court rely almost exclusively on Mr. Morgan's email prior to the January 9 meeting. As Appellee argues, and as EER concedes, Mr. Morgan originally intended to settle the matter on January 9. But as EER repeats, and as Appellee fails to understand, the surprise presentation of \$150,000.00 worth of invoices changed Mr. Morgan's intent. On January 9, he no longer intended to settle the dispute because he was not willing to pay for invoices based only on his adversary's claims. As with the previous invoices, he required time to investigate.⁶

Mr. Morgan chose to discuss potential settlement terms that S&A might accept if the new invoices proved valid. Upon receiving the surprise, Mr. Morgan could have—and now

⁴ See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

⁵ See *Mullane*, 339 U.S. at 315.

⁶ Doc. No. 20, Exhibit A.

it is clear he should have—gotten back on the plane to Texas without discussion. Instead he chose to stay and make the most of the meeting.

Appellee argues that if Mr. Morgan did not intend to make an offer, he would have said so when Ms. Gough allegedly accepted the supposed offer. However, if Mr. Morgan did not intend to make a formal offer, (and the context of the hand written note makes that clear) Ms. Gough's indication that those terms would be acceptable does not any require response from Mr. Morgan. The circumstances imply the parties were discussing a hypothetical; if the new invoices proved valid, Ms. Gough was willing to accept the terms discussed. Similarly, Mr. Wight had no reason to question Mr. Morgan's use of New Concept Energy ("NCE"). Mr. Morgan's hypothetical terms obligated NCE to pay \$500,000.00. Appellee argues that if Mr. Morgan had no authority to bind NCE, Mr. Wight would have spoken up. But again, believing these were hypothetical terms, Mr. Wight had no reason to intercede.

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

Mr. Morgan made no binding settlement offer that Ms. Gough could accept. Ms. Gough's gesture of agreement was to hypothetical terms of settlement. Later, S&A's counsel contacted Mr. Morgan stating that S&A would require an agreed entry of judgment. Whether hypothetical or binding, this was not a term EER would accept. Appellee and the circuit court severely downplay the significance of this new term. The entry of judgment does not only affect the method of payment, but affects what EER is willing to pay. Thus even assuming *arguendo* that EER made an offer, that offer ended when S&A proposed a new, material term.

C. The parties' minds never met.

Appellee argues that the record is devoid of any evidence that there was no meeting

of the minds. This is clearly erroneous; the record is replete with evidence that the parties were not on the same page. As just discussed, S&A suggested that it would require an agreed entry of judgment. This term was never discussed by the parties and EER would never agree to it. Second, EER understood that under the hypothetical terms, NCE would fund most of the payments. But S&A argues that EER should pay the entire settlement. Finally, if there was a meeting of the minds, it was that there was no settlement. The alleged settlement agreement called for \$100,000.00 payments every month beginning January 15, 2009. When January 15th passed without a payment, S&A did not say a word. Instead, S&A filed a motion for default.

This Court has held that a court may **only** enforce a settlement if there has been a **definite** meeting of the minds.⁷ Here, the evidence clearly demonstrates that there definitely was no meeting of the minds.

D. The Final Judgment Order Is Erroneous.

Appellee argues that this Court should not consider EER's challenge to the circuit court's final Judgment Order. Appellee's position is that EER did not object to the circuit court's order holding EER responsible for the entire settlement payment even though the agreement enforced only required EER to pay \$100,000.00 of the \$600,000.00. Appellee also argues that EER did not file a motion to alter the judgment under Rule 59 of the West Virginia Rules of Civil Procedure.

First, to charge EER with the responsibility to foresee what the circuit court did in this case is unreasonable. EER could not fathom that the circuit court would enter a final judgment order completely inconsistent with the very settlement agreement it was claiming

⁷ See *Messer v. Huntington Anesthesia Group, Inc.*, 664 S.E.2d 751 at 759 (W.Va. 2008) (emphasis added); 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.

to enforce. EER's first response to the circuit court's order was EER's objection in its Petition for Appeal to this Court.

Appellee's suggestion that EER had a duty to file a Rule 59 motion is unfounded.⁸ Additionally, Appellee's citations are inapplicable.

In *O'Neal v. Peake Operating Co.*, two separate pre-trial orders stated that the defendant was a trespasser and that the defendant agreed to liability. On appeal after the second trial, this Court held that the defendant could not then challenge a finding of trespasser liability.⁹ *State Road Commission v. Ferguson* regards objections to direct examination testimony during trial.¹⁰ Here, EER objected to the circuit court's final Judgment Order in EER's first filing post entry—its Petition for Appeal to this Court. EER was not required to file any other motion or response and its assignment of error should be heard.

Appellee next argues that EER should be held responsible for the entire settlement, suggesting Mr. Morgan had authority to bind NCE and Mr. Wight did not object at the January 9 meeting. Assuming *arguendo* that Appellee's arguments are true, they would actually support EER's contention that it should not be liable for NCE's share of the settlement. Appellee suggested, and the circuit court agreed, that the parties entered into a binding and enforceable settlement agreement, by which NCE was to pay \$500,000.00 of the \$600,000.00 settlement. Even if the Court accepts Appellee's argument that Mr. Morgan had authority to bind NCE to this payment, there is a gap in Appellee's train of thought. Logically, Appellee was required to join NCE to this action if it believed a settlement had been reached.

⁸ Syl. Pt. 2, *Parkway Fuel Serv., Inc. v. Pauley*, 159 W. Va. 216, 220 S.E.2d 439 (1975).

⁹ See *O'Neal v. Peak Operating Co.*, 404 S.E.2d 420, 423 (1991).

¹⁰ *State Road Commission v. Ferguson*, 137 S.E.2d 206, 210 (1964).

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

In all the pages Appellee devotes to the award of attorney's fees, it fails to explain (1) how EER acted in bad faith, vexatiously, wantonly, or for oppressive reasons, and (2) why default judgment was necessary when a settlement agreement existed.

For a court to award attorney's fees, it must find that the losing party "acted in bad faith, vexatiously, wantonly or for oppressive reasons."¹¹ EER maintains that it has legitimate reasons to challenge the alleged settlement agreement and is not acting in bad faith. Appellee does not assert that EER acted in such a way. Thus the circuit court was wrong in awarding Appellee its attorney's fees.

Appellee next claims that the fees awarded are justified because "none of the fees claimed and detailed would have been expended if EurEnergy had simply lived up to its side of the bargain." Appellee asserts that it did not move for default until "EurEnergy had communicated its breach of the parties' agreement" as early as February 12, 2009. Apparently Appellee was not tipped off to EER's position when Appellee did not receive a \$100,000.00 check on January 15, 2009. Instead of requesting payment or moving to enforce the alleged settlement agreement, Appellee sought default judgment. These actions not only show that EER should not be held liable for attorney's fees, but tend to show that Appellee did not believe a binding settlement agreement even existed.

CONCLUSION

Appellee's arguments suggesting a settlement agreement was reached are not persuasive. While Mr. Morgan may have initially intended to settle the dispute, how could Appellee reasonably expect that achieving a settlement was feasible when it presented \$150,000 in new invoices to Mr. Morgan at the settlement? A settlement agreement was

¹¹Syl. pt. 3, *Sally-Mike Properties*, 365 S.E.2d 246.

never formed. Appellee confirmed this when it moved for default judgment, rather than seeking to enforce the settlement agreement.

Thus, 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. Appellee has not asserted or proved that EER acted in bad faith, vexatiously, wantonly, or with oppressive reasons, to support a grant of \$6,202 in attorney's fees. Finally, 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.

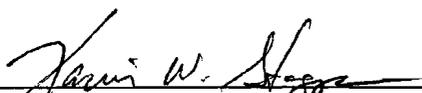
PRAYER FOR RELIEF

WHEREFORE, your Petitioner herein prays that this appeal be granted and that, after hearing by this Honorable Court, the order of May 19, 2009 and final order of July 28, 2009 of the Circuit Court of Wood County, West Virginia be vacated, that the judgment in favor of the Respondent be overturned, and that this matter be remanded to the Circuit Court of Wood County for a trial on the merits of Respondent's claim.

Respectfully submitted,

**EURENERGY RESOURCES
CORPORATION**

By Counsel,



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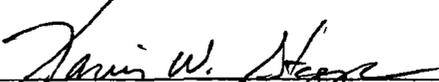
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CERTIFICATE OF SERVICE

I, **Xavier W. Staggs**, counsel for Petitioner, EurEnergy Resources Corporation, hereby certify that on this 4th day of November, 2010, I served a true copy of the attached **REPLY 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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