

12-0206

IN THE CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA

GADDY ENGINEERING COMPANY,

Plaintiff,

v.

CIVIL ACTION NO.: 10-C-27
(Thomas C. Evans, III, Judge)

BOWLES RICE McDAVID
GRAFF & LOVE, LLP, and
J. THOMAS LANE, individually,

Defendants.

FINAL ORDER

(Re: Defendants' Motion for Summary Judgment)

Introduction

On the 5th day of December, 2012, came the plaintiff, Gaddy Engineering Company ("Gaddy"), by its counsel, J. Laura Wakim, and came the defendants, Bowles Rice McDavid Graff & Love LLP ("Bowles Rice") and J. Thomas Lane ("Mr. Lane"), by their counsel, David D. Johnson, III, for a hearing convened by the Court *sua sponte* concerning defendants' Motion for Summary Judgment. A hearing on the Motion was previously convened on September 12, 2011, at which time the Court heard oral arguments from counsel and made certain rulings from the bench granting the Motion in substantial part. The Court subsequently prepared an Order which was signed on September 15, 2011, and entered by the Clerk on September 19, 2011, in which the Court granted defendants' summary judgment Motion with respect to any and all claims asserted by plaintiff for breach of contract. In that same Order, the Court memorialized certain of the rulings made from the bench during the hearing of September 12, 2011, granting defendants' summary judgment Motion as to Gaddy's claims for professional negligence, fraud, and punitive damages.

The Court, having carefully considered the various filings by the parties pertaining

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to defendants' Motion for Summary Judgment, and having also carefully considered the oral arguments of counsel at the hearing on September 12, 2011, and at the hearing on December 5, 2011, is of the opinion that defendants' Motion for Summary Judgment should be granted as to all remaining claims asserted by Gaddy. In support of this ruling, the Court incorporates by reference here all findings of fact and conclusions of law contained in the Court's prior Order dated September 15, 2011.

Gaddy's Claims For Negligence, Gross Negligence And Intentional Breach

Count IV of the Complaint asserts claims for negligence, gross negligence, and intentional breach. However, the gist of those claims is Gaddy's allegation that "[d]efendants negligently . . . and intentionally breached their agreement with, and duty to, Plaintiff." Complaint, page 16, Count IV. Defendants argue, and the Court agrees, that this is nothing more than Gaddy's breach of contract claim couched in tort terminology. The Court awarded summary judgment to defendants on the contract claim in the Order of September 15, 2011.

Moreover, a tort claim is dependent on the existence of a legal duty and a breach of that duty. The only basis alleged by Gaddy for a legal duty owed to it by Mr. Lane and Bowles Rice is the alleged attorney-client relationship, and the Court has already ruled that there was no such relationship between Gaddy and the defendants. *See* the Order dated September 15, 2011, page 2, paragraph 2. Moreover, "[a] breach of contract action cannot be turned into one sounding in tort merely because the Plaintiff alleges intent . . . on the part of the breaching party." *Snuffer v. Motorists Mutual Insurance Co.*, 636 F.Supp. 430, 433 (S.D.W.Va. 1986). On the undisputed material facts found by the Court beginning at page 4 of the Order dated September 15, 2011, Bowles Rice and Mr. Lane are entitled to judgment as a matter of law on Gaddy's claims for

negligence, gross negligence and intentional breach.

Gaddy' Claim For Negligent Misrepresentation

In Count VIII of its Complaint, Gaddy asserts, in relevant part, that “[d]efendants negligently or willfully represented to [Gaddy] that [they] would pay [Gaddy] [the] ‘one third of one third’ fee which [they] received . . . and [they] willfully or negligently failed to pay the monies due [Gaddy].” Complaint, page 17, Count VIII. Again, defendants assert that this is nothing more than Gaddy’s breach of contract claim re-labeled. The Court agrees. Gaddy’s breach of contract claim was rejected by the Court in the Order dated September 15, 2011.

Additionally, as noted in the preceding section of this Order, the only basis alleged by Gaddy for a legal duty owed to it by Mr. Lane and Bowles Rice is the alleged attorney-client relationship. The Court has already ruled that there was no such relationship between Gaddy and the defendants. *See* the Order of September 15, 2011, page 2, paragraph 2. A tort claim will not lie in the absence of a legal duty and a breach of that duty.

Moreover, the only difference between a fraud claim and a claim for negligent misrepresentation is that the latter does not require *scienter*. *Chhapparwal v. West Virginia University Hospitals*, 2009 WL 2959882, *7 (N.D.W.Va., Sept. 9, 2009). Thus, as with a fraud claim, in order to state a viable claim for negligent misrepresentation, one must allege that “the defendant negligently made an incorrect statement of *past or existing fact . . .*” *Mellon Investor Services, LLC v. Longwood Country Garden Centers, Inc.*, 2008 WL 341705, *6 (4th Cir., Feb. 6, 2008) (unpublished opinion) (emphasis added). This Court has already found that the Complaint contains no such allegation, and that Gaddy has proffered no such evidence. *See* the Order dated September 15, 2011, pages 3-4, paragraph 4. Gaddy’s Complaint alleges only that Mr. Lane made a statement

in January, 2004, concerning a future event, specifically, that Bowles Rice would share its fees with Gaddy if litigation against Columbia proved successful. Such an allegation cannot support a claim for negligent misrepresentation, and defendants are entitled to judgment as a matter of law on the claim asserted in Count VIII of Gaddy's Complaint.

Gaddy's Claim For Conversion

In Count VI of the Complaint, Gaddy alleges - in essence - that because Bowles Rice did not give Gaddy 1/3 of the attorneys' fees received by the firm in *Tawney, et al. v. Columbia Natural Resources, et al.*, Civil Action No. 03-C-10E ("*Tawney*"), as Bowles Rice allegedly had promised to do, Bowles Rice thereby converted Gaddy's share of those fees. *See* the Complaint, pages 16-17, paragraph 70. The substance of this allegation is no different than the substance of Gaddy's failed breach of contract claim.

The only basis alleged by Gaddy to support its claim that it had a right to possession of a portion of the Bowles Rice attorneys' fee in *Tawney* is the alleged fee-sharing contract which is at the heart of the Complaint. The Court has already rejected Gaddy's breach of contract claim. *See* the Order dated September 15, 2011. *Also see, Williams v. Melendez, Gano and Faye*, 141 Va. 370, 384, 127 S.E. 82, 86 (1925), a case, like this one, where the plaintiff's conversion claim rested on the theory that plaintiff was entitled to immediate possession of the disputed property pursuant to an alleged contract, and holding that "instead of this being a proper case in which to try the issue of . . . conversion, it is a case for the trial of the question as to whether or not there has been a breach of the contract" Here, because Gaddy's breach of contract claim fails, so does the claim for conversion.

Conversion consists of "[a]ny distinct act of dominion wrongfully exerted over the

property of another” *Rodgers v. Rodgers*, 184 W.Va. 82, 95, 399 S.E.2d 664, 677 (1990). It is settled law that “[a]n action for conversion of personal property cannot be maintained by one without title or right of possession.” *Thompson Development, Inc. v. Kroger Company*, 186 W.Va. 482, 487, 413 S.E.2d 137, 142 (1991) (internal citation omitted). The money which Gaddy alleges was converted was a portion of the attorneys’ fees and litigation expense reimbursements approved by this Court for class counsel in *Tawney* and disbursed to Bowles Rice pursuant to its agreement with Mr. Masters and the other original class counsel in that case. Bowles Rice was presumptively entitled to receive its share of the attorneys’ fees awarded in *Tawney*. Because Gaddy has not demonstrated a right to possession of any portion of the Bowles Rice fee, its claim for conversion fails. Bowles Rice and Mr. Lane are entitled to judgment on that claim as a matter of law.

Gaddy’s Claim For Promissory Estoppel

In Count VII of the Complaint, Gaddy asserts that “[d]efendants are estopped from claiming ownership of and retaining [p]laintiff’s monies contrary to [d]efendants’ duty to deliver [p]laintiff’s monies when it [sic] was received by [d]efendants.” *See* the Complaint, page 17, paragraph 73. The Court concludes that this paragraph of the Complaint states no viable claim for promissory estoppel relief.

Promissory estoppel is a doctrine available to a plaintiff in a proper case to avoid the affirmative defenses of lack of consideration or statute of frauds with respect to a breach of contract claim. *See, e.g., Everett v. Brown*, 174 W.Va. 35, 321 S.E.2d 685 (1984) (statute of frauds), and *State ex rel. Anstey v. Davis*, 203 W.Va. 538, 509 S.E.2d 579 (1998) (lack of consideration). Neither of those defenses is asserted by Bowles Rice and Mr. Lane in the present case, and the doctrine of promissory estoppel therefore has no application here. Even if this were not so, Gaddy cannot

establish the elements which are essential to a claim for promissory estoppel, in light of the undisputed facts of this case as recited beginning at page 4 of the Court's Order dated September 15, 2011. The pertinent facts will be repeated here.

In March, 2004, Frank McCullough began Gaddy's computation of the damages suffered by the lessor-clients of Gaddy and Bowles Rice, and his work was completed by July 27, 2004. That work began shortly after the point in time when Gaddy alleges Mr. Lane entered into a fee-sharing agreement with John Bullock. *See* the Order dated September 15, 2011, page 9. By prior oral agreement, Gaddy billed Bowles Rice a flat fee of \$750 for each claim evaluation done by Mr. McCullough. Bowles Rice then billed each client for its own flat fee of \$1,000 for conducting a legal analysis of the client's potential claim, and for Gaddy's \$750 fee, and remitted payment to Gaddy of its fee when payment was received from the clients. *Id.*

When all of the lessor-clients later opted to remain in Mr. Masters' *Tawney* class action, thereby preventing Bowles Rice from pursuing and controlling separate claims on behalf of its clients, the firm had no further need for Gaddy to perform any work relating to Columbia, because Mr. Masters had already retained an expert and said that he had no need of Gaddy's services. Gaddy was not asked to do any further work relating to Columbia, and Gaddy's past work product was never used in *Tawney*. *Id.*, page 12. Nonetheless, Mr. Masters assured Mr. Lane that if the *Tawney* case were successful, he would ask this Court to approve payment to Gaddy for its past work in support of the lessors' putative Columbia claims. *Id.*

Although Gaddy had received a modest flat rate fee for performing a damage assessment for each land company, it was recognized that the flat fees did not fully compensate Gaddy for the work which it had actually done. *Id.*, page 13. Accordingly, at the direction of Mr.

Lane, on February 14, 2007, Gaddy submitted to Bowles Rice an invoice which contained, for the most part, charges only for the damage assessment work performed by Mr. McCullough from March 5 through July 27, 2004, which totaled \$74,275.00 (subsequently, “the McCullough invoice”). After evaluating Mr. McCullough’s time devoted to his damage assessment work, and the value of that work to the land companies in relation to the artificially low flat fees which had previously been charged, Mr. Lane concluded that the McCullough invoice was reasonable and gave it to Mr. Masters for submission to this Court. *Id.*, page 15. This Court then approved payment of the invoice from the recovery in *Tawney*.

Payment of the McCullough invoice was included in the settlement fund claims administrator’s disbursement to Mr. Masters, who then disbursed to Bowles Rice its share of the *Tawney* fee and the expense payments approved by the Court, including payment of the McCullough invoice. *Id.* Bowles Rice tendered to Gaddy’s counsel a check in payment of that invoice, but the check was rejected by Gaddy. *Id.* Bowles Rice continues to hold the funds necessary to pay the McCullough invoice. Had Gaddy accepted the check, it would then have received not only the admittedly inadequate flat fee payments previously made by clients for damage assessment work in 2004, but also additional payment for that work on an hourly fee basis, constituting payment in full for Gaddy’s claim evaluation work. It is therefore exclusively Gaddy’s fault that it has not been fully compensated for that work.

For promissory estoppel to apply, a plaintiff must demonstrate that it reasonably relied to its detriment on a promise made and broken by the defendant, and, most important, that in the absence of estoppel relief, an injustice will result. *Everett v. Brown*, 174 W.Va. at 39, 321 S.E.2d at 689. Under the undisputed facts of this case, Gaddy cannot make such a showing. Bowles Rice

and Mr. Lane are therefore entitled to judgment as a matter of law on Gaddy's claim for promissory estoppel relief.

Gaddy's Claim For Unjust Enrichment

At page 18 of the Complaint, in paragraph 78, Gaddy asserts, without any explanation, that "[a]s a result of Plaintiff's work Defendants were unjustly enriched." This conclusory allegation, on its face, is insufficient to support a claim for unjust enrichment.

In *Annon v. Lucas*, 155 W.Va. 368, 185 S.E.2d 343 (1971), the Supreme Court of Appeals held that relief for unjust enrichment is imposed in equity with respect to "property which has been acquired by fraud, or where, although acquired originally without fraud, it is against equity that it should be retained by the person holding it." *Id.* 155 W.Va. at 382, 185 S.E.2d at 352. Quoting from 19 M.J. Trusts and Trustees, § 48, the *Annon* Court elaborated that such relief may be imposed only where "the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest [in the property]" 155 W. Va. at 381-82, 185 S.E.2d at 352. The clear import of the Court's holding is that actionable unjust enrichment occurs only where a defendant has obtained real or personal property through any variety of fraud, or through conduct of like character. This Court rejected Gaddy's fraud claim in the Order dated September 15, 2011. Because the fraud claim fails, the unjust enrichment claim also necessarily fails.

This Court approved the aggregate fee award in *Tawney*, finding that the fee was reasonable under all of the circumstances. *See, e.g.*, the "Order Granting Joint Motion For Final

Approval Of Class Action Settlement” entered by this Court in *Tawney* on November 22, 2008, of which this Court now takes judicial notice. Four separate law firms, including Bowles Rice, participated as class counsel in *Tawney*. The portion of the aggregate fee award in *Tawney* that was received by Bowles Rice was determined by what the original class counsel were willing to allow. See this Court’s summary judgment Order dated September 15, 2011, at page 11. Defendants have represented to the Court, and Gaddy has not disputed, that the *Tawney* fee received by Bowles Rice constituted far less than even 5% of the total fee award approved by this Court and disbursed to the four law firms through lead class counsel, Mr. Masters. Accordingly, there is ample legal justification for the Bowles Rice fee, and Gaddy has identified no facts which render the fee unjustified, much less unjust. Defendants are entitled to summary judgment on the unjust enrichment claim as a matter of law.

Gaddy’s Claim For Quantum Meruit Relief

In Count V of the Complaint, Gaddy alleges that “[i]n the event it is determined that an enforceable contract does not exist between Plaintiff and Defendants, then Plaintiff is entitled to damages under the theory of *quantum meruit* because Plaintiff reasonably relied, to its detriment, on the representations and course of conduct of Defendants.” Complaint, page 16, paragraph 68. In other words, Gaddy alleges that it is entitled to compensation for work it performed in reliance upon the fee-sharing agreement which Gaddy contends Mr. Lane entered into early in 2004.¹

Gaddy’s damage assessment calculations performed for the lessor-clients between March and July, 2004, were conducted by agreement for a flat fee of \$750.00 per client, a sum which

¹The doctrine of *quantum meruit* (which means *as much as he deserves*) is applied where a plaintiff is unable to prove the existence of an alleged contract, but claims entitlement to compensation for services performed.

defendants concede was inadequate to fully compensate Gaddy for the time actually devoted to the claim evaluation process during that period of time. Gaddy does not dispute that it received payment of the flat fees. Later, in 2007, and specifically in response to urging from Bowles Rice, Gaddy submitted to Bowles Rice the McCullough invoice for \$74,275.00 constituting the actual aggregate charges for all work by Gaddy in connection with the claim evaluations during the same period of March through July, 2004. Bowles Rice submitted that invoice to this Court in *Tawney*, and it was approved. Bowles Rice tendered a check in the amount of \$74,275.00 to Gaddy, and Gaddy, for whatever reason, refused the check. *See* the discussion, *infra*, pages 6-7.

In other words, Gaddy was first paid the agreed-upon flat fees for its damage evaluations, and then later would have received full payment for that work on an hourly fee basis, had Gaddy not made the decision to reject the check offered by Bowles Rice in payment of the McCullough invoice. Where “it appears uncontroverted that the plaintiff received full compensation for the services it performed . . .,” plaintiff is not entitled to relief in *quantum meruit*. *Fry Racing Enterprises, Inc. v. Chapman*, 201 W.Va. 391, 395, 497 S.E.2d 541, 545 (1997).

As the yardstick for measuring what it claims to be entitled to as *quantum meruit* relief, Gaddy points to another invoice (“the Bullock invoice”) which it tendered to Bowles Rice prior to submission of the McCullough invoice. *See* Gaddy’s Response to the Motion for Summary Judgment, at page 20. The Bullock invoice purported to state the time and work supposedly devoted by Mr. Bullock to the Columbia matter on a weekly basis from January 1, 2000 through the end of 2006. The invoice contained total charges for Mr. Bullock’s work amounting to \$258,400.00. *See* the Court’s Order dated September 15, 2011, at pages 13-14.

However, Gaddy asserts that the alleged fee-sharing agreement was not entered into

until January, 2004. All time allegedly devoted to the Columbia matter by Mr. Bullock or anyone else at Gaddy prior to January, 2004, and all time devoted by them to any work once the claim evaluations were complete in July, 2004, could not be recovered by Gaddy as *quantum meruit* relief. Gaddy does not dispute that it was not asked by Bowles Rice to do any work after the claim evaluations were complete. Gaddy also does not dispute that its work product was never used in *Tawney*. See the Order dated September 15, 2011, page 12.

More important, Gaddy has not disputed that John Bullock did not keep sufficient record of his work or time devoted to the Columbia matter to be able to create an invoice for that work. Gaddy has also not disputed that Mr. Bullock did little or no work relating to Gaddy's claim evaluations. See the Court's Order dated September 15, 2011, page 14. Mr. Bullock has also admitted that when the Bullock invoice was created in 2007, he had no specific recollection of his work beginning in 2000, and that he also had no written record of his work. See Exhibit 4 to defendants' summary judgment Reply, pages 128-29. It is for these reasons that Mr. Lane and Bowles Rice rejected the Bullock invoice and refused to submit it to this Court for consideration in *Tawney*. The Bullock Invoice can therefore not be relied on in support of the *quantum meruit* claim.

Under the undisputed facts of this case, Gaddy is entitled to no relief on its *quantum meruit* claim. Independent of that claim, Gaddy is entitled to receive the sum of \$74,275.00 reflected in the McCullough invoice, a sum approved by this Court which Bowles Rice previously offered, and which Gaddy rejected. Bowles Rice and Mr. Lane have made it clear that they remain willing to deliver a check for that amount to Gaddy, if Gaddy wishes to receive it.

Conclusion

For all reasons stated in this Order and in the Court's Order of September 15, 2011, there are no genuine issues as to any of the facts that are material to Gaddy's claims against Bowles Rice and Mr. Lane for professional negligence, breach of contract, fraud, negligence, gross negligence, intentional breach, negligent misrepresentation, conversion, promissory estoppel, unjust enrichment, and *quantum meruit*, and defendants are entitled to judgment on all claims asserted by Gaddy in this civil action as a matter of law.

Accordingly, it is hereby **ORDERED** that summary judgment should be, and it hereby is granted in favor of defendants and against plaintiff on all claims asserted in plaintiff's Complaint.

The Clerk is directed to forward copies of this Order to counsel of record.

ENTERED this 9th day of January, 2012, *without objection as to form.*



Thomas C. Evans, III, Judge

Prepared and Presented To The Court Pursuant to Trial Court Rule 24.01(c) By:

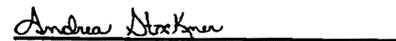


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Entered in ^{CIV} C.O.B. No. 451 Page _____
this 12 day of January, 20 12

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CLERK CIRCUIT COURT
ROANE COUNTY, WEST VIRGINIA

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GADDY ENGINEERING COMPANY,

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CIVIL ACTION NO: 10-C-27
(Judge Thomas C. Evans, III)

BOWLES RICE McDAVID
GRAFF & LOVE, LLP, and
J. THOMAS LANE, individually,

Defendants.

ORDER

(Re: Defendants' Motion for Summary Judgment)

Pending is the Defendants' Motion for Summary Judgment. The court has considered the motion, the response thereto and memorandum filed by the Plaintiff, and the reply memorandum of the Defendants. Also, the court has had the benefit of oral argument at a hearing on September 12, 2011.

Introduction

It is apparent to the court from the undisputed material facts, and the Complaint, that the essence of Plaintiff Gaddy Engineering Company's (hereinafter: "Gaddy" or "Plaintiff") 9 Count Complaint is an allegation that defendants entered into a fee-sharing agreement with Gaddy, and then breached the agreement. Count II, at page 8 of the Complaint, asserts a claim for breach of contract based upon that allegation.

At the summary judgment hearing on September 12, 2011, the court announced certain rulings, and the bases for those rulings, as follows:

1) that genuine issues of material fact exist regarding the basic breach of contract claim, precluding summary judgment. However, the court took under advisement one of the issues raised by the defendants in their motion, i.e., if in fact, it is found by a jury that the fee-sharing agreement as maintained by Plaintiff was entered into, are Defendants excused from performance of such agreement on the basis of "impracticability" or "impossibility."

2) the undisputed material facts do not amount to a genuine issue of material fact regarding the claim of the Plaintiff that an attorney/client relationship existed between Gaddy and Bowles, Rice and J. Thomas Lane, Defendants. It is apparent to the court that only one conclusion can be drawn from the undisputed facts, and it is that the relationship was one between a law firm representing certain clients on the one hand and, on the other, a litigation support service provider engaged by the law firm/attorney to provide services for those same clients in anticipated litigation.

3) The undisputed material facts do not warrant an award of punitive damages. **See *Goodwin v. Thomas*, 184 W.Va. 611, 403 S.E.2d 13 (1991)(emphasis added).** At 184 W.Va. 614, 403 S.E.2d 16, the Supreme Court of Appeals stated as follows:

"[t]his Court has previously held that "[g]enerally, absent an independent, intentional tort committed by the defendant, punitive damages are not available in an action for breach of contract." *Berry v. Nationwide Mut. Fire Ins. Co.*, 181 W.Va. 168, 381 S.E.2d 367, 374 (1989). We dispute the lower court's finding that Goodwin's suit was simply an action for damages for breach of a contract of lease. Goodwin's complaint clearly alleged tortious activity by the appellees in that they deliberately tore down the garage in willful and wanton disregard of his rights under the lease. " 'In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or

criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages....' Syl. pt. 4, in part, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895).' Syl. pt. 1, *Wells v. Smith*, 171 W.Va. 97, 297 S.E.2d 872 (1982). '[T]he weight of West Virginia precedent is that where there is an intentional wrong, or where there are circumstances which warrant an inference of malice, willfulness, or wanton disregard of the rights of others, punitive damages may be awarded.' *Addair v. Huffman*, 156 W.Va. 592, 195 S.E.2d 739, 743 (1973), citing *George v. Norfolk & Western Railway Co.*, 80 W.Va. 317, 92 S.E. 430 (1917)."

In a case alleging breach of a contract to provide credit disability insurance, the Supreme Court of Appeals held that punitive damages are allowed but only where there has been malice, fraud, oppression, or gross negligence. A wrongful act done under a bona fide claim of right and without malice in any form constitutes no basis for punitive damages. Syl. pt. 3, *Warden v. Bank of Mingo*, 176 W. Va. 60, 341 S.E.2d 679 (1985). At best, the evidence of the Plaintiff indicates a promise made by Defendants of certain performance and a breach. There simply is no evidence of false or fraudulent misrepresentations, concealment of material facts, oppression, malice or gross negligence.

4) The court granted summary judgment regarding the fraud claim alleged in the Complaint. The undisputed material facts demonstrate that Gaddy's evidence is, at best, that a promise was made by Defendants to pay Gaddy 1/3 of a 1/3 contingency fee and a failure to pay such sum. Gaddy has no evidence that Bowles Rice or Mr. Lane made any "intentional misrepresentation of a past or existing fact". *See Croston v. Emax Oil Company*, 195 W.Va. 86, 464 S.E.2d 728 (1995), where the court indicated that a false promise could not support a fraud claim. The Court said in Syllabus Point 3 of *Croston v. Emax Oil Company, supra*: "Fraud cannot be

predicated on a promise not performed. To make it available there must be a false assertion in regard to some existing matter by which a party is induced to part with his money or his property." *See also* Syllabus point 1, *Love v. Teter*, 24 W.Va. 741 (1884).

Statement of Facts Relevant to the Impracticability Defense

The summary judgment record shows the following undisputed, material facts:

Gaddy Engineering is a company which provides land and natural resource management services for clients that are land companies and do not have the revenues to support their own in-house land management teams. *See* excerpts from the transcript of the deposition of John Bullock, President and majority owner of Gaddy (subsequently, "J. Bullock Tr."), p. 26, Exhibit 1 to the Motion for Summary Judgment.) Bowles Rice is a West Virginia-based law firm. At all times relevant to this civil action, Defendant Lane has been a partner of Bowles Rice, practicing out of the firm's Charleston offices, in the firm's mineral law practice group. His practice includes trial work. He has been practicing law with Bowles Rice and its predecessors since 1975. (Lane Tr., pp. 4-5, Exhibit 2).

Since the 1980s, Defendant Lane has provided advice to, and has litigated on behalf of, landowners involving the underpayment of natural gas royalties and similar issues. He is also a natural gas lessor and, through a company which he partially owns, is a lessee and an operator of an oil and gas well. *Lane Affid.*, ¶¶ 3 and 4.

Defendant Lane - - through his work for natural gas lessors - - previously became aware in or before 2001 of various problems relating to payment by Columbia Natural Resources ("Columbia") of royalties to its lessors. Clients of Bowles Rice that were Columbia lessors were receiving royalty payments from Columbia which appeared to be significantly lower than payments made by other gas producers for similar wells. *Lane Affid.*, ¶ 5, Exhibit 3. His land company clients and other clients and he began to investigate what appeared to be this underpayment of royalties by Columbia.

Certain land companies are, or in the past have been, clients of both Gaddy and Bowles Rice. In 2003, Gaddy and Bowles Rice had been retained by one such company, independent of each other, to assist the company with various problems it was having. Based on Mr. Lane's evaluation, he concluded that the company had various potential claims against Columbia for the underpayment of royalties. However, in discussions with the client, it was decided that the cost of litigation for a single client against Columbia would be too high to justify pursuing such claims. *Lane Affid.*, ¶ 5.

During the same period, John Bullock, on behalf of the aforesaid land company and other Gaddy clients, was also looking into Columbia's royalty payment practices. *Bullock Tr.*, pp. 40-53, Exhibit 1. Mr. Bullock has said that he began investigating Columbia's royalty payment practices in May, 2000. *Bullock Tr.*, p.40. He and Frank McCullough, a Gaddy Vice President, say that Mr. McCullough began working at Gaddy as an independent contractor in mid-2003 and immediately

became involved in looking into the Columbia royalty payment issues. *Id.*, pp. 45-49; *McCullough Tr.*, pp. 14-15, Exhibit 4. For most of their time devoted to investigating Columbia's royalty payment practices, Mr. Bullock and Mr. McCullough did not bill Gaddy's clients because the clients would not tolerate it. *McCullough Tr.*, p. 14, Ex. 4; *J. Bullock Tr.*, pp. 50-53, Ex. 1.

From the work done by Mr. Bullock and Mr. McCullough, Gaddy concluded that some of its clients and other gas lessors had been defrauded by Columbia. *Complaint*, p. 2, ¶ 7. Gaddy believed that a civil action should be considered on behalf of defrauded lessors against Columbia. John Bullock approached Mr. Lane concerning potential litigation against Columbia in December, 2003. *J. Bullock Tr.*, pp. 69-74; *Gaddy's answer to defendants' Interrogatory No. 8*, Exhibit 5, pp. 4-6.

Gaddy, Bowles Rice, and Mr. Lane all agree that in January or February, 2004, they entered into an agreement pursuant to which they would offer to evaluate potential claims on behalf of their respective clients and other Columbia land company lessors in order to ascertain (1) whether there were viable claims; (2) whether the lessors wished to pursue such claims; and (3) whether the likely value of those claims would justify the cost of litigation against Columbia. *See Gaddy's answer to defendants' Interrogatory No. 9*, pp. 6-8, Ex. 5; *J. Bullock Tr.*, pp. 70-75, Ex.1; *Lane Tr.*, pp. 58-62, Ex. 2 to Defendants' Motion for Summary Judgment. Pursuant to that agreement, Gaddy was to assess the lessors' past and future losses from underpayment of royalties. Bowles Rice was to evaluate the lessors' individual legal claims, based on the terms of their respective leases with Columbia. *Id.*

Defendant Lane and Gaddy agreed that in order to attract the largest possible number of potential lessor-clients, they would charge each lessor a reduced flat fee for the evaluations, consisting of a \$750 fee for Gaddy's work, and a \$1,000 fee for the work of Bowles Rice. *Id.* Mr. Lane wrote to each land company and offered the claim evaluation for an aggregate flat fee of \$1,750, asking each to reply and state whether they wished to have an evaluation. A number of land companies then requested the evaluation.

For each damage evaluation performed by Gaddy, the company sent a separate invoice to Bowles Rice for the Gaddy fee of \$750 reflecting the name of the lessor-client. Bowles Rice then invoiced the lessor for its fee of \$1,000 together with Gaddy's fee of \$750 - for a total of \$1,750. When Bowles Rice received payment from the lessor, it remitted the \$750 fee to Gaddy in payment of Gaddy's invoice. *J. Bullock Tr.*, p. 77, Ex. 1; *McCullough Tr.*, p. 60, Ex. 4; *Lane Tr.*, p. 62, Ex.2.

Where Bowles Rice and Mr. Lane part company with Gaddy, with respect to the admitted flat fee agreement to evaluate potential claims for the land companies, is Gaddy's allegation - - which is at the core of the Complaint in this action - - that the same agreement also included a contingent fee-sharing agreement between the parties, to the effect that in any litigation against Columbia on behalf of the lessors, Bowles Rice would demand a 1/3 contingent fee from each lessor and pay 1/3 of the fee to Gaddy. *Complaint*, ¶¶ 13 and 50. This is denied by the evidence of the Defendants. Bowles Rice and Mr. Lane acknowledge only that John Bullock more than once proposed that Gaddy should receive some percentage of any legal fee

received by Bowles Rice from litigation against Columbia. Defendants at no time agreed to such a proposal. *Lane Affid.*, Ex. 3, ¶ 12; *Lane Tr.*, pp. 76-80, Ex. 2. Mr. Lane contemplated that if the flat fee claim evaluations led Bowles Rice to initiate litigation against Columbia, the firm would rely on Gaddy for consulting litigation support, and both Bowles Rice and Gaddy would negotiate their own fee agreements with the clients, structured so as to include a bonus feature in the event of a favorable outcome. *Lane Tr.*, Ex. 2, pp. 84-85, 118; *Lane Affid.*, ¶ 11.

At the time Gaddy and Bowles Rice agreed to evaluate the lessors' potential claims, they had no way of knowing whether, in the end, Bowles Rice would even pursue any litigation against Columbia, because they did not know what the results of the claim evaluations would be. *Lane Tr.*, p. 118, Ex. 2. No lessor had committed in advance of the claim evaluations to sue Columbia. *McCullough Tr.*, pp. 64-65, Ex. 4; *Lane Tr.*, pp. 58-63, 118. At that point, none of the land company clients had agreed to do anything other than to pay an aggregate evaluation fee of \$1,750, provide Gaddy and Bowles Rice with well production and royalty data, and await the results of the evaluation.

Gaddy and Bowles Rice agreed that if litigation against Columbia on behalf of the land company-lessors proved viable, Bowles Rice would prosecute the cases on behalf of each land company. *McCullough Tr.*, pp. 58-59, Ex. 4; *J. Bullock Tr.*, pp. 69-70, Ex. 1. At the time, both Gaddy and Bowles Rice were aware of the pending case *Garrison Tawney, et al. v. Columbia Natural Resources, et al*, Civil Action No. 03-C-10E ("*Tawney*") of this court, which had been brought by lawyer Marvin Masters

and others. However, Gaddy and Bowles Rice were uncertain whether this Court would certify a class in that case. See *J. Bullock Tr.*, pp. 57-58 (stating that a lawyer not affiliated with Bowles Rice had told him it was doubtful that all lessors' claims could be pursued in one case); *Gaddy's answer to Interrogatory No. 8*; and the *Lane Affid.*, ¶ 6, Ex's. 1, 5 and 3, respectively, to the Defendants' Motion for Summary Judgment.

Then, an Order was entered by this court in *Tawney* on **February 27, 2004**, certifying a class under Rule 23, WVCivP. On **June 10, 2004**, the Supreme Court of Appeals refused a Petition for a Writ of Prohibition challenging the circuit court order certifying the class. See *Petition No. 040862, W. Va. Supreme Court of Appeals, Miscellaneous Motions Conference*, June 10, 2004. At that point, it was clear that the *Tawney* case would proceed as a class action case. The Bowles, Rice and Gaddy clients were included in the class as defined and certified by the circuit court order, and the circuit court set **October 15, 2004**, as the deadline for "opting-out" of the class.

The person at Gaddy Engineering who actually performed the damage assessments for the land companies was Frank McCullough. *McCullough Tr.*, p. 51, Ex. 4; *Lane Tr.*, pp. 69-70, Ex. 2. He did not begin that work until March 5, 2004. *McCullough Tr.*, pp. 51-52. The evaluations were complete by July 27, 2004. See Defendants' Motion for Summary Judgment Ex. 6, and Gaddy's invoice to Bowles Rice for Mr. McCullough's damage assessment work, page 10.

The court order in *Tawney*, entered February 27, 2004, which certified the

class, also appointed counsel for the class. Marvin W. Masters and the law firm of Masters & Taylor, L.C., and Michael W. Carey and George M. Scott and the law firm of Carey, Scott & Douglas, were appointed as class counsel to act on behalf of the class. These were the attorneys that filed the *Tawney* case in 2003 and represented the named Plaintiffs in the case. Neither Bowles, Rice nor any of its attorneys were appointed class counsel by the 2004 order.

After the class was certified in *Tawney*, and the challenge to it refused by the Supreme Court of Appeals, Defendant Lane wrote to the land companies and explained in detail the advantages and disadvantages of both class action litigation, and pursuing separate claims. See, e.g., Mr. Lane's October 6, 2004, letter to Horse Creek Land and Mining Company, Ex. 7 to Defendants' Motion for Summary Judgment.

Mr. Lane proposed to the land companies that they authorize him to pursue independent claims against Columbia on their behalf in the Circuit Court of Kanawha County, and then ask the Court to consolidate those actions to achieve economies of scale. *Id.*, pages 5-6. In other words, Defendants proposed that the land companies opt-out of the class and engage Bowles, Rice to pursue their claims in the Circuit Court of Kanawha County.

Despite the recommendation of Defendants Lane and Bowles Rice, the land companies decided to remain as class members in *Tawney*. They did not opt-out. From that point forward, the large land companies, along with every other member of the class, were represented by class counsel. That decision was, of course, binding

on Bowles Rice and Defendant Lane.

Once the land companies opted to remain in the *Tawney* case, any possibility that Bowles Rice would prosecute independent claims for the companies in Kanawha County ended.

Marvin Masters was lead counsel in *Tawney*, and it was he who ultimately controlled litigation decisions on behalf of the class, including the land company-lessors. Lane Tr., pp. 10-13, Ex. 2; Mark Adkins Tr., pp. 7-8, Ex. 8. Bowles Rice did make a formal appearance in *Tawney* on behalf of a subclass composed of the twelve land companies on December 7, 2004.

The formula by which the Bowles Rice share of the aggregate fee award in *Tawney* was determined was controlled by what Mr. Masters and the other original class counsel would agree to. See *defendants' supplemental answer to Gaddy's Interrogatory No. 6*, and the *Lane Affidavit*, Exhibits 3 and 14, respectively, Defendants' Motion for Summary Judgment. This evidence is not contradicted. Further, in a successful class action, the trial court must approve any award of attorneys' fees and expense reimbursements; and, it is common for original class counsel to then control how the aggregate court-approved attorneys' fees will be allocated among any other class counsel. ***Brown v. Esmor Correctional Services, Inc.***, 2005 WL 1917869, *9 (D.N.J., Aug. 10, 2005).

The evidence is further uncontradicted that Defendant Lane approached lead class counsel, Marvin Masters, about possibly using Gaddy as expert consultants in *Tawney*. Mr. Masters said that he had already retained an expert of his own and had

no use for Gaddy's services. *Lane Tr.*, pp. 137-38. However, Mr. Masters did say that if the *Tawney* case were successful, he would ask this Court to approve Gaddy's charges for the claim evaluation work it had already performed. *Lane Affid.*, ¶ 13.¹

Mr. Masters also said that if it proved necessary to have a litigation consultant, other than the expert he had already retained, to support the claims of the land company subclass, Bowles Rice might be able to use Gaddy for that purpose. However, that never occurred. *Id.* None of this evidence is contradicted or otherwise challenged. No affidavit from Marvin Masters, Michael Carey or George M. Scott contrary to these facts has been submitted to the court, and none of these attorneys are on the trial witness list of the Plaintiff.

After the land companies opted to remain in *Tawney*, Gaddy did no more work for Bowles Rice relating to Columbia. *Lane Tr.*, p. 66. Gaddy was not asked by any class counsel to work on *Tawney*. *Id.*, p. 130. Mark Adkins was the lead litigation partner for Bowles Rice assigned to *Tawney*. *Adkins Tr.*, p. 40. He never utilized Gaddy's claim evaluation work product in any way in connection with *Tawney*. *Id.* p. 32. John Bullock testified that he has no knowledge that Gaddy's work product was ever used in *Tawney*, or that Gaddy was asked by Bowles Rice to do any further work relating to Columbia once the claim evaluation work by Mr. McCullough was complete. *J. Bullock Tr.*, pp. 121-22, Ex. 1. He cannot recall anything that he, personally, was asked to do by Bowles Rice after the claim evaluation work was

complete. *Id.*, pp. 122-23.

Although Gaddy had received a modest flat rate fee for performing a damage assessment for each land company, it was recognized that the flat fees did not fully compensate Gaddy for the work which it had actually done. Accordingly, beginning as early as February, 2006, almost a year before the *Tawney* case was tried, Mr. Lane alerted Gaddy to the fact that if *Tawney* were successful, he would need to be able to submit an invoice to the Court reflecting hourly rate charges for Gaddy's claim evaluation work in order to obtain Court approval for payment of those charges from any funds recovered for the class. However, Gaddy took no action to begin preparing such an invoice throughout the next year.

Then, on January 31, 2007, less than a week after the *Tawney* jury returned a verdict against CNR, NiSource and Chesapeake Energy in excess of \$400,000,000.00, Gaddy submitted an invoice to Bowles Rice which totaled \$367,225.00. See Exhibit 17, Defendants' Motion for Summary Judgment. That invoice contained a lump-sum charge for Mr. McCullough's claim evaluation work totaling \$108,825.00. The invoice (subsequently, "the Bullock invoice") also purported to charge the sum of \$258,400.00, almost all of it attributable to work allegedly done by John Bullock beginning January 1, 2000 - - four years before he alleges that Mr. Lane promised to share the Bowles Rice contingent fee with him, and three years before Marvin Masters filed the Complaint in *Tawney*. The Bullock

¹ Indeed, in *Tawney*, this Court approved payment of Gaddy's fees for its consulting claim evaluation work which was done in aid of the clients' putative claims against

invoice purported to identify work done by Mr. Bullock on a weekly basis from January 1, 2000 through the end of 2006.

It was at once apparent to Mr. Lane that the Bullock invoice could never be submitted to this Court, because the charges reflected in the invoice for work by Mr. Bullock were patently questionable. Mr. Bullock had previously told Mr. Lane that he had done little or no work relating to the damage assessments performed by Mr. McCullough, and that he had kept no record of his time devoted to working on the Columbia matter. *Lane Affid.*, Ex. 3, Defendants' Motion for Summary Judgment. Mr. Lane made it clear to Gaddy that a new and legitimate invoice would be required which reflected work actually done by Gaddy only for the period during which Gaddy had worked to do damage assessments for potential Columbia claims on behalf of the lessor-clients. *Id.* Mr. Bullock responded on February 11, 2007, acknowledging that, contrary to his earlier invoice, he had in fact kept no time records for any of his work on the Columbia matter. See Ex. 18, Defendants' Motion for Summary Judgment.

On February 14, 2007, Gaddy submitted to Bowles Rice a revised invoice which contained, for the most part, charges only for the damage assessment work performed by Mr. McCullough from March 5 through July 27, 2004, which totaled \$74,275.00. See Exhibit 6, Defendants' Motion for Summary Judgment. This invoice ("the McCullough invoice") appeared on its face to be legitimate, and Mr. Lane was told that the invoice was based on Mr. McCullough's actual time-charge records for

Columbia. The payment was apparently refused by the Plaintiff Gaddy Engineering.

his work on the Columbia matter. After evaluating Mr. McCullough's time devoted to his damage assessment work, and the value of that work to the land companies in relation to the artificially low flat fees which had previously been charged, Mr. Lane concluded that the revised invoice was reasonable and gave it to Mr. Masters for submission to this Court. *Id.*

Bowles Rice attorneys Lane and Mark Adkins emphasized to Gaddy that the only way Gaddy's legitimate charges for work relating to claims against Columbia could be paid in connection with Tawney was to submit all such charges to the Court for approval, and that a hearing would later be convened before this Court where any interested party could appear and be heard on the question of payment of fees or expenses. *Lane Affidavit, Ex. 3, Defendants' Motion for Summary Judgment.* No additional invoice was subsequently submitted to Bowles Rice by Gaddy. *Id.* When a hearing on fees and expenses was scheduled in this Court, Mr. Lane and Mr. Adkins gave Gaddy and Gaddy's counsel notice of the date and time. *Id.* When that hearing was convened by this Court, Gaddy made no appearance. *Id.* The Court, in the *Tawney* case, later approved payment of the McCullough invoice.

Payment of that invoice was included in the settlement fund claims administrator's disbursement to Marvin Masters, lead class counsel, who then disbursed to Bowles Rice its share of the *Tawney* fee and the expense payments approved by the Court, including payment of the McCullough invoice. *Lane Affid., Ex. 3, Defendants' Motion for Summary Judgment.* Bowles Rice tendered to Gaddy's counsel a check in payment of that invoice, but the check was rejected by Gaddy. *Id.*

Bowles Rice continues to hold the funds necessary to pay the McCullough invoice. Had Gaddy accepted the check, it would then have received not only the inadequate flat fee payments previously made by clients for damage assessment work in 2004, but also additional payment for that work on an hourly fee basis.

Opinion Relating to the Defense of Impracticability

A. The Legal Standard Applicable

WVRCivP Rule 56(c) provides that a motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The W. Va. Supreme Court of Appeals has stated 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). Rule 56 "is one of the few safeguards in existence that prevent frivolous lawsuits from being tried which have survived a motion to dismiss. Its principal purpose is to isolate and dispose of meritless litigation." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995).

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*, 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.) A nonmoving party “cannot create a genuine issue of material fact through . . . the building of one inference upon another.” *Id.*, n. 14 (internal citation and quotation marks omitted). “[S]elf-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).

B. The Doctrine of Impracticability or Impossibility

The argument of the Defendants is that even if the Jury should find the existence of an oral agreement between Plaintiff and Defendants to the effect that in exchange for providing litigation support services, Gaddy would share 1/3rd of the a 1/3rd contingency fee (1/3rd of the settlement amount for the 12 large landowner group), nonetheless, Defendants are excused from performance pursuant to the doctrine of impracticability.

In the Restatement (Second) of Contracts § 261 (*Discharge By Supervening Impracticability*), it is said that “[w]here, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.” Comment a. to § 261 clarifies that “this Section

states a principle broadly applicable to all types of impracticability and it 'deliberately refrains from any effort at an exhaustive expression of contingencies'" *Id.*

(Internal citation omitted.) Comment b. observes that "[t]he fact that the event was foreseeable, or even foreseen, does not necessarily compel a conclusion that its non-occurrence was not a basic assumption." *Id.* Finally, Comment d. to § 261 states that "[e]vents that come within the rule stated in this Section are generally due either to 'acts of God' or to acts of third parties." *Id.* (Emphasis added.)

The doctrine of impracticability articulated in § 261 of the Restatement is also referred to as the doctrine of impossibility. *Waddy v. Riggleman*, 216 W.Va. 250, 256, 606 S.E.2d 222, 228 (2004).

The doctrine of impossibility was "developed in the common law to alleviate, to a limited degree, the harsh results obtained from the strict rule of absolute contractual liability by providing, under certain limited circumstances, an excuse from performance of a contract." *Waddy*, 216 W.Va. at 256, 606 S.E.2d at 228. In earlier times, the doctrine was more difficult to invoke because it required proof that performance under a contract had been rendered completely *impossible*. The modern rule, embodied in the Restatement, abandons the reference to *impossibility* in favor of the less demanding requirement of *impracticability* - "a more equitable rule . . . that entertain[s] the excuse of impracticability under certain unanticipated circumstances." 216 W.Va. at 257, 606 S.E.2d at 229 (internal citation and quotation marks omitted, and brackets added).

In *Waddy*, the Supreme Court of Appeals expressly adopted the doctrine of

impracticability as it appears in the Restatement (Second) of Contracts § 261:

Following this modern trend, we now adopt [the Restatement] and hold that, under the doctrine of impracticability, a party to a contract who claims that a supervening event has prevented, and thus excused, a promised performance must demonstrate each of the following: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not agreed, either expressly or impliedly, to perform in spite of impracticability that would otherwise justify his nonperformance.

Waddy, supra, 216 W.Va. at 258, 606 S.E.2d at 230.

The doctrine of impracticability was applied by the Supreme Court of Appeals in a more recent case. In *Frederick Management Company, LLC v. City National Bank of W. Va.*, 2010 WL 4723412 (W. Va. 2010)(No. 35438), in a *per curiam* decision, the court applied the doctrine to facts quite complex and, as in *Waddy*, held that it was error to apply the doctrine and excuse performance, where the nonoccurrence of the presupposed event was the fault of, or in the control of, the party who was to be excused from performance.

In the instant case, Defendants maintain that under the agreement as alleged by Plaintiff Gaddy, it was presupposed that (1) the land company clients would engage Bowles Rice and Defendant Lane as counsel; (2) the Defendants would enter into a contingency agreement with each and, if successful, receive 1/3rd of the recovery of each client and maintain control of the litigation; and, (3) Plaintiff Gaddy would provide litigation support for the claims of the land company clients in the

litigation. Further, Defendants maintain that once the circuit court certified the class in *Tawney*, and the land company clients elected to remain in the class in *Tawney*, these presupposed events could not occur through no fault nor negligence of either Bowles Rice or Mr. Lane. Defendants further maintain that the nonoccurrence of the presupposed events was beyond the control of attorney Lane and Bowles Rice.

It is unclear what Plaintiff maintains regarding this defense. From the Plaintiff's response to the pending motion, it appears that Plaintiff maintains that an issue of material fact exists "as to whether the alleged agreement fails under the doctrine of impracticability or impossibility, because the clients decided to participate in the already existing *Tawney* class action brought by Marvin Masters, Esq." It appears that Plaintiff is arguing that the doctrine is inapplicable, because the Defendants did not instruct Plaintiff to discontinue working on the claims of the large landowner clients. The undisputed evidence, however, shows that Gaddy in fact did stop working on these claims in 2004, at the time the large landowner clients refused Defendant Lane's recommendation and elected to remain as class members in the *Tawney* litigation. As stated, the evidence is that Mr. McCullough of Gaddy did not begin the claim evaluation work until March 5, 2004. *McCullough Tr.*, pp. 51-52. The evaluations were complete by July 27, 2004. See Defendants' Motion for Summary Judgment Ex. 6, and Gaddy's invoice to Bowles Rice for Mr. McCullough's damage assessment work, page 10. Practically all of Gaddy's work for the large landowner clients was done in 2004. *Id.*

There is no evidence that under the alleged oral agreement, Defendant Lane

and Bowles Rice agreed to share fees with Gaddy even if the presupposed events did not occur, that is, to perform in spite of impracticability (requirement #4); further, the nonoccurrence of the presupposed events made both the Defendants' performance and Plaintiffs' performance impracticable (#1), because Defendants did not control the decision of the large landowner clients whether to opt-out of the *Tawney* class, did not control the litigation, were not able to enter into contingency fee agreements with the large landowner clients,² and, Defendants did not have the ability to control whether Plaintiff Gaddy was engaged to provide litigation support services for the large landowner group of clients. In fact, Plaintiff Gaddy was not so engaged, because Marvin Masters had already engaged expert engineering services to do the same work.

The final requirement to be considered is whether the "impracticability" resulted without the fault of the party seeking to be excused (#3), here Defendants Bowles Rice and J. Thomas Lane. It must be reiterated that the evidence offered in this regard by Defendants, as contained in the Motion for Summary Judgment, is not contradicted. The court has reviewed the letter sent by Defendant Lane to one of the large landowner clients, Horse Creek Land and Mining Company. A copy of this letter, which is Exhibit 7 to Defendants' Motion for Summary Judgment, reveals that Defendants used reasonable, diligent efforts to fully inform the subject clients of the advantages and disadvantages of the class action and of filing separate litigation in Kanawha County circuit court; further, Defendants **recommended** that these clients

² In *Tawney*, the circuit court was vested with exclusive authority to determine the appropriate attorney

opt-out of the *Tawney* class and file separately from the class litigants. Certainly, the opt-out decision was one for these clients after receiving full information from counsel. It was not Defendants' decision; neither of the Defendants controlled the decision. Unlike the Rigglemans in the *Waddy* case, who claimed impracticability of performance, the uncontradicted evidence is that Bowles Rice and J. Thomas Lane did not cause, directly or indirectly, the large landowner group of clients to decide to remain in the *Tawney* class action litigation. This was the event that set in motion the impracticability of performance by both Plaintiff Gaddy and Defendants Bowles Rice and J. Thomas Lane.

Accordingly, the applicable criteria for operation of the doctrine of impracticability are met, and Gaddy's breach of contract claim fails. *Waddy*, 216 W.Va. at 258, 606 S.E.2d at 230.

Based on the foregoing, it is therefore **ORDERED** that Defendants' Motion for Summary Judgment, as to all claims for relief to which the defense of impracticability is raised (the breach of contract claim), is granted.

The clerk shall forward attested copies of this order to counsel of record.

All of which is ORDERED, accordingly.

ENTER: September 15, 2011



Thomas C. Evans, III, Circuit Judge
Fifth Judicial Circuit, State of West Virginia