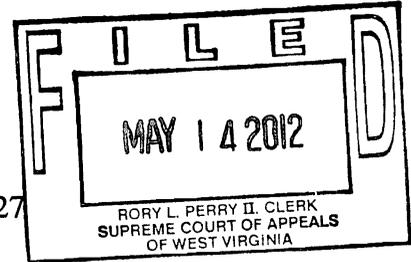


**IN THE
WEST VIRGINIA SUPREME COURT OF APPEALS**

No. 12-0206
Roane County Case No.: 10-C-27



GADDY ENGINEERING COMPANY,
Plaintiff Below, Petitioner,

v.

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

Defendants Below, Respondents.

**APPEAL FROM THE FINAL ORDER OF THE CIRCUIT COURT
OF ROANE COUNTY**

PETITIONER'S BRIEF

Paul J. Harris
W. Va. Bar #4673
Fifteenth & Eoff Streets
Wheeling, WV 26003
304.232.5300
pjh7294@aol.com
Counsel for Petitioner

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred in finding that Gaddy Engineering's claim for breach of contract fails because the doctrine of impossibility or impracticability excused performance of the agreement by Defendants. Even though the clients of Gaddy Engineering chose to enter the class in *Tawney v. Columbia Natural Resources*, instead of pursuing an independent claim against Columbia, Defendants still received recovery from the litigation of *Tawney v. Columbia Natural Resources*. Therefore, the doctrine of impossibility or impracticability is not applicable. Moreover, if Defendants believed that it would be impossible to honor the agreement with Gaddy Engineering due to impracticability or impossibility, Defendants should have instructed Gaddy Engineering to cease performance of work on the case.

2. The Circuit Court erred in finding that Gaddy Engineering's claim for professional negligence fails because there was no attorney-client relationship between Gaddy Engineering and Defendants. The evidence shows that Gaddy Engineering relied on advice given by Defendants in attendance of hearings and other matters. Gaddy Engineering believed it was a client of Defendants.

3. The Circuit Court erred in finding that Gaddy Engineering's claim for fraud fails because Gaddy Engineering has no evidence that Defendants made any "intentional misrepresentation of past or existing fact." Defendants repeatedly assured Gaddy Engineering that there was an agreement between Gaddy Engineering and Defendants to share 1/3 of any recovery.

4. The Circuit Court erred in finding that Gaddy Engineering Company's claims for negligence, gross negligence, and intentional breach fail because Defendants did not owe

any duty to Gaddy Engineering. The Circuit Court erred in finding there was no duty owed to Gaddy Engineering because Gaddy Engineering was a client of Defendants.

5. The Circuit Court erred in finding that Gaddy Engineering's claim for negligent misrepresentation was just a breach of contract claim re-labeled. The Circuit Court erred in finding that Defendants made no incorrect statement of past or existing fact. Defendants repeatedly assured Gaddy Engineering that there was an agreement between Gaddy Engineering and Defendants to share 1/3 of any recovery.

6. The Circuit Court erred in finding that Gaddy Engineering's claim for conversion fails because it is no different from Gaddy Engineering's claim for breach of contract. Gaddy Engineering's claim for conversion does not fail because Gaddy Engineering is entitled to 1/3 of any recovery. By failing to pay Gaddy Engineering 1/3 of the recovery, Defendants converted those funds to their own use.

7. The Circuit Court erred in finding that Gaddy Engineering's claim for promissory estoppel fails because Gaddy Engineering would have been fully compensated if it had accepted the check for work completed on an hourly basis. However, that check only compensated the work that one person from Gaddy Engineering completed. Gaddy Engineering was not paid for any of the other work that it did (with the exception of a flat fee that all parties agree did not adequately compensate Gaddy Engineering). Gaddy Engineering was promised 1/3 of any recovery by Defendants. Gaddy Engineering relied on that promise to its detriment when it was not paid 1/3 of the recovery. Therefore a reasonable trier of fact could have found that Defendants should be estopped from denying it owes Gaddy Engineering 1/3 of any recovery.

8. The Circuit Court erred in finding that Gaddy Engineering's claim for unjust enrichment fails because Gaddy Engineering's fraud claim fails. Defendant's own expert

testified at his deposition that if Defendants stated to Gaddy Engineering that it would be compensated by sharing 1/3 of the recovery, Gaddy Engineering would be entitled to rely on that assertion.

9. The Circuit Court erred in finding that Gaddy Engineering's claim for quantum meruit relief fails because Gaddy Engineering received full compensation for the services it performed when Defendants attempted to tender a check for the work one member of Gaddy Engineering performed. The check is not an adequate payment of services and the term of payment under the agreement was never supposed to be for compensation on an hourly basis.

STATEMENT OF THE CASE

This case involves a dispute regarding an agreement between Gaddy Engineering Company, hereinafter "Gaddy", and Bowles Rice McDavid Graff and Love, LLP and J. Thomas Lane, hereinafter "Defendants", to share in Defendants' recovery from the class action *Tawney et al. v. Columbia Natural Resources*, Civil Action No. 03-C-10E. (Appendix Record "AR" 006-7). Gaddy alleges that Tom Lane, Esq., a partner at Bowles Rice, agreed to share one-third of Bowles Rice's recovery. (AR006-7). Defendants argue that there was no agreement. (AR023). Gaddy filed its complaint against Defendants stating Defendants are liable to Gaddy based upon professional negligence, breach of contract, fraud, negligence, gross negligence, intentional breach and fraud, quantum meruit, conversion, promissory estoppel, negligent misrepresentation, and unjust enrichment. (AR004-022).

There is no dispute that in 2004 there was an oral contract for Gaddy and Bowles Rice to conduct an evaluation of potential royalty claims for companies for a flat fee of \$1,750, which was collected and divided by Defendants. (AR536-38). Bowles Rice would

receive \$1,000 and Gaddy would receive \$750 of that flat fee. (AR536-38). Both parties realized that this flat fee would not provide enough compensation for the amount of work that was done. (AR539). After this initial evaluation was completed, Defendant Lane never told Gaddy that its services as consultant were not needed. (AR540). Gaddy continued to perform work after the initial evaluations were completed, and continue to do so today. (AR541-42). It is also undisputed that Defendant Lane never told Gaddy to keep track of its time spent on this case until February 16, 2006. (AR543-44). Gaddy and Defendants also agreed that Gaddy would solicit clients to form a group for litigation and research the complicated calculations of the market to prove damages. (AR006). Defendants would perform the legal work of evaluating the various leases, prepare and try the case. (AR013). Gaddy completed its agreement. (AR008). Defendants evaluated the leases, but did not prepare and try the case. (AR013). Instead, Defendants entered a different deal with Marvin Masters, Esq. to join the *Tawney* case under an arrangement, whereby other lawyers prepared and tried the case, and Defendants would receive less than one-third of the clients' one-third recovery. (AR008). As a consequence, Defendants breached their agreement with Gaddy and never disclosed the actual amount Defendants received until threatened with the instant action. (AR009).

In 2004, Frank McCullough, an agent of Gaddy, sent Defendant Lane a series of e-mails attempting to receive a confirmation of the deal between Defendant Bowles Rice and Gaddy Engineering. (AR545). The first e-mail was dated February 26, 2004. (AR546). In this e-mail Mr. McCullough states: "Lets talk about the next step: Gaddy's and your firm's role and, finally, the 'deal' as we work through this opportunity." (AR546). Mr. McCullough's e-mail dated March 17, 2004 talks about the "methodology for allocating the recovered funds between the parties-- i.e. client(s), Bowles/Lane/George and Gaddy."

(AR546). An e-mail dated March 18, 2004 discusses again that there “will be some sort of equitable sharing of those proceeds between the folks that make it happen--i.e..., the client, Bowles/Lane/George and Gaddy.” (AR547). On April 2, 2004, Mr. McCullough sends another e-mail to Defendant Lane stating “we need to sit down and discuss the litigation strategy and the Bowles/George/Gaddy financial relationship.” (AR548). Finally, on April 3, 2007, Mr. McCullough states in an e-mail to Defendant Lane that it is his belief that a document “memorializing the verbal understanding that we (John, Ted, Frank and you) have long had regarding our particular participation...” is being drafted by Defendant Lane and his staff attorney. (AR549). It is undisputed that the first written communication from Defendant Lane refusing to share fees with Gaddy was July 25, 2007. (AR550-52).

Gaddy admits that Defendant Lane stated that he was unable to split attorney fees with a non-lawyer. (AR541-42). However, it was always relayed that a one-third of Defendants’ recovery in the *Tawney* litigation would be distributed to Gaddy for its work on the case, either directly, or by discounting the legal fees that Bowles Rice received from the litigation by one-third and instructing the clients to remit that one-third directly to Gaddy and to call the distribution a “bonus”. (AR551-52). Ellen Bullock, a member of Gaddy Engineering, testified at her deposition that she overheard a conversation between Defendant Lane and John Bullock that Gaddy would receive one-third of Defendants’ recovery:

A. Uh-huh (yes), John [Bullock, President of Gaddy Engineering] asked Tom [Lane] to agree that the case was going well and that there was a very good chance that we were going to get -- Tom was saying yes and nodding his head, and John asked and said, “And we are going to get a third of this, right?” and Tom came back in the room and said, “Yes, yes, but we can’t say it like that, we have to phrase it differently”.

John said, “But we are going to get the equivalent of a third or a third?” and Tom said, “Yes, I will take care of you”.

Ellen Bullock Deposition, Pages 26-27 (AR553-55). Even Defendant Lane admits in his deposition that there was a discussion regarding a bonus arrangement for Gaddy:

Q. ...But my question is, did you in the early stages, 2003-2004, say to Gaddy, "There's a way in which you can get a bonus out of this thing"?

A. Yeah, that discussion -- I feel pretty confident it did take place.

Lane Deposition, page 140-141 (AR556-57). Lane also admits "that at some point it was clear that they [Gaddy] saw the possibility that there would be -- they would get some percentage of our fee." Lane Deposition, page 119 (AR558).

Defendants attempted to provide Gaddy with a check in the amount of \$74,275.00. (AR760). Gaddy refused the check because it was only compensation for the work Frank McCullough, an agent of Gaddy, performed. (AR757). This amount does not adequately compensate Gaddy for its work, because Defendants never instructed Gaddy to keep its time spent on this case until February 16, 2006. (AR543-44). When Gaddy attempted to reconstruct its time spent on this case, Defendants refused to submit the invoice to the Court for payment. (AR760). The agreement was for 1/3 of 1/3 of any recovery by Defendants. (AR006-7). Gaddy was not paid anything for its work in obtaining the clients and performing the intensive work of proving damages; work which inured to the benefit of Gaddy's clients and Bowles Rice.

SUMMARY OF ARGUMENT

The Circuit Court erred in granting summary judgment against Gaddy for its claims for professional negligence, breach of contract, fraud, negligence, gross negligence, intentional breach, negligent misrepresentation, conversion, promissory estoppel, unjust enrichment, and quantum meruit. The Circuit Court admitted that there was a genuine issue of material fact as to

the breach of contract claim, but dismissed it under the doctrine of impossibility or impracticability because the clients decided to join the *Tawney* class action, and decided against hiring Defendants to file separate civil actions. (AR711). The evidence shows Defendants still participated in the *Tawney* litigation. (AR740). Defendants gained a recovery from that litigation and then refused to compensate Gaddy under the terms of the agreement (AR009).

The evidence also shows that Defendants repeatedly assured Gaddy that there was an agreement, and never told Gaddy to stop performing work. (AR551-52). Defendants reaped the benefit of the work that Gaddy performed, and then refused to properly compensate Gaddy for its time, under the agreement to share in any recovery. (AR010).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that Rule 19 oral argument is appropriate in this case given Petitioner's assignments of error. It is Petitioner's position that the Circuit Court failed to apply settled law to the facts of the case and found in favor of Defendants against the weight of the evidence. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

I. Standard of Review

In reviewing a trial court's decision of a motion for summary judgment, the decision is reviewed de novo. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189 (1994).

II. Circuit Court erred in granting Defendants' motion for summary judgment for Gaddy Engineering's claim for breach of contract because the doctrine of impossibility or impracticability excused the performance of the agreement by Defendants, when the evidence shows that Defendants still participated in litigation, and received recovery from that litigation.

The Circuit Court found that even if the jury should find that an oral agreement existed between Gaddy and Defendants, Defendants "are excused from performance pursuant to the doctrine of impracticability." (AR726). The Circuit Court cites *Waddy v. Riggleman*, 216 W.Va. 250 (2004) for the proposition that a party may be excused from performing under a contract under certain circumstances. (AR727) The Circuit Court stated:

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.

(AR728-29). The Court assumes that Defendants did not participate in the litigation involving the land company clients. However, Defendants did participate in litigation in the *Tawney* case, and in fact, shared in the recovery of the *Tawney* case. (AR009). It is correct that Defendants did not bring a separate civil action on behalf of the land company clients. Gaddy nonetheless did provide litigation support, even though the land company clients were members of the *Tawney* suit. (AR541-42).

One of the factors to determine whether or not it is impracticable to perform is that "[t]he nonoccurrence of the event was a basic assumption on which the contract was made." *Waddy* at 259. The Supreme Court stated that "[t]he fact that the event was unforeseeable is significant as suggesting that its non-occurrence was a basic assumption." *Id.* It was foreseeable that the

landowner clients would chose to become class members of the *Tawney* litigation. In fact, Defendants wrote a letter to the landowner clients discussing the benefits of filing their own claims as opposed to joining the pending class action. (AR335-40). Because it was foreseeable that the landowner clients would join the *Tawney* class action, the nonoccurrence of the event was not a basic assumption on which the contract was made.

The Circuit Court made erroneous factual findings that led to an abuse of discretion because it stated that the “**undisputed evidence**...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.” (*Emphasis added*, AR729). However, that is incorrect. John Bullock, President of Gaddy, asserts that Gaddy continued to perform litigation support after 2004. (AR542). It is undisputed that Defendants never instructed Gaddy to cease work for the landowner clients. In fact, it is undisputed that it was not until July 25, 2007, that Defendant Lane ever sent correspondence to Gaddy refusing to honor the oral agreement that Gaddy would share 1/3 of 1/3 of any recovery. (AR550-52).

Because Defendants still participated in litigation with the large landowner clients, and Gaddy provided litigation support to those clients, the doctrine of impossibility or impracticability is inapplicable and does not excuse Defendants from performing under the terms of the agreement. It was error to grant summary judgment as to Gaddy’s breach of contract claim.

III. Circuit Court erred in finding that Gaddy Engineering’s claim for professional negligence fails because there was no attorney-client relationship between Gaddy Engineering and Defendants, when Gaddy Engineering routinely relied on the advice given by Defendants.

The Circuit Court stated that “the relationship [between Gaddy and Defendants] 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.” (AR711). This is an erroneous finding, because there is evidence that shows that Gaddy often sought the advice of Defendant Lane, relied on that advice, and acted pursuant to that advice. (AR539-40, AR542, AR559-60, AR561-62).

Frank McCullough testified that there was an attorney-client relationship. (AR559-60). Moreover, Defendant Lane admits providing advice to Gaddy:

Q. ...But you're giving them [Gaddy] advice about how to handle their fees with the court, aren't you?

A. What I was trying to do was provide them with the manner in which the fees would need to be presented to the court in order to get compensated for it.

(although Defendant Lane contends that he was “instructing” not providing advice on how to be paid in the *Tawney* case)(AR539-40). John Bullock also testified that Defendant Lane provided advice to Gaddy:

A. ...Tom was always advising me what to do and how to do this. I will say it again; we were following his guidance. He was our lawyer in this.

(AR561-62).

Defendants' own expert, Jack Bowman, testified that no written document is required to form an attorney-client relationship:

Q. There are circumstances where an attorney/client relationship can be formed without a written document; correct?

A. Oh, sure.

Q. And in fact, when Joe Lawyer has a little office in a small town in West Virginia and someone just stops in, as they do in small offices at times, an attorney/client relationship can be formed without something put in writing?

A. Sure.

Q. All right.

A. In fact, one of the things I warn people about is getting the client you don't -- didn't know you had. You're at a cocktail

party and you're checking out the dip, and someone says, "I've got a question. You're a lawyer?"

And you say, "Yeah," and you answer him off the cuff. You may have entered into an attorney/client relationship. It's possible.

(AR563-64). Mr. Bowman also testified that one must examine both the lawyer's belief and the belief of the lay person to determine whether an attorney-client relationship exists:

Q. Now, when looking at that issue, do we -- as to whether or not an attorney/client relationship existed, do we focus on the belief of the lay person or of the lawyer or both?

A. ... you focus on the -- the lawyers. It's the lawyer's responsibility to make it clear if there's any question. But the sophistication of the client, or would-be client, also is a factor to be considered.

Q. Sure. But it's the lawyer's responsibility to say I'm not your lawyer?

A. If there's any question about that, yes.

(AR565).

Defendant Lane advised Gaddy on a number of issues, including advice that Gaddy should not attend the hearing in *Tawney* regarding the issue of fees. (AR541-42). Therefore, there is a question of fact that an attorney-client relationship exists, which precludes summary judgment. "As soon as the client has expressed a desire to employ an attorney, and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity, the relation of attorney and client has been established; and all dealings thereafter between them relating to the subject of the employment will be governed by the rules applicable to such relation." Syl. Pt. 3 *State ex rel. DeFrances v. Bedell*, 191 W.Va. 513 (1994). It was error to grant summary judgment against Gaddy on the issue of whether or not there was an attorney-client relationship because there is a genuine issue as to material fact.

IV. Circuit Court erred in finding that Gaddy Engineering's claim for fraud fails because there was no evidence that Defendants made any intentional misrepresentation of past or existing fact, when the evidence shows that Defendants repeatedly assured Gaddy Engineering that there was an agreement.

The Circuit Court found that Gaddy's claim for fraud fails because the evidence fails to show that Defendants made any "intentional misrepresentation of past or existing fact." (AR712)(citing *Croston v. Emax Oil Company*, 195 W.Va. 86 (1995)). However, the Circuit Court ignores the fact that Defendants repeatedly made assurances that there was an agreement in place. Defendant Lane repeatedly assured Gaddy that it had an agreement. (AR541-42, 553-555, 574, 578-80, 581-82). This repeated assertion that an agreement between Defendants and Gaddy existed is a present-existing fact. Additionally, Frank McCullough sent an e-mail to Defendant Lane on April 3, 2007 stating that:

I was advised that you and your staff attorney were in the process of drafting a document memorializing the verbal understanding that we (John, Ted, Frank and you) have long had regarding our participation in the Mahonia case as it pertains to the sub-class that Gaddy Engineering assisted in.

(AR549). This e-mail shows that at least in terms of preparation of the agreement, Gaddy was misled as to a present-existing fact.

The West Virginia Supreme Court has refined the elements of fraud and has stated:

The essential elements in an action for fraud are: '(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.'

Folio v. City of Clarksburg, 221 W.Va. 397 (2007)(citing Syl. Pt. 5 of *Kidd v. Mull*, 215 W.Va. 151(2004)).

Here, there is evidence that would support each element of fraud, which would preclude summary judgment. Defendant Lane entered into an oral agreement with Gaddy to

share fees from the *Tawney* litigation. (AR006-7). Defendant Lane now asserts that there was never an agreement because the Rules of Professional Responsibility do not permit an attorney to share fees with a non-lawyer. (AR024). However, Gaddy relied on the existence of an agreement and incurred substantial time and costs in performing work for the *Tawney* litigation. (AR541-42).

Defendants' expert, Jack Bowman, also unequivocally stated that if Defendant Lane did say that there was an agreement to share in attorney fees, that Gaddy had a right to rely on it, and that Defendant Lane violated the ethics rules and deviated from the standard of care:

Q. If the jury or -- believes or maybe the judge, that he did say it, did the Gaddy folks then have the right -- right to rely upon what Mr. Lane was saying?

A. Yes.

Q. Okay.

A. If he did say that, they had a right to rely on that, and he was in violation of the Ethics Rules.

Q. Well, okay, in violation of the Ethics Rules. Would he have also deviated from the standard of care?

A. Yes.

(AR586-87). Because there is evidence to suggest that Gaddy relied on Defendants' assertion that there was an agreement to share in the fees, summary judgment was not warranted.

V. Circuit Court erred in finding that Gaddy Engineering's claims for negligence, gross negligence, and intentional breach fail because Defendants did not owe a duty to Gaddy Engineering, when in West Virginia, there is deemed to exist a covenant of good faith and fair dealing in every contract.

The Circuit Court erred in finding that there was no legal duty owed to Gaddy by Defendants because there was no attorney-client relationship. (AR733). Gaddy argues that it is a

question of material fact as to whether an attorney-client relationship existed, as set forth *supra*, section III.

Further, it is established law in West Virginia that in every contract there is a covenant of good faith and fair dealing. *Caperton v. A.T. Massey Coal Company, Inc.*, No. 33350 (W.Va., 2008). There is evidence to show that Defendants violated that implied covenant, when Defendants entered into an agreement with Gaddy to share in any recovery, and then deflected responsibility in fulfilling the terms of the contract. The record is replete with instances of bad faith by Defendants. (See Statement of the Case, *supra*). Therefore, summary judgment on the issues of negligence, gross negligence, and intentional breach was not proper.

VI. Circuit Court erred in finding that Gaddy Engineering's claim for negligent misrepresentation fails because there was no incorrect statement of past or existing fact, when the evidence shows that Defendants repeatedly assured Gaddy Engineering that there was an agreement.

The West Virginia Supreme Court has held that the in order to sustain a claim of negligent misrepresentation the following must be present:

One under a duty to give information to another, who makes an erroneous statement when he has no knowledge on the subject, and thereby misleads the other to his injury, is as much liable in law as if he had intentionally stated a falsehood.

Folio v. City of Clarksburg, 655 S.E.2d 143 (W.Va., 2007) (citing Syllabus Point 1, *James v. Piggott*, 74 S.E. 667 (1910)). There are sufficient facts to satisfy the claim for negligent misrepresentation. A trier of fact can determine that Defendant Lane negligently misrepresented that Bowles Rice would share fees with Gaddy. Defendant Lane repeatedly assured Gaddy that it had an agreement. (AR541-42, 553-555, 574, 578-80, 581-82).

Plaintiffs can sustain a claim of negligent misrepresentation. The Circuit Court erred in granting summary judgment on the basis that Defendants owed no legal duty to Gaddy and that

Defendants did not make any incorrect statement of past or existing fact. (AR734)(See also discussion in Section IV *supra*).

VII. Circuit Court erred in finding that Gaddy Engineering's claim for conversion fails because the claim was just the breach of contract claim re-labeled, when the evidence shows that Defendants failed to pay Gaddy Engineering of the recovery, and Defendants converted those funds to their own use .

The Circuit Court incorrectly found that because Gaddy "has not demonstrated a right to possession of any portion of the Bowles Rice fee, its claim for conversion fails." (AR736). The essential elements of conversion are as follows:

Any distinct act of dominion wrongfully exerted over the property of another, and in denial of his rights, or inconsistent therewith, may be treated as a conversion and it is not necessary that the wrongdoer apply the property to his own use. And when such conversion is proved the plaintiff is entitled to recover irrespective of good or bad faith, care or negligence, knowledge or ignorance.

Syl. Pt. 17, *Rodgers v. Rodgers*, 184 W.Va. 82 (1990) (*Citing Syl. Pt. 3, Pine & Cypress Mfg. Co. v. American Eng'g & Constr. Co.*, 97 W.Va. 471 (1924)).

When Defendants failed to disburse one third of its attorney fees to Gaddy, Defendants wrongfully exerted dominion over the property of Gaddy. Therefore, the elements for a claim for conversion have been met, and the granting of summary judgment was improper.

VIII. Circuit Court erred in finding that Gaddy Engineering's claim for promissory estoppel fails because Gaddy Engineering would have been fully compensated if it had accepted the check for work completed on an hourly basis, when the evidence shows that the check only compensated the hourly work of one member of Gaddy Engineering.

The West Virginia Supreme Court of Appeals has held:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person

and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise.

Everett v. Brown, 174 W.Va. 35, 39 (1984).

The Circuit Court stated that it is “exclusively Gaddy’s fault that it has not been fully compensated for that work” because Defendants offered to tender a check for \$74,275.00 to Gaddy. (AR738). However, that check only compensates the work that one member of Gaddy, Frank McCullough, performed. (AR760). This does not adequately compensate Gaddy for the other work it performed. (AR760).

Also, the agreement was never that Gaddy would be paid on an hourly basis. (AR006-7). From the very inception of the agreement, the terms were that Gaddy would share 1/3 of 1/3 of any recovery Defendants would receive from litigation. (AR006-7). Gaddy did not keep its time, with the exception of Frank McCullough, because the agreement was that Gaddy was going to be paid one-third of Defendants’ recovery. (AR541-42). Furthermore, it was not until February 2006 that Defendant Lane instructed Gaddy to keep its time. (AR544).

Gaddy’s claim for promissory estoppel does not fail. Gaddy has proven that it relied on the promise that Defendant Lane made to its detriment. Therefore, the Circuit Court erred in granting summary judgment against Gaddy.

IX. Circuit Court erred in finding that Gaddy Engineering’s claim for unjust enrichment fails because their claim for fraud fails, when Defendants’ own expert witness testified at his deposition that if Defendants stated to Gaddy Engineering that it would be compensated, Gaddy Engineering would be entitled to rely on that assertion.

This Court holds that:

‘Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another....

The benefit may be an interest in money, land, chattels, or choses in action; beneficial services conferred; satisfaction of a debt or duty owed by him; or anything which adds to his security or advantage.'

Ft. Nt. 2, *Dunlap v. Hinkle*, 173 W.Va. 423 (1984)(quoting *Baugh v. Darley*, 184 P.2d 335, 337 (Utah, 1947)).

The Circuit Court found that because Gaddy's claim for fraud fails, its claim for unjust enrichment must fail. (AR739). However, as discussed *supra* Section IV, Gaddy's claim for fraud does not fail. Defendants have refused to pay the 1/3 of their recovery under the agreement. Defendants have been unjustly enriched by the work Gaddy performed. Summary judgment was not justified.

X. Circuit Court erred in finding that Gaddy Engineering's claim for quantum meruit relief fails because Gaddy Engineering received full compensation for the services it performed when Defendants attempted to tender a check for the work one member of Gaddy Engineering performed, when the evidence shows that the amount of the check does not adequately compensate Gaddy Engineering for the work it performed.

The Circuit Court held that Gaddy cannot recover under quantum meruit because it failed to accept payment of \$74,275.00. (AR742). The Circuit Court also stated that none of the work performed by Gaddy was used in the *Tawney* litigation. (AR742). However, evidence supports that Gaddy did perform litigation support. (AR543-44). Just because Gaddy was never used as an expert witness in *Tawney* does not mean that Gaddy's work was not used in the *Tawney* litigation.

As stated *supra*, the agreement did not call for compensation on an hourly basis. Rather, the agreement was to share one third of Defendants' recovery of the lawsuit by the landowner clients. (AR006-7). Furthermore, Gaddy tendered to Defendant Lane an invoice reconstructed based upon a mathematical calculation of the time Gaddy spent on the *Tawney* litigation. (AR543-44). Defendant rejected that invoice and offered to tender payment for \$293,000 less

than the amount originally invoiced. (AR740). Simply put, \$74,275.00 is not enough to compensate Gaddy for its work. Summary judgment on the issue of quantum meruit was not warranted.

CONCLUSION

For reasons set forth above, the Petitioner requests this Honorable Court to grant this petition for an appeal; to schedule it for oral argument; and, after the proceedings in this Honorable Court are complete, to reverse the lower tribunal and grant Petitioner a new trial.

Dated this 14th day of May 2012.

Petitioner,
by counsel,

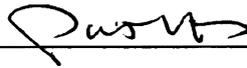


Paul J. Harris
W. Va. Bar No. 4673
Fifteenth & Eoff Streets
Wheeling, WV 26003
304.232.5300

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2012, a true and accurate copy of the foregoing *Petitioner's Brief* was delivered via hand-delivery as follows:

David D. Johnson, III, Esq.
Winter Johnson & Hill, PLLC
216 Brooks Street, Suite 201
Charleston, WV 25301



Paul J. Harris (WV Bar # 4673)
Counsel of Record for Petitioner