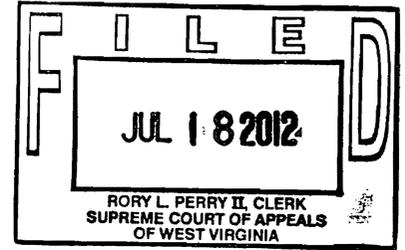


**IN THE
WEST VIRGINIA SUPREME COURT OF APPEALS**

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 REPLY BRIEF

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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.

ARGUMENT¹

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. **John Bullock's affidavit is not a sham affidavit because it is not contrary to the testimony Mr. Bullock gave at his deposition.**

Defendants Bowles and Lane argue that the affidavit of John Bullock, President of Gaddy Engineering Company, is a "sham affidavit." See Respondent's Brief, p. 15-17. Defendants argue that the affidavit contradicts testimony given by John Bullock at his deposition. However, this is not correct. Defendants state that 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 in July." See Respondent's Brief, p. 7. However, Mr. Bullock's actual testimony was that counsel for Defendants would have to direct the questions regarding subsequent work to other members of Gaddy:

¹ Gaddy Engineering only raises a few points in its reply brief. Gaddy Engineering does not concede any points discussed by Respondents in their brief. Gaddy Engineering simply wishes to point out two glaring issues.

Q: Okay, thank you. Do you have any knowledge that the information that was developed, the data that was developed and analyzed by you or Mr. McCullough was used directly in the Tawney case, in the Tawney civil action?

A: I don't know whether or not it was.

Q: Let me ask you this. At what point roughly was the claim evaluation process complete approximately?

A: Mr. McCullough could answer that question. I would just be speculating.

Q: Okay, that's fine. Once the claim evaluation process was over, did there ever come a time when either Mr. Lane or Mark Adkins or anybody at Bowles Rice asked Gaddy, anybody at Gaddy, to do any further work in connection with the Columbia litigation?

A: That is another question for Mr. McCullough.

Q: I am going to have marked as the next exhibit -- I intended - - in my last question, what I intended to say, and maybe I didn't, was I intended to ask whether once the claim evaluation process was over, anybody at Gaddy, including yourself, but also including Mr. McCullough or Mr. Streit or anybody, was asked by Bowles Rice to do any further work in connection with the Columbia litigation, and I understood your answer to be that at least as to the others, excluding yourself, Mr. McCullough is the one I need to ask, is that correct?

A: You can ask Mr. McCullough that and ask Mr. Streit.

Q: But I took it from your answer that you were not asked? I mean, you would know obviously if you were asked, I assume --

A: I can't think of anything I was asked to do.

AR 240-242. However, Mr. Bullock states in his affidavit:

Gaddy relied on the existence of an agreement and incurred substantial time and costs in performing work for the *Tawney* claim, even today. Mutual clients of Gaddy and Bowles Rice still contact Gaddy for assistance in settlement distributions.

AR542. Nothing in that affidavit states that Bowles Rice requested Gaddy perform work. The affidavit simply states that work was performed. The affidavit is not contrary to Mr. Bullock's deposition testimony.

III. Contrary to Defendants' assertion, there is an issue of material fact as to whether or not Gaddy Engineering performed work past 2004.

Defendants cite to Defendant Lane's affidavit for the proposition that Gaddy Engineering performed no work past 2004. Defendants state in their brief: "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, more important, that he had kept no record of his time devoted to working on the Columbia matter from 2000, forward." See Respondent's Brief, p. 8. However, Mr. Bullock states in his affidavit:

I never told Mr. Lane that I had performed little or no work on the *Tawney* matter. In fact, I performed an enormous amount of work that took years to complete. I regularly conducted research into Columbia Gas' post-production expenses, administrative expenses, and impression expenses. I also researched Columbia Gas' Securities and Exchange Commission (SEC) filings and compared those filings with the filings of other gas companies. I explored why Columbia Gas routinely paid approximately 67% less royalties than other gas companies. I contacted numerous land companies, engineers, and attorneys to discuss the legality of Columbia Gas' actions. I also coordinated numerous meetings with potential litigants against Columbia Gas.

AR541-42.

In addition, Defendants do not provide a reason as to why Defendant Lane was communicating with Gaddy Engineering past 2004, the year that Defendants claim Gaddy Engineering ceased all work. Defendant Lane sent a letter to Gaddy Engineering on July 25, 2007 stating that a lawyer cannot share fees with a non-lawyer. AR551-52. Frank McCullough, a member of Gaddy Engineering, sent e-mail correspondence dated April 3, 2007 to Defendant Lane stating that Mr. McCullough

was advised that you [Tom Lane] and your staff attorney were in the process of drafting a document memorializing the verbal understanding that we (John [Bullock], Ted [Streit], Frank [McCullough] and you [Tom Lane]) have long had regarding our

particular participation in the Mahonia case as it pertains to the subclass that Gaddy Engineering assisted in.

AR549. An e-mail from Tom Lane dated February 16, 2006 to Gaddy Engineering informs Gaddy to submit an invoice of their time “as if you [Gaddy Engineering] were charging on an hourly rate basis...” AR544. Defendants argue that Gaddy Engineering “took no action to begin preparing such an invoice throughout the next year.” See Respondent’s Brief, p. 8. However, Defendants never instructed Gaddy Engineering to keep track of its time until February 16, 2006. AR545.

Furthermore, Defendants fail to mention that Gaddy Engineering brought a fair number of clients to Defendants. See AR005-6, AR308-310. Defendants may not have been able to pursue any subclass cause of action had Gaddy Engineering not performed the claim evaluation work.

Finally, Defendant Lane admits that he never told Gaddy Engineering to cease work:

Q: Did you verbally--Did you tell Mr. Bullock or anyone from Gaddy, “Okay, your role as a consultant with Bowles Rice is over”?

A: No.

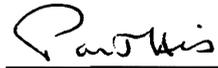
AR540. Defendants’ argument that there is no dispute that Gaddy Engineering did not perform work past 2004 is simply incorrect. See Respondent’s Brief, p. 20. Whether Gaddy Engineering performed work past 2004 is a material fact in dispute.

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 trial on the merits.

Dated this 17th day of July 2012.

Petitioner,
by counsel,



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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 2012, a true and accurate copy of the foregoing *Petitioner's Reply Brief* was delivered via U.S. Mail, postage prepaid, as follows:

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