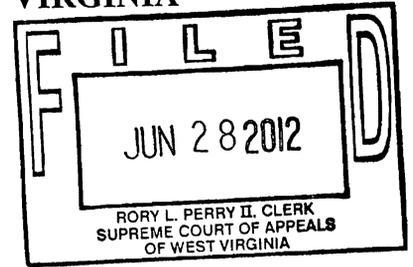


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CASE NO. 12-0206

(Roane County Civil Action 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.

RESPONDENTS' BRIEF

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GADDY ENGINEERING COMPANY,

Plaintiff/Petitioner,

v.

Appeal No. 12-0206

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

Defendants/Respondents.

BRIEF OF RESPONDENTS

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

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, respondents J. Thomas Lane (“Mr. Lane”) and Bowles Rice McDavid Graff & Love LLP (“Bowles Rice”, or the “firm”), by their counsel, David D. Johnson, III, and the law firm of Winter Johnson & Hill PLLC, respectfully tender to the Court their Brief in opposition to the opening Brief of petitioner, Gaddy Engineering Company (“Gaddy”). Gaddy appeals from an Order entered by the Circuit Court of Roane County on September 15, 2011 (subsequently, “first Order”), and from a Final Order entered on January 9, 2012, which incorporated the first Order by reference, in which the Circuit Court of Roane County (Thomas C. Evans, III, Judge) granted respondents’ Motion for Summary Judgment on all nine counts of Gaddy’s Complaint. The Complaint contained nine separate counts, all based upon an alleged contingent fee-sharing agreement between Gaddy and Bowles Rice. The trial court correctly concluded that there were no genuine issues as to any of the facts which were material to Gaddy’s claims, and that Bowles Rice and Mr. Lane were entitled to judgment on all nine counts of the Complaint as a matter of law. The decision of the trial court should be affirmed.

I. STATEMENT OF THE CASE¹

Gaddy is a company which provides land and natural resource management services for clients that are land companies. *See* excerpts from the transcript of the deposition of John Bullock, President and majority owner of Gaddy (subsequently, "J. Bullock Tr."), A-198. Mr. Lane is a partner of the Bowles Rice law firm, practicing in the firm's mineral law practice group. He has been practicing law with Bowles Rice and its predecessors since 1975. Lane Tr., A-249-50. Since the 1980s, Mr. Lane has provided advice to, and has litigated on behalf of, landowners involving the underpayment of natural gas royalties and similar issues. Lane Affid., ¶ 3, A-280.

Mr. 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, A-281.

Certain land companies are 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 of Columbia, he concluded that his client had potential claims against Columbia for the underpayment of royalties.

¹Consistent with Rule 10(d), W. Va. R. App. P., respondents have elected to submit their own Statement of the Case to the Court in order to address inaccuracies and omissions in the Statement of the Case contained in petitioner's opening Brief. Respondents' Statement of the Case is taken from the Statement of Facts contained in the Memorandum in support of their Motion for Summary Judgment, which appears in the Appendix beginning at page 149 (references to the Appendix will appear in the format, "A-149"). The trial court incorporated portions of the Statement of Facts in its first Order. *See* the first Order, beginning at A-710.

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, A-281.

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., A-199-212. Mr. Bullock has said that he began investigating Columbia's royalty payment practices in May, 2000. Bullock Tr., A-199. Frank McCullough, a Gaddy Vice President, began working at Gaddy as an independent contractor in mid-2003 and immediately became involved in looking into the Columbia royalty payment issues. *Id.*, A-204-08; McCullough Tr., A-286-87. 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., A-286; J. Bullock Tr., A-209-12.

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, ¶ 7, A-005. 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., A-221-26; Gaddy's answer to defendants' Interrogatory No. 8, A-307.

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 land companies that were Columbia 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, A-308; J. Bullock Tr., A-222-27; Lane Tr., A-258-62. Gaddy would assess the lessors' past and future losses from underpayment of royalties. Bowles Rice would evaluate the lessors' individual legal claims, based on the terms of their respective leases with Columbia. *Id.* Mr. 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 a combined flat fee of \$1,750.00, asking each to reply and state whether they wished to have an evaluation. A number of land companies then requested the evaluation.

Gaddy, to bolster its allegation in this case that it entered into a fee-sharing agreement with Bowles Rice, refers to the parties having "divided" a flat fee of \$1,750.00. Gaddy's Brief, page 3. This is nothing but a red herring. For each damage evaluation which it performed, Gaddy sent a separate invoice to Bowles Rice for the Gaddy fee of \$750.00 reflecting the name of the lessor-client for whom Gaddy had performed the evaluation. Bowles Rice then invoiced the lessor for its own fee of \$1,000.00, together with Gaddy's fee of \$750.00 - for a total of \$1,750.00. When Bowles Rice received payment from the lessor, it remitted the \$750.00 fee to Gaddy in payment of Gaddy's invoice. J. Bullock Tr., A-228; McCullough Tr., A-297; Lane Tr., A-262.

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 lessor land companies, 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, A-4 and 14. Bowles Rice and Mr. Lane acknowledge only that John Bullock repeatedly proposed that Gaddy should receive some percentage of any legal fee received by Bowles Rice from litigation against Columbia. Respondents at no time agreed to such a proposal. Lane Affid., ¶ 12, A-282; Lane Tr., A-270-72; Mark Adkins Tr., A-344-45 (Mr. Adkins is a Bowles Rice partner); Joseph Starsick Affid. (Mr. Starsick is a former Bowles Rice partner), A-376-77; Natalie Jefferis Affid. (Ms. Jefferis is a former Bowles Rice associate), A-379-80.² 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. Lane Tr., A-273-74, 276; Lane Affid., ¶ 11, A-282.

Gaddy and Bowles Rice agreed that if the claim evaluations led to litigation on behalf of the land company-lessors, Bowles Rice would prosecute the cases on behalf of each land company. McCullough Tr., A-295-96; J. Bullock Tr., A-221-22. At the time, both Gaddy and Bowles Rice were aware of the pending Roane County case, *Tawney, et al. v. Columbia Natural Resources*, Civil Action No. 03-C-10E (“*Tawney*”), which had been brought by Marvin Masters and others as a putative class action. However, Gaddy and Bowles Rice were doubtful that the trial court would certify a class in that case. *See*, J. Bullock Tr., A-213-14 (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, A-307-10; and the Lane Affid., ¶ 6, A-281. Then, an Order

²As is subsequently discussed, due to the Circuit Court’s ruling on Gaddy’s breach of contract claim, this factual dispute was rendered immaterial as a matter of law for purposes of the Motion for Summary Judgment, and presented no obstacle to an award of summary judgment to defendants.

was entered in *Tawney* on February 27, 2004, certifying a class which, by definition, included the land company-lessor clients of Bowles Rice and Gaddy unless they opted out of the class. The deadline for opting out was October 15, 2004.

The person at Gaddy who actually performed the damage assessments for the land companies for a flat fee of \$750.00 was Frank McCullough. McCullough Tr., A-293; Lane Tr., A-265-66. He did not begin that work until March 5, 2004. McCullough Tr., A-293-94. The evaluations were complete by July 27, 2004. *See*, Gaddy's invoice to Bowles Rice for Mr. McCullough's damage assessment work, page 10, A-333.

Mr. Lane then wrote to the land companies and explained in detail the advantages and disadvantages of both class action litigation, on the one hand, and pursuing individual claims, on the other. *See, e.g.*, Mr. Lane's letter to one of the land companies, A-335-40. Mr. Lane proposed to the land companies that they authorize him to pursue individual 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.*, A-339-40. In the end, however, the land companies decided to remain as class members in *Tawney*. That decision was, of course, binding on Bowles Rice. Bowles Rice, with the consent of Mr. Masters and other class counsel, made a formal appearance in *Tawney* on behalf of a subclass composed of twelve land companies on December 7, 2004. Lane Affid., ¶ 13, A-282-83.

Once the land companies opted to remain in the *Tawney* case, any possibility that Bowles Rice would prosecute individual claims for the companies in Kanawha County ended. Mr. 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., A-251-54; Mark Adkins Tr.,

A-342-43. Mr. Lane approached Mr. Masters about possibly using Gaddy as expert consultants in *Tawney*. However, Mr. Masters said that he had already retained an expert of his own and had no need for Gaddy's services. Lane Tr., A-278-79. However, Mr. Masters did say that if the *Tawney* case were successful, he would ask the trial court to approve Gaddy's charges for the claim evaluation work it had already performed before the land companies decided to participate in *Tawney*. Lane Affid., ¶ 13, A-282-83.

After the land companies opted to remain in *Tawney*, Gaddy did no more work for Bowles Rice relating to Columbia. Lane Tr., A-264. Gaddy was not asked by any class counsel to work on *Tawney*. *Id.*, A-277. Mark Adkins was the lead litigation partner for Bowles Rice assigned to *Tawney*. Adkins Tr., A-348. He never utilized Gaddy's claim evaluation work product in any way in connection with *Tawney*. *Id.* A-347. John Bullock, President of Gaddy, 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, 2004. J. Bullock Tr., A-240-41. He cannot recall anything that he, personally, was asked to do by Bowles Rice after the claim evaluation work was complete. *Id.*, A-241-42.

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 time it had devoted to that work. 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 time entries for Gaddy's claim evaluation work in order to obtain Court approval for payment of Gaddy's fees.

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 Columbia in excess of \$400,000,000.00, Gaddy submitted an invoice to Bowles Rice out of the blue which totaled \$367,225.00. *See*, A-424-49. The invoice (subsequently, “the Bullock invoice”) included charges for Mr. McCullough’s claim evaluation work, but it 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 Mr. Masters filed the Complaint in *Tawney*. The Bullock invoice purported to identify work done by Mr. Bullock during every week from January 1, 2000 through the end of 2006, even though (1) Gaddy alleged that the fee-sharing agreement was not even entered into until early 2004; (2) the claim evaluation work began on March 5 and was completed in July, 2004; and (3) Gaddy had not been asked to do any further work relating to Columbia after July, 2004.

It was at once apparent to Mr. Lane that the Bullock invoice could never be submitted to the *Tawney* Court for approval, because the charges reflected in the invoice for work by Mr. Bullock were, as the Circuit Court found, “patently questionable.” *See* the first Order, A-723. 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. Lane Affid., A-283. 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 beginning in March, 2004.

Id. Mr. Bullock responded on February 11, 2007, acknowledging that, contrary to the time entries contained in the Bullock invoice, he had in fact kept no time records for any of his work on the Columbia matter. *See*, A-450.

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, all of which was performed by Mr. McCullough from March 5 through July 27, 2004, which totaled \$74,275.00. *See*, A-323. 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 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 the Circuit Court in *Tawney*. Lane Affid., A-284. The Court approved the McCullough invoice for payment. *Id.* When Bowles Rice received its portion of the class counsel fee along with expense reimbursements, payment of the McCullough invoice was included. It is undisputed that Bowles Rice then tendered to Gaddy payment in full for the McCullough invoice, and Gaddy refused to accept payment. This civil action followed.

II. SUMMARY OF ARGUMENT

The Circuit Court correctly concluded that if, as Gaddy alleges and respondents deny, the parties entered into a contingent fee-sharing agreement, Bowles Rice and Mr. Lane were excused from performing under that agreement as a matter of law pursuant to the doctrine of impracticability adopted by this Court in *Waddy v. Riggleman*, 216 W.Va. 250, 256, 606 S.E.2d 222, 228 (2004). The land company-lessors’ decision to participate as class members in the *Tawney* class action was

an event, the non-occurrence of which was a basic assumption upon which the agreement would necessarily have been made. The clients' decision rendered performance under the alleged fee-sharing agreement impracticable, indeed, impossible, and Bowles Rice and Mr. Lane were not at fault in bringing about the clients' decision. *Id.*, 216 W.Va. at 258, 606 S.E.2d at 230. The Circuit Court therefore correctly concluded that application of the doctrine of impracticability rendered any factual dispute concerning the existence or non-existence of the alleged fee-sharing agreement immaterial, and that respondents were entitled to judgment on Gaddy's breach of contract claim as a matter of law.

The Circuit Court also correctly concluded that the undisputed facts relating to the working relationship between Gaddy and respondents clearly demonstrated that Mr. Lane and Bowles Rice did not have an attorney-client relationship with Gaddy, and that Gaddy's claim for alleged professional negligence therefore failed. The Court also properly found that Gaddy's claims for negligence, gross negligence, intentional breach, negligent misrepresentation, fraud and conversion were nothing more than the failed breach of contract claim re-labeled as tort claims. Finally, the Circuit Court correctly concluded that Gaddy failed to proffer evidence probative of the essential elements of its claims for fraud, negligence, gross negligence, intentional breach, negligent misrepresentation, conversion, promissory estoppel, unjust enrichment, and *quantum meruit* relief.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Bowles Rice and Mr. Lane agree with Gaddy that Rule 19 oral argument would be appropriate in this appeal because Gaddy's Brief assigns error in the Circuit Court's application of settled law to the facts of this case. Respondents further agree with Gaddy that disposition of this

appeal by memorandum decision would be appropriate.

IV. ARGUMENT

A. Standard Of Review

It is settled that “[a] circuit court’s entry of summary judgment is reviewed *de novo*.” *Frederick Management Co., L.L.C. v. City National Bank of West Virginia*, 228 W.Va. 550, 723 S.E.2d 277 (2010), Syl. Pt. 1 (internal citations and quotation marks omitted). In conducting its *de novo* review, this Court “appl[ies] the same standard utilized in the circuit court.” *Id.*, 723 S.E.2d at 285. The standard applied by a trial court pursuant to Rule 56, W.Va. R. Civ. P., requires that a summary judgment motion “should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. Of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

Nonetheless, summary judgment is mandated where a plaintiff fails to make an adequate showing on even one essential element of a claim on which it seeks to recover. *Painter v. Peavy*, 192 W. Va. 189, 192-93, 451 S.E.2d 755, 759 (1994). As the United States Supreme Court has observed, “the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This Court has said 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).³

**B. The Circuit Court Correctly Held That
Gaddy's Breach Of Contract Claim Failed
Pursuant To The Doctrine Of Impracticability**

Respondents' Motion for Summary Judgment was predicated, in substantial part, on the doctrine of impracticability, adopted by this Court in *Waddy v. Riggleman*, 216 W.Va. 250, 258, 606 S.E.2d 222, 230 (2004), citing and adopting the Restatement (Second) of Contracts § 261. Bowles Rice and Mr. Lane adamantly deny that they entered into a contingent fee-sharing agreement with Gaddy, and there is no evidence, independent of testimony by Gaddy's owners and principals, to substantiate Gaddy's naked and self-serving assertion that there was such an agreement. Nonetheless, even if one assumes that the agreement existed, the Circuit Court correctly concluded that respondents' duty to perform under the agreement would clearly have been excused under the doctrine of impracticability. *See* the Court's first Order, entered on September 15, 2011, beginning at A-726.⁴ The Circuit Court quoted from *Waddy*:

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

³From the Circuit Court's first Order, which was expressly incorporated by reference in the Final Order, it is apparent that the Court utilized the appropriate summary judgment standard. *See* the first Order, A-725-26, and the Final Order, A-733.

⁴The Circuit Court incorporated in this section of its first Order portions of the argument contained in respondents' Memorandum in support of their Motion for Summary Judgment. *See* the Memorandum, beginning at A-173.

otherwise justify his nonperformance.

See the first Order, A-728, quoting from *Waddy*, 216 W.Va. at 258, 606 S.E.2d at 230.

The Circuit Court correctly found that the fee-sharing agreement alleged by Gaddy presupposed that Bowles Rice would file and prosecute civil actions against Columbia individually on behalf of the firm's land company clients; that Bowles Rice would enter into a contingent fee agreement with each client pursuant to which the firm would be entitled to a fee of one-third of any sum recovered for the client; that Bowles Rice would then rely on Gaddy to provide expert litigation support services for the claims against Columbia; and that, if the litigation proved successful, Bowles Rice would give one-third of its one-third fee to Gaddy. See the first Order, A-728.⁵ Applying this Court's holding in *Waddy*, the Circuit Court then correctly concluded that performance under the alleged fee-sharing agreement - both by Gaddy and by respondents - would have been rendered impracticable, indeed, impossible, by the decision of the land company clients to participate as class members in the pre-existing *Tawney* class action. *Id.*, beginning at page 20, A-729.

The trial Court noted that it was undisputed that Mr. McCullough's claim evaluation work pursuant to the flat fee arrangement with the land company clients was performed between March 5 and July 27, 2004, and ended well before the time the land companies decided to participate in the *Tawney* class action. *Id.* As a result of that decision, which the trial Court correctly recognized was binding on respondents, Bowles Rice and Mr. Lane were unable to prosecute individual claims for their clients, or to insist upon a one-third contingent fee agreement with each

⁵Gaddy's Brief in this appeal does not dispute the above characterization of the terms of the fee-sharing agreement which Gaddy alleges it entered into with respondents.

land company. *See* the Circuit Court’s first Order, page 21 and n. 2, A-730 (noting that the Court had exclusive authority to determine the appropriate fee in *Tawney*). Mr. Lane and Bowles Rice did not control the *Tawney* litigation, and they had no control over whether Gaddy would or would not be relied on to provide expert litigation support services. *Id.* The Court correctly noted that it was undisputed that Mr. Masters, who was lead class counsel in *Tawney*, made the decision not to utilize Gaddy’s services, because he had already retained his own expert. *Id.*

The Circuit Court correctly found that Bowles Rice and Mr. Lane were without fault in causing the land companies to decide to remain as class members in *Tawney*. *See* the Court’s first Order, A-730-31. Indeed, the Circuit Court correctly noted that Mr. Lane had recommended to the land companies that they *not* participate in the class action, and that they should instead allow him to pursue individual claims on their behalf against Columbia in Kanawha County. *Id.*, discussing Mr. Lane’s letters to the land companies proposing that they pursue individual claims, an example of which was attached as Exhibit 7 to the Motion for Summary Judgment, A-335-40. This is the third prerequisite for application of the doctrine of impracticability - “the impracticability resulted without the fault of the party seeking to be excused” *Waddy*, 216 W.Va. at 258, 606 S.E.2d at 230. Finally, the Circuit Court correctly found that there was no evidence in the record which would show that Mr. Lane and Bowles Rice agreed to perform under the alleged fee-sharing agreement despite the impracticability of doing so, the fourth and final criterion for applying the doctrine of impracticability. *Id.*

In its Brief, Gaddy first challenges the trial Court’s application of the doctrine of impracticability by asserting:

The [Circuit] 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. [Internal citation to the Appendix omitted.] 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. [Internal citation to the Appendix omitted.]

See Gaddy's Brief, page 8 (emphasis added). To support its assertion that "Gaddy nonetheless did provide litigation support," Gaddy relies exclusively on an Affidavit signed by John Bullock on August 31, 2011, in support of Gaddy's Response in opposition to the Motion for Summary Judgment. See the Affidavit, A-541-42. Mr. Bullock's Affidavit avers, in relevant part, as follows:

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 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.

Id., A-541-42.

The Bullock Affidavit does not say when the work described therein was performed. Bowles Rice and Mr. Lane have not disputed that Mr. Bullock and Mr. McCullough worked to investigate and analyze data pertaining to Columbia's royalty payment practices between 2000 and early 2004, prior to the time when Gaddy alleges it entered into a working relationship with Bowles Rice and the claim evaluations began. See the discussion, *infra*, at pages 2-3. All of that work was done by Gaddy entirely on its own and independent of Bowles Rice. What is denied by Bowles Rice and Mr. Lane is that Gaddy was ever called on to do any work relating to *Tawney*, or any work of

any sort relating to Columbia, once the claim evaluation process was over and the land companies chose to participate in *Tawney*. This Court should note that the Bullock Affidavit - if read carefully - does not contain a clear and affirmative statement that Mr. Bullock actually worked “on the *Tawney* matter” Nor could he truthfully make such a statement. Rather, the Affidavit very carefully avoids saying *when* or *for what specific purpose* the work described therein was done. Yet, even if the Affidavit is generously interpreted to implicitly aver that Mr. Bullock *did* work “on the *Tawney* matter,” it should be disregarded by the Court, along with the bare statement in Gaddy’s Brief that it “did provide litigation support” See the Gaddy Brief, page 8.

On July 13, 2011, a month and one-half before he signed his Affidavit in opposition to the Motion for Summary Judgment, Mr. Bullock gave his discovery deposition in this civil action. Mr. Bullock testified that he had no idea whether any of Gaddy’s work product was ever used in *Tawney*. He also could not say whether anyone at Gaddy was asked by Bowles Rice to do any work relating to Columbia once the claim evaluation work by Mr. McCullough was complete. J. Bullock Tr., A-240-42. It is undisputed that the claim evaluation work was completed by July 27, 2004, months before the land companies decided to participate as class members in *Tawney*. See, Ex. 6, the McCullough invoice, A-333. Mr. Bullock also testified under oath that he could not recall anything that he was asked to do by anyone at Bowles Rice after the claim evaluation work was complete and Bowles Rice began working in *Tawney*. J. Bullock Tr., A-241-42.⁶ All of this evidence was carefully noted by the Circuit Court at page 12 of its Order of September 15, 2011.

⁶It is undisputed that it was Mr. McCullough, not Mr. Bullock, who did Gaddy’s portion of the claim evaluation work between March and July, 2004. McCullough Tr., A-293-94; Lane Tr., A-265-66.

See the Court's first Order, A-721.⁷

Accordingly, if this Court interprets Mr. Bullock's Affidavit to aver, in combination with the aforesaid statement at page 8 of Gaddy's Brief, that the work described in the Affidavit constituted litigation support for the *Tawney* class action, then the Affidavit is a so-called "sham affidavit" and should be rejected. In *Kiser v. Caudill*, 215 W.Va. 403, 410, 599 S.E.2d 826, 833 (2004), this Court adopted the federal judiciary's "'sham affidavit' rule" based on the Court's conclusion that the "rule furthers the purposes of summary judgment because it helps circuit court judges determine whether there is in fact a genuine issue for trial." *Id.* Under the rule, "an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained." *Id.*, and Syl. Pt. 4. Mr. Bullock's bare bones Affidavit contains no explanation, much less an adequate one, concerning its clear contradiction of his prior deposition testimony.

Gaddy next asserts that the land companies' decision to participate in the *Tawney* class action against Columbia was entirely foreseeable, and that it can therefore not be said that "the nonoccurrence of [that] event was a basic assumption on which [the alleged fee-sharing] contract was made," as required by *Waddy*, 216 W.Va. at 258, 606 S.E.2d at 230. See Gaddy's Brief, pages 8-9. Gaddy points to the fact that Mr. Lane wrote to the land company clients and discussed their possible future participation in the *Tawney* class action. See Gaddy's Brief, page 9. However, Gaddy again ignores evidence that was uncontradicted in the Circuit Court. In its first Order, the

⁷Thus, even if one assumes that someone at Gaddy continued to do any work pertaining to Columbia after the clients chose to participate in *Tawney*, it remains entirely undisputed that no such work was done in the *Tawney* case; no such work was done at the request of Bowles Rice or other class counsel in *Tawney*; and no work product of Gaddy's was ever used in any way in *Tawney* or in any other litigation.

Circuit Court correctly noted that when Mr. Lane wrote to the clients, he recommended to them that they *not* participate in the class action, and that they should instead allow him to pursue individual claims on their behalf against Columbia. *See* the first Order, A-730-31, discussing Mr. Lane’s letters to the land companies proposing that they pursue individual claims, an example of which was attached as Exhibit 7 to the Motion for Summary Judgment, A-335-40.

More important, in the Circuit Court, Gaddy never disputed that it and Bowles Rice assumed from the very beginning that if the claim evaluations were favorable, Mr. Lane would file individual claims against Columbia for each land company. *See, e.g.*, J. Bullock Tr., A-221-22. Indeed, the *foreseeability* argument now raised by Gaddy on appeal, at pages 8-9 of its Brief, was never even mentioned by Gaddy at all in the Circuit Court. Because this argument was not made by Gaddy and decided by the Circuit Court in connection with the Motion for Summary Judgment, the argument is not reviewable by this Court on appeal. *Koffler v. City of Huntington*, 196 W.Va. 202, 207, 469 S.E.2d 645, 650, n. 6 (1996).

To support its *foreseeability* argument, Gaddy quotes the following language from *Waddy*: “The fact that the event was unforeseeable is significant as suggesting that its non-occurrence was a basic assumption.” *See Waddy*, 216 W.Va. at 261, 606 S.E.2d at 233 (quoting from the introductory note to Chapter eleven of the Restatement (Second) of Contracts, addressing the issue of impracticability of performance), and *see* Gaddy’s Brief, pages 8-9, incorrectly citing 216 W.Va. at 259 for the aforesaid quote. Gaddy thus asserts, at least implicitly, that if an event *was* foreseeable, its non-occurrence could necessarily not have been an assumption upon which an alleged contract was made.

Unfortunately, Gaddy fails to quote for this Court the very next sentence from the

Restatement which was also quoted by the Court in *Waddy*: “However, the fact that [the event] was foreseeable, or even foreseen, does not, of itself, argue for a contrary conclusion,” that is to say, a conclusion that the non-occurrence of the event was not a basic assumption. *See* 216 W.Va. at 261, 606 S.E.2d at 233 (emphasis added). In *Waddy*, this Court underscored that point by quoting further from Comment *b* to § 261 of the Restatement: “The fact that the event was foreseeable, or even foreseen, does not necessarily compel a conclusion that its non-occurrence was not a basic assumption.” 216 W.Va. at 261, 606 S.E.2d at 233. This language, too, was ignored by Gaddy in its Brief on appeal.

Gaddy’s Response in opposition to the Motion for Summary Judgment did not even contain a separate argument section specifically devoted to the doctrine of impracticability. Rather, in a section of its Response devoted to the issue of whether it had presented clear and convincing evidence of the alleged fee-sharing agreement, Gaddy made only a passing reference to the issue of “impracticability and impossibility” - at pages 14-15 of its Response, A-527-28.⁸

Gaddy’s Response to the Motion for Summary Judgment stated that “[e]ven if the contract was deemed impossible or impracticable because the clients chose to become a part of the

⁸In their Motion for Summary Judgment, as an alternative ground for judgment in their favor, Bowles Rice and Mr. Lane argued that because the alleged fee-sharing agreement, if it existed, was indisputably oral and - though it could in theory have been performed within one year - was not, in fact, performed within a year, Gaddy’s threshold burden was to present the Court with clear and convincing evidence of the existence of the agreement before the breach of contract claim could reach the jury. *See Thompson v. Stuckey*, 171 W.Va. 483, 486-87, 300 S.E.2d 295, 298-99 (1983). However, the Circuit Court did not rely on that theory in awarding summary judgment against Gaddy. Nonetheless, this is one more theory upon which this Court could affirm the Orders of the Circuit Court. *See, e.g., Hoover v. Moran*, 224 W.Va. 372, 381-82, 686 S.E.2d 23, 32-33 (2009) (citing cases which clarify that this Court may affirm a summary judgment order on any ground, regardless of whether the ground was relied on by the trial court. *Also see* respondents’ summary judgment Memorandum, beginning at page 17, A-165.

class of *Tawney*, Defendants should have instructed Gaddy to cease work on the case.” Response, A-527-28. However, as noted before, the Circuit Court correctly found in its first summary judgment Order that it was undisputed that once the land companies opted to participate in *Tawney*, Gaddy did no more work for Bowles Rice relating to Columbia; Gaddy was not asked by any class counsel to do such work; Gaddy’s prior work product was never used in *Tawney*; John Bullock had no knowledge that Gaddy was asked to do any work relating to Columbia once the claim evaluations were complete; and he had no recollection that he, personally, was asked to do any work relating to Columbia during that period. *See* the first Order, A-721-22.

For all of the foregoing reasons, this Court should affirm the Circuit Court’s award of summary judgment in favor of Mr. Lane and Bowles Rice on Gaddy’s breach of contract claim. The arguments now advanced by Gaddy on appeal were, in large part, not raised in or decided by the trial Court. The arguments are therefore not reviewable by this Court. Moreover, it is clear that the Circuit Court properly applied the doctrine of impracticability to the undisputed facts of this case, and concluded that even if one assumes that the alleged fee-sharing agreement in fact existed, performance under that contract by Mr. Lane and Bowles Rice would have been excused.

**C. The Circuit Court Correctly Found That There Was No Evidence
That Bowles Rice And Mr. Lane Entered Into An
Attorney-Client Relationship With Gaddy**

Count I of Gaddy’s Complaint purported to assert a claim against Bowles Rice and Mr. Lane for professional negligence, based on the alleged existence of an attorney-client relationship. *See* the Complaint, page 8, A-11. However, that Count contains nothing more than the conclusory allegation that “[i]n rendering legal advice to Plaintiff, Defendant Lane[] and Defendant Bowles Rice willfully, negligently or with gross negligence, failed to act as reasonably

prudent lawyers would have acted under the same or similar circumstances, and breached their duties to Plaintiff.” *Id.*, ¶ 32.

In Paragraph 13 of the Complaint, Gaddy alleged that it entered into an agreement with defendants pursuant to which Bowles Rice and Mr. Lane “agreed to provide legal representation to Plaintiff and to Plaintiff’s clients and others in a case against Columbia Natural Resources” A-7. Similarly, in Paragraph 30 of the Complaint, Gaddy made the conclusory allegation that Mr. Lane “routinely rendered legal advice to Plaintiff regarding the matters set forth in this Complaint and other matters.” A-10-11.

However, in the Circuit Court, there was never any assertion that Gaddy was, or was ever intended to be, a party-plaintiff in any litigation against Columbia. Much to the contrary, it is undisputed that Bowles Rice was always intended to represent land company clients which also were clients of Gaddy, with Gaddy providing litigation support. Indeed, in *Tawney*, the Circuit Court approved payment of Gaddy’s fees for its engineering consulting work which was done on behalf of the mutual clients of Gaddy and Bowles Rice. In the claim evaluation process, it is clear from the undisputed facts that both Gaddy and Bowles Rice were performing their own professional services for mutual clients. In short, Gaddy has presented no evidence of any specific matter in which Mr. Lane or any other Bowles Rice lawyer supposedly provided legal advice or representation to Gaddy.

The Circuit Court accurately found that within the body of evidence offered by the parties in connection with the summary judgment Motion, there was no genuine issue of material fact regarding Gaddy’s claim for professional negligence. *See* the Order of September 15, 2011, A-711. The Court specifically found and concluded that it was “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 clients on the one hand, on the other, a litigation support service provider engaged by the law firm/attorney to provide services for those same clients in anticipated litigation.”

Id. Over the space of more than twelve pages, the Court then made detailed factual findings which are relevant to, and supportive of, its conclusion that there was no attorney-client relationship between Gaddy and Bowles Rice. *See* the first Order, A-713-25.⁹

Gaddy nonetheless challenges the trial Court’s conclusion that there was no attorney-client relationship by citing the deposition testimony of Mr. McCullough. *See* Gaddy’s Brief, page 10, citing the McCullough Tr., A-559-60. Mr. McCullough was asked whether he, personally, believed Gaddy had a client-attorney relationship with Bowles Rice, and he answered: “Absolutely.” This bald and conclusory statement has no probative value, at all. Gaddy offers no particularized evidence of any type to support Mr. McCullough’s statement.

Gaddy next cites Mr. Lane’s testimony concerning his instructions to Gaddy as to the form in which its claim evaluation consulting fees would have to be presented to the Circuit Court in *Tawney* in order to hopefully obtain Court approval for reimbursement of those fees from the *Tawney* recovery. *See* Gaddy’s Brief, page 10, citing Mr. Lane’s Transcript, A-539, where he

⁹The Court found that Gaddy is an engineering company serving land companies who are oil and gas lessors, and that Bowles Rice provides legal services to many of the same companies. A-713. It found that Gaddy and Bowles Rice, independent of each other, began investigating Columbia’s royalty payment practices on behalf of their respective clients, and both concluded that Columbia was likely defrauding its lessors. A-714-15. The Circuit Court found that Bowles Rice and Gaddy agreed to jointly offer to evaluate potential claims against Columbia on behalf of various land companies, with Gaddy using its engineering expertise to do damage assessments for the companies, and Bowles Rice conducting a legal analysis of the potential claims based on an analysis of the companies’ respective leases. A-715. None of these facts were in dispute in the Circuit Court, and none of the facts support the existence of an attorney-client relationship between Gaddy and Bowles Rice.

simply testified: “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.” Gaddy seeks to support its averment that there was an attorney-client relationship by describing the foregoing testimony as an admission by Mr. Lane that he was “providing advice to Gaddy.” Gaddy’s Brief, page 10. This argument borders on being silly, and it should be given no consideration by this Court.

Finally, Gaddy quotes the entirely conclusory, unsupported statement by Mr. Bullock that - “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.” Gaddy’s Brief, page 10. Again, such conclusory testimony carries no weight at all.

Gaddy chose not to provide the Court with Mr. Bullock’s testimony in direct response to questions from respondents’ counsel seeking to pin him down as to the factual basis for Gaddy’s claim that it had a client-attorney relationship with Bowles Rice. *See* the John Bullock Transcript, A-243-47, where he was questioned about Gaddy’s answer to an interrogatory which asked for the factual foundation for Gaddy’s assertion that there was a client-attorney relationship. In the first three paragraphs of this testimony, Mr. Bullock first repeats what had been said in Gaddy’s interrogatory answer, and then attempts to explain how it is - in his view - probative of an attorney/client relationship:

Okay, I will give you the answer. How to legally approach the Gaddy/Bowles Rice clients, that phrase right there in response, those are conversations, I believe, that Frank McCullough and Tom Lane had about coordination of their effort to talk to the clients.

* * * * *

What information was necessary to prove the case at trial legally; I think that is Frank and Tom talking about what do we need to do here, how are we going to show these damages, what is the magnitude of the damages, what is the practice in industry.

* * * * *

As to the form in which the information had to be presented legally, they [Tom Lane and Frank McCullough] were coordinating that conversation and that work between them and possibly Ted also, and how Gaddy was to be paid.

* * * * *

I guess what I am saying is, it is everything all together that constitutes the attorney-client relationship interpretation.

Id. Mr. Bullock’s testimony does nothing more than describe the interaction between Mr. McCullough and Mr. Lane in the course of their work evaluating potential royalty claims for their mutual clients.¹⁰

Gaddy ends this section of its Brief with the bald assertion that “there is a question of fact that an attorney-client relationship exists” Brief, page 10. There is no genuine issue of material fact on that point. “The quality and quantity of the evidence offered to create a question of fact must be adequate to support a jury verdict.” *Thompson Everett, Inc. v. Nat’l. Cable Advert., L.P.*, 57 F.3d 1317, 1322-23 (4th Cir. 1995), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis added). Excluding its own uncorroborated and entirely conclusory statements, Gaddy presented no evidence of an attorney-client relationship, much less evidence on that point which would be “adequate to support a jury verdict.” *Id.*

Even if Gaddy had honestly believed and intended that Bowles Rice and Mr. Lane would be representing both Gaddy and the mutual clients of Gaddy and Bowles Rice in litigation with Columbia, this - without more - would not give rise to an attorney-client relationship. The law looks principally to “the manifest intentions of the parties to determine whether they have entered into a client-lawyer relationship.” 1 Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of*

¹⁰Gaddy also cites testimony by respondents’ expert, Prof. Forest J. Bowman, but his testimony lends no support to Gaddy’s legal malpractice claim. *See* Gaddy’s Brief, pages 10-11.

Lawyering (3rd Ed.) § 2.5.

For an attorney-client relationship to exist, a person must first manifest an intention to receive legal services from a lawyer, and the lawyer must then consent to provide the services, or fail to negate consent where the other person has reason to assume that the relationship is underway. *Id. Accord*, Restatement (Third) of The Law Governing Lawyers, § 14, and Comment b. thereto: “The client-lawyer relationship ordinarily is a consensual one” *Also see*, Forest Jackson Bowman, “*Ethics and Malpractice Problems Endemic to the Mineral Lawyer*”, Annual Institute Proceedings of the Eastern Mineral Law Foundation for 1989, Chapter 4, § 4.02, page 4-4: “The attorney-client relationship is consensual and arises only when both the lawyer and the client have agreed to its formation. The burden of establishing the relationship rests upon the claimant.” (Internal footnote citation omitted.)¹¹

**D. The Circuit Court Properly Concluded That Gaddy’s
Fraud Claim Failed Because The Only Evidence Presented Pertained
To A Promise Allegedly Made and Broken By Bowles Rice And Mr. Lane**

Gaddy asserted claims for fraud both in Count III and in Count IV of its Complaint. Count IV is actually labeled as one for “(Negligence, Gross Negligence, Intentional Breach, [and] Fraud)”. *See* the Complaint, page 16, A-19. However, a comparison of Count III with Count IV reveals that there is no substantive difference between the two fraud claims. At the core of Count IV is the allegation that defendants “fraudulently and intentionally breached their agreement with, and duty to, [Gaddy].” *Id.*

In Count III, which is Gaddy’s stand-alone fraud count, Gaddy incorporated by

¹¹Even if Gaddy could demonstrate the existence of an attorney-client relationship between it and Bowles Rice, Gaddy has not articulated any breach of a professional duty owed to it by respondents, much less offered any evidence probative of such a breach.

reference all of the factual allegations pertaining to the alleged fee-sharing agreement which were contained in the thirty-eight paragraphs which precede Count III. *Id.*, ¶ 39, A-12. Gaddy then specifically alleged in Count III that Mr. Lane promised in January of 2004 to give Gaddy 1/3 of the 1/3 fee which Bowles Rice might ultimately receive from pursuing litigation against Columbia. *Id.*, ¶ 50, A-14. Gaddy further alleged that in reliance on defendants' promise, it undertook extensive and time-consuming work to evaluate potential claims against Columbia. *Id.*, ¶ 42, A-12-13. Gaddy then alleged that in November, 2008, Mr. Lane acknowledged to Gaddy that he had previously promised to give Gaddy a share of the Bowles Rice contingent fee, but that "Bowles Rice declined to make payment to Gaddy under that contingen[t] agreement." *Id.*, ¶ 61, A-18.

Count III, as well as Count IV insofar as it purports to state a fraud claim, are transparently nothing more than breach of contract claims masquerading as fraud claims.¹² In West Virginia and most other jurisdictions, "actionable fraud must ordinarily be predicated upon an intentional misrepresentation of a past or existing fact and not upon a misrepresentation as to a future occurrence. Somewhat similarly, it cannot be based on statements which are promissory in nature or which constitute expressions of intention, unless the non-existence of the intention to fulfill the promise at the time it was made is shown." *Croston v. Emax Oil Co.*, 195 W.Va. 86, 90, 464 S.E.2d 728, 732 (1995) (internal citation omitted).¹³ In other words, "[f]raud cannot be predicated

¹²Again, defendants deny the existence of the alleged contingent fee-sharing agreement. However, even if one assumes, only for purposes of the present appeal, that the agreement did exist, the Circuit Court correctly concluded that Gaddy's fraud claims were fundamentally flawed.

¹³Even if the existence of the fee-sharing promise is assumed for the sake of argument, Gaddy presented no evidence to the Circuit Court - and has pointed to none on appeal - which would support an argument that at the time Mr. Lane allegedly made that promise he had no intention of keeping it.

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.” *Id.* (Internal citation and quotation marks omitted. Emphasis in the original.)

These principles were at the heart of the Circuit Court’s award of summary judgment to Mr. Lane and Bowles Rice on Gaddy’s fraud claims. *See* the first summary judgment Order, A-712, citing and discussing *Croston*. On appeal, Gaddy acknowledges the trial Court’s reliance on *Croston*, but then suggests that this Court has now “refined the elements of fraud” Gaddy’s Brief, page 12. As evidence of this supposed *refinement*, Gaddy then quotes the elements of a fraud claim as stated in this Court’s 2007 decision in *Folio v. City of Clarksburg*, 221 W.Va. 397, 655 S.E.2d 143 (2007), twelve years after *Croston* was decided. However, far from being a refinement of the principles stated in *Croston*, the holding quoted by Gaddy from *Folio* was originally stated by this Court in 1927, almost fifty years before *Croston* was decided, in *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737 (1927). Clearly, this Court’s 1927 holding in *Horton* is in no way inconsistent with the 1995 holding in *Croston*, and the principles stated in the latter decision remain good law today.

Nor is the holding in *Croston* an aberration. Courts in West Virginia and in other jurisdictions routinely reject a plaintiff’s attempt at slight-of-hand in trying to label as a fraud claim what is clearly, at best, a breach of contract claim. *See, e.g., Seven Hanover Associates, LLC v. Jones Lang Lasalle Americas, Inc.*, 2008 WL 464337, **3-5 (S.D.N.Y., Feb. 19, 2008), *aff’d*, 363 Fed. Appx. 49 (2nd Cir. 2009) (rejecting plaintiffs’ claims for fraud, breach of fiduciary duty, conversion, and others, because they were nothing more than a breach of contract claim masquerading as tort claims).

Some courts reach this result by relying on the so-called “gist of the action” doctrine, “which operates to preclude a plaintiff from re-casting ordinary breach of contract claims into tort claims.” *Centimark Corp. v. Pegnato & Pegnato Roof Management, Inc.*, 2008 WL 1995305, *13 (W.D.Pa., May 6, 2008). *Accord, Backwater Properties, LLC v. Range Resources-Appalachia, LLC*, 2011 WL 1706521, (N.D.W.Va., May 5, 2011) (holding that “[u]nder the gist of the action doctrine, a tort claim arising from a breach of contract may be pursued only if the action in tort would arise independent of the existence of the contract”, and that “pursuant to a longstanding principle of West Virginia law, a plaintiff cannot predicate a fraud claim on another party’s failure to perform a promise”) (Internal citation and quotation marks omitted.)

This Court has reached the same result. *See, Cochran v. Appalachian Power Co.*, 162 W.Va. 86, 92-93, 246 S.E.2d 624, 628 (1978) (holding that “where the gist of the action is the breach of the contract, either by malfeasance or nonfeasance, it is, in substance, an action on the contract, whatever may be the form of the pleading”). In *Cochran*, the Court went on to hold that if a plaintiff’s allegations are clearly based on an asserted breach of contract, “additional averments appropriate to a cause of action for a wrong will not convert the cause of action into one for tort, and the part of his pleading appropriate to an action in tort will be considered surplusage.” *Id.*

At page 13 of its Brief, Gaddy quotes from the deposition testimony of Prof. Bowman, whom Bowles Rice and Mr. Lane retained as an expert to counter Gaddy’s own expert, Richard F. Neely, in the event the Circuit Court did not grant respondents’ Motion to exclude Mr. Neely as a trial witness. However, respondents’ Motion *in limine* was granted, and the Court ruled from the bench on September 12, 2011, that Mr. Neely would not be permitted to testify at trial. The testimony by Professor Bowman relied on by Gaddy, all of which was predicated on a request by

Gaddy's counsel that Prof. Bowman assume the existence of the alleged fee-sharing agreement, provides no support for this appeal. Clearly, the Circuit Court correctly applied *Croston* to the evidence presented by Gaddy in this case and properly awarded summary judgment in favor of respondents on the fraud claims.

Strangely, Gaddy also argues at page 13 of its Brief that Mr. Lane "now asserts that there was never [a fee-sharing] agreement because the Rules of Professional Responsibility do not permit an attorney to share fees with a non-lawyer." No such argument was made by or on behalf of Mr. Lane in connection with the Motion for Summary Judgment, and no such argument is made now on appeal.

Gaddy's counsel, by referring to the Rules of Professional Responsibility, presumably intended to refer to the West Virginia Rules of Professional Conduct, which replaced the Code of Professional Responsibility in 1989. However, the argument referred to by Gaddy is a gross mis-characterization of an argument advanced on behalf of Mr. Lane and Bowles Rice in support of their Motion to Dismiss filed two years ago, which was denied by the Circuit Court. *See* the Motion and supporting Memorandum, beginning at A-23. The arguments and authorities in support of the Motion to Dismiss have no bearing on this appeal, except to the extent that they provide an independent basis for this Court to affirm the Circuit Court's award of summary judgment to respondents based on the doctrine of illegality. *See, e.g., Noland v. Virginia Insurance Reciprocal*, 224 W.Va. 372, 382, 686 S.E.2d 23, 33 (2009) (holding that this Court may affirm an award of summary judgment on grounds other than those relied on by the trial court).

**E. The Circuit Court Correctly Awarded Summary Judgment
Against Gaddy On Its Claims For Negligence,
Gross Negligence, And Intentional Tort**

Gaddy devotes but two short paragraphs to this portion of its argument. *See* Gaddy’s Brief, page 17. Gaddy asserts that respondents owed a legal duty to Gaddy because of the existence of an attorney-client relationship. *Id.* That argument fails for the reasons stated, *infra*, beginning at page 20. The Circuit Court correctly concluded that there was no such relationship.

Gaddy also contends that defendants owed it a duty of care because “in every contract there is a covenant of good faith and fair dealing.” *Id.* However, it is settled law in this state “that an implied covenant of good faith and fair dealing does not provide a cause of action apart from a breach of contract claim” *Highmark West Virginia, Inc. v. Jamie*, 221 W.Va. 487, 492, 655 S.E.2d 509, 514 (2007). Stated differently, this Court “has ‘declined to recognize an independent claim for breach of the common law duty of good faith,’ and has instead held that such a claim sounds in breach of contract.” *Corder v. Countrywide Home Loans, Inc.*, 2011 WL 289343, *3 (S.D.W.Va., Jan. 26, 2011), quoting from *Doyle v. Fleetwood Homes of Virginia, Inc.*, 650 F.Supp.2d 535, 541 (S.D.W.Va. 2009) (citing *Highmark, supra*). The Circuit Court’s award of summary judgment on these claims should be affirmed.

**F. The Circuit Court Correctly Awarded Summary Judgment Against Gaddy
On Its Claim For Negligent Misrepresentation**

Gaddy’s negligent misrepresentation claim alleged 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].” *See* the Final Order, page 3, A-734, quoting from the Complaint. The Circuit Court correctly concluded “that this is nothing more than Gaddy’s breach of contract claim re-labeled.” *Id.* The

Circuit Court also correctly found that Gaddy had not established any basis for a legal duty owed to it by respondents. *Id.* Finally, the Circuit Court accurately observed that “the only difference between a fraud claim and a claim for negligent misrepresentation is that the latter does not require *scienter*.” *Id.*, citing *Chhapparwal v. West Virginia University Hospitals, Inc.*, 2009 WL 2959882, *7 (N.D.W.Va., Sept. 9, 2009). Because Gaddy’s fraud claim failed, the negligent misrepresentation claim likewise failed. *Id.* Gaddy’s Brief offers this Court nothing new to demonstrate that the ruling by the Circuit Court was in error.

**G. The Circuit Court Properly Awarded Summary Judgment
Against Gaddy On Its Conversion Claim**

Gaddy correctly observes that conversion consists of “[a]ny distinct act of dominion wrongfully exerted over the property of another” *See* Gaddy’s Brief, page 15, quoting from *Rodgers v. Rodgers*, 184 W.Va. 82, 95, 399 S.E.2d 664, 677 (1990). Additionally, “[a]n action for conversion of personal property cannot be maintained by one without title or right of possession.” *Thompson Development, Inc. v. Kroger Co.*, 186 W.Va. 482, 487, 413 S.E.2d 137, 142 (1991) (internal citation omitted). The Circuit Court relied on these same authorities in awarding summary judgment in favor of Bowles Rice and Mr. Lane on Gaddy’s conversion claim. *See* the Final Order, A-754-55.

The sole argument asserted by Gaddy in support of its conversion claim on appeal is that “[w]hen Defendants failed to disburse one third of its [sic] attorney fees to Gaddy, Defendants wrongfully exerted dominion over the property of Gaddy.” Gaddy’s Brief, page 15. However, as the Circuit Court recognized, the attorneys’ fees received by class counsel in *Tawney* were approved by the Court as reasonable, and the comparatively small percentage of those fees received by Bowles Rice was determined by the firm’s agreement with Mr. Masters, not by the agreement which Gaddy

alleges it entered into with Mr. Lane. Final Order, page 5, A-755. The Circuit Court therefore correctly concluded that “[b]ecause Gaddy has not demonstrated a right to possession of any portion of the Bowles Rice fee, its claim for conversion fails.” *Id.*

H. The Circuit Court Correctly Awarded Summary Judgment Against Gaddy On Its Claim For Promissory Estoppel

Gaddy’s Complaint contained but one substantive paragraph in support of its claim for promissory estoppel: “Defendants are estopped from claiming ownership of and retaining Plaintiff’s monies contrary to Defendants’ duty to deliver Plaintiff’s monies when it [sic] was received by Defendants.” Complaint, ¶ 73, A-20. On appeal, Gaddy asserts that it relied to its detriment on respondents’ alleged promise to share any fee it might receive in litigation against Columbia. *Id.*, citing *Everett v. Brown*, 174 W.Va. 35, 321 S.E.2d 685 (1984). Gaddy argues that - relying on the alleged promise - it did substantial work for which it was not compensated. *Id.*

However, the Circuit Court correctly found and concluded that the only work performed by Gaddy in reasonable reliance on any agreement it had with Bowles Rice and Mr. Lane was the initial claim evaluation work by Mr. McCullough between early March and late July, 2004. *See* the Final Order, A-737-38, and the discussion and citations to the Appendix, *infra*, pages 3-4, and 5-7. The Circuit Court also correctly found that once the claim evaluation work was complete and the land companies chose to participate in *Tawney*, Gaddy did no more work pertaining to Columbia at the request of Bowles Rice or other class counsel, and Gaddy’s work product was never used in any manner in *Tawney*. *Id.* Finally, the Court found that it was undisputed that Gaddy received a flat fee of \$750.00 for each damage assessment which it performed; that Mr. Lane sought and obtained approval from the Court in *Tawney* for payment of Mr. McCullough’s actual time charges for the claim evaluations; and that when Bowles Rice tendered payment to Gaddy for Mr.

McCullough's charges, Gaddy refused to accept it. *Id.*

The Circuit Court was therefore correct in concluding that, in light of the foregoing facts, Gaddy could not prove “that it reasonably relied to its detriment on a promise made and broken by [Bowles Rice and Mr. Lane], and, most important, that in the absence of estoppel relief, an injustice [would] result.” Final Order, A-738, citing *Everett v. Brown*, 174 W.Va. at 39, 321 S.E.2d at 689.¹⁴ The Final Order should be affirmed with respect to the promissory estoppel claim.

**I. The Circuit Court Properly Awarded Summary Judgment
Against Gaddy On Its Claim For Unjust Enrichment**

Citing this Court's opinion in *Dunlap v. Hinkle*, 173 W.Va. 423, 427, 317 S.E.2d 508, 512, n. 2 (1984), Gaddy asserts that it is entitled to recover from Bowles Rice and Mr. Lane under the theory of unjust enrichment. *See* Gaddy's Brief, pages 16-17. In the Complaint, page 18, paragraph 78, Gaddy alleged without elaboration that “[a]s a result of Plaintiff's work Defendants were unjustly enriched.” *Id.*, A-21. However, the Circuit Court correctly found that the undisputed evidence established that “there is ample legal justification for the Bowles Rice [*Tawney*] fee, and Gaddy has identified no facts which render the fee unjustified, much less unjust.” Final Order, A-740. This was because the trial Court had ruled in *Tawney* that the aggregate attorneys' fee approved in that case for the four firms which served as class counsel was reasonable under all of the circumstances, and Gaddy had not disputed that Bowles Rice's share of the aggregate fee amounted to far less than even 5% of the total fee award to all four firms. *Id.*

Additionally, the Circuit Court correctly noted that in order for a plaintiff to recover

¹⁴The trial Court also correctly observed that promissory estoppel relief is generally available in a proper case sounding in contract to avoid the affirmative defenses of lack of consideration or statute of frauds. Final Order, A-736, citing *Everett v. Brown*, and *State ex rel. Anstey v. Davis*, 203 W.Va. 538, 509 S.E.2d 579 (1998). Neither defense was asserted in this case.

under the doctrine of unjust enrichment, he must prove that “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]” Final Order, A-739, quoting from *Annon v. Lucas*, 155 W.Va. 368, 381-82, 185 S.E.2d 343, 352 (1971). As the Circuit Court recognized, the clear import of the holding in *Annon* is that “actionable unjust enrichment occurs only where a defendant has obtained property through any variety of fraud, or through conduct of like character.” *Id.* Inasmuch as the Circuit Court had already rejected Gaddy’s fraud claim, the unjust enrichment claim also failed. *Id.*

Perhaps the most extensive and contemporary treatment of the law of unjust enrichment is found in the Restatement of the Law (Third) - Restitution and Unjust Enrichment (Tentative Draft No. 7) (subsequently, “the Restatement of Unjust Enrichment”).¹⁵ Preferring the terminology *unjustified* enrichment, the Restatement observes that unlike *unjust* enrichment, “instances of unjustified enrichment are both predictable and objectively determined, because the justification in question is not moral, but legal.” *Id.* In 66 Am. Jur.2d Restitution and Implied Contracts § 9, discussing the Restatement Tentative Drafts, it is observed that the Restatement “concludes that equity and good conscience are not in fact the true limiting factors in determining

¹⁵The initial discussion draft of the Restatement of Unjust Enrichment was first circulated in 2000 and had as its goal “to replace the original Restatement of Restitution, promulgated during Franklin Roosevelt’s first term as President” 66 Am. Jur.2d Restitution and Implied Contracts, § 9 (“Unjust Enrichment Defined”), n.6. A proposed Restatement Second was considered in 1983 and 1984, but was never adopted. *Id.* Tentative Draft No. 7 of the Third Restatement, cited here, was issued on March 12, 2010, and is apparently anticipated by the American Law Institute to be the final draft.

whether enrichment is unjust, and rather that the term refers to a narrower concept of 'unjustified enrichment' (i.e., enrichment that lacks an adequate legal basis)." *Id.*

On appeal, Gaddy offers no new argument in support of its unjust enrichment claim. Rather, Gaddy relies only on the arguments advanced in support of its fraud claim, which are all that it offered in opposition to the Motion for Summary Judgment. *See* Gaddy's Brief, page 17, and its Response, A-532. The Circuit Court properly rejected the fraud claim. The trial Court also correctly found that the fee received by Bowles Rice was entirely justified and reasonable. The Circuit Court's award of summary judgment in favor of Bowles Rice and Mr. Lane on Gaddy's unjust enrichment claim should therefore be affirmed.

**J. The Circuit Court Correctly Awarded Summary Judgment
Against Gaddy On Its *Quantum Meruit* Claim**

In the Complaint, in support of its claim for *quantum meruit* relief, Gaddy asserted simply 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, ¶ 68, A-19. In its Response to the Motion for Summary Judgment, Gaddy argued that pursuant to the doctrine of *quantum meruit*, it was entitled to receive more than the sum of \$74,275.00 approved by the Circuit Court in *Tawney* for payment of Gaddy's McCullough invoice. Specifically, Gaddy referred in its Response to the first invoice it provided to Bowles Rice for submission to the *Tawney* Court, which was for a sum \$293,000.00 greater than the amount ultimately approved by the Court. This was the Bullock invoice which was rejected by Mr. Lane because it was clearly bogus. *See* Gaddy's summary judgment Response, A-532-33. *Also see* the discussion, *infra*, pages 8-10, with citations to the Appendix. Gaddy relies on the same Bullock

invoice on appeal. *See* Gaddy's Brief, pages 19-20. The Circuit Court correctly rejected Gaddy's argument in its Final Order, beginning at A-759.¹⁶

Gaddy notes in its Brief that the Circuit Court found that "none of the work performed by Gaddy was used in the *Tawney* litigation," but Gaddy asserts that the "evidence supports that Gaddy did perform litigation support." Brief, page 17. This is nothing more than obfuscation. It was not disputed in the Circuit Court that Gaddy did no work relating to Columbia at the request of Bowles Rice or any other *Tawney* class counsel once the pre-litigation claim evaluations were completed in July, 2004, and that no Gaddy work product was ever used in any litigation against Columbia. *See* the discussion, *infra*, page 7, with citations to the Appendix. To support its assertion that it "did perform litigation support," Gaddy cites only to pages A-543-44 of the Appendix. Brief, page 17.

Page A-543 is an orphaned page from the Transcript of Mr. Lane's deposition, which Gaddy tendered to the Circuit Court in opposition to the summary judgment Motion. This single page from the Transcript reflects only that Gaddy's counsel had shown Mr. Lane a single page from the multi-page, bogus Bullock invoice.¹⁷ Page A-544, also cited in Gaddy's Brief, is nothing more than an e/mail message from Mr. Lane to Mr. Bullock and others at Gaddy in early 2006 giving them

¹⁶On appeal, in support of its *quantum meruit* claim, Gaddy complains that its alleged fee-sharing agreement with respondents "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." Brief, page 17. In other words, Gaddy appears to assert that its claim based on the *quantum meruit* doctrine is somehow predicated on the alleged agreement for Gaddy "to share one third of Defendants' recovery in *Tawney*." This makes no sense. It is Gaddy's inability to prove the actual existence of that alleged fee-sharing agreement which necessitates Gaddy's failed attempt to rely on the *quantum meruit* doctrine.

¹⁷The entire Bullock invoice appears beginning at page A-424 as an exhibit to the Motion for Summary Judgment.

a status report about *Tawney* and explaining that if the case were successful, class counsel had agreed to submit to the Circuit Court a bill for Gaddy's past claim evaluation work. Again, it was undisputed in the Circuit Court, and it is undisputed on appeal, that Gaddy provided no litigation support, whatsoever, for *Tawney*, and performed no work relating in any way to Columbia at the request of Bowles Rice once the claim evaluations were complete in July, 2004.

The doctrine of *quantum meruit* (which means "as much as he deserves") is applied in two very different sets of circumstances. See Appendix A to the Restatement of Unjust Enrichment, pages 225-26. In one scenario, plaintiff is able to establish the actual existence of an alleged contract with the defendant, but the contract is silent as to one or more key terms, such as the amount of compensation owed to the plaintiff for its performance under the contract. In the other scenario, which is the one expressly contemplated by ¶ 68 of Count V of Gaddy's Complaint, A-19, the plaintiff is entirely unable to prove the existence of an alleged contract, but claims entitlement to compensation for services performed. See Appendix A to the Restatement of Unjust Enrichment, page 225. The latter claim is substantively indistinguishable from a claim for unjust enrichment. *Id.* Accordingly, the arguments stated in the preceding section of this Brief dealing with unjust enrichment apply with equal force here.

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, a sum which admittedly was inadequate to fully compensate Gaddy for the time actually devoted to the claim evaluation process during that period of time. Gaddy, in its role as engineering consultant, billed Bowles Rice separately for each flat fee, and received payment from Bowles Rice after the firm received payment from the clients. Later, in 2007, within a week of the \$400,000,000 verdict in

Tawney, Gaddy submitted to Bowles Rice the bogus Bullock invoice. When that was rejected, Gaddy submitted the McCullough invoice for \$74,275.00 constituting the actual aggregate charges for all work by Mr. McCullough in connection with the claim evaluations during the same period, March through July, 2004. Bowles Rice submitted the McCullough invoice to the Circuit Court, and it was approved. Payment of that sum was then tendered to, and refused by, Gaddy.

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 ill-advised 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).

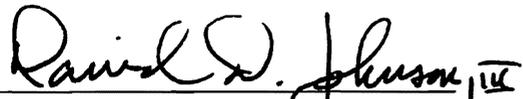
Gaddy clearly has no *quantum meruit* claim for work it did from 2000 to early 2004 prior to the time it alleges a fee-sharing agreement was entered into, nor for work it claims to have performed, albeit without any request from Bowles Rice, after the claim evaluations ended in July, 2004, and Bowles Rice ceased using Gaddy’s services. Bogus charges for that alleged work by Mr. Bullock comprised the bulk of the Bullock invoice. Under the facts of this case, as a matter of law, Gaddy is not entitled to *quantum meruit* relief “because, by definition, such a claim requires as an element of recovery that the services at issue were performed under such circumstances by the individual seeking recovery that he reasonably expected to be paid for such services by the person sought to be charged.” *Copley v. Mingo County Board of Education*, 195 W.Va. 480, 486-87, 466 S.E.2d 139, 145-46 (1995). Accordingly, the Circuit Court correctly concluded that “[u]nder the undisputed facts of this case, Gaddy is entitled to no relief on its *quantum meruit* claim,” and that,

“[i]ndependent of that claim, Gaddy is entitled to receive the sum of \$74,275.00 reflected in the McCullough invoice, a sum approved by [the Circuit Court] which Bowles Rice previously offered, and which Gaddy rejected.” Final Order, A-742.

V. CONCLUSION

For all of the foregoing reasons, this Court should affirm the Circuit Court’s first Order and its Final Order. The trial court correctly concluded that there were no genuine issues as to any of the facts which were material to Gaddy’s claims, and that Bowles Rice and Mr. Lane were entitled to judgment on all nine counts of the Complaint as a matter of law.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GADDY ENGINEERING COMPANY,

Plaintiff/Petitioner,

v.

Appeal No. 12-0206

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

Defendants/Respondents.

CERTIFICATE OF SERVICE

I, David D. Johnson, III, counsel for the defendants/respondents, do hereby certify that I have served the foregoing **Brief of Respondents** upon counsel by placing a true and exact copy thereof in a properly stamped and addressed envelope, first class postage prepaid, addressed to:

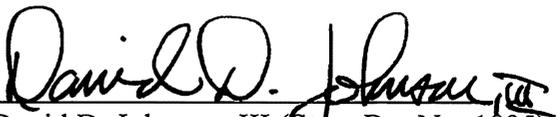
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