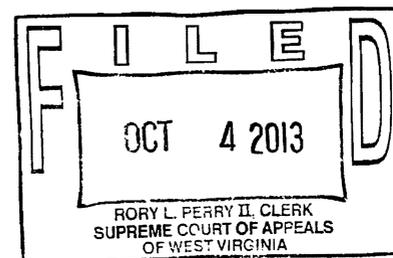


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 13-0601



**CLASSIC OIL AND GAS
RESOURCES, INC.**, a Kentucky
corporation licensed to do business
in West Virginia,

Petitioner

V.

**WHITNEY WELL SERVICE,
INC.**, a West Virginia Corporation;
**DANNY WEBB CONSTRUCTION
CO., INC.**, a West Virginia
Corporation; and **VELMA WEBB**,
an individual

Respondent

Appeal from a final order
of the Circuit Court of Wyoming
County (07-C-149)

Respondents' Brief

Counsel for Respondents, Whitney Well Services,
Inc., and Danny Webb Construction Co., Inc.,

Nicholas S. Preservati (WV Bar #8050)
Counsel of Record
Preservati Law Offices PLLC
P.O. Box 1431
Charleston, WV 25325
304-346-1431
nsp@preservatilaw.com

Michael C. Litman (WV Bar #12178)
Co-counsel
Jones & Associates
P.O. Box 1989
Charleston, WV 25327
304-343-9466
mlitman@efjones.com

I. TABLE OF CONTENTS

I. TABLE OF CONTENTSi

II. TABLE OF AUTHORITIESii

III. STATEMENT OF THE CASE.....1

IV. SUMMARY OF ARGUMENT.....4

V. ARGUMENT.....5

 A. The Trial Court Did Not Err in Refusing to Set Aside the Mediation Agreement6

 B. The Trial Court Did Not Err in Ruling that Respondents Were Entitled to a 15% Working Interest on Well Sites in Which Respondents Performed Any Work Whatsoever.....9

 C. The Trial Court Did Not Err in Granting Respondents an Independent 15% Working Interest in the Walker No. 1 Well.....12

 D. The Trial Court Did Not Err in Granting Respondents an Overall 24% Working Interest in the Walker No. 1 Well13

 E. The Trial Court Did Not Err in Granting a 15% Working Interest in Certain Wells First Identified in Respondents’ Proposed Final Order14

 F. The Trial Court Did Not Err in Awarding \$35,150.00 to Respondents for Lost Business Opportunities Related to Not Receiving a Replacement Title to the Service Rig Provided to Respondent by Petitioner as Part of the Mediation Agreement15

 G. The Trial Court Did Not Err in Ordering that as a Part of the Compliance With the Mediation Agreement that Petitioner Must Provide Certain Additional Tools to the Respondent.....16

 H. The Trial Court Did Not Commit an Abuse of Discretion.....18

VI. STATEMENT REGARDING ORAL ARGUMENT19

VII. CONCLUSION19

II. TABLE OF AUTHORITIES

Cases

<u>Barney v. Auvil</u> , 195 W. Va. 133, 466 S.E.2d 801 (1995)	5
<u>Black v. State Consol. Pub. Retirement Bd.</u> , 202 W. Va. 511, 505 S.E.2d 430 (1998).....	5
<u>Burdette v. Burdette Real Improvements, Inc.</u> , 214 W. Va. 448, 590 S.E.2d 641 (2003)	5, 7, 8
<u>Candle Co. v. Citizens Nat'l Bank</u> , 200 W. Va. 515, 490 S.E.2d 334 (1997)	5
<u>Collins v. City of Bridgeport</u> , 206 W. Va. 467, 525 S.E.2d 658 (1999).....	6, 18
<u>Collins v. Collins</u> , 209 W. Va. 115, 543 S.E.2d 672 (2000)	5
<u>Estate of Tawney v. Columbia Natural Res., L.L.C.</u> , 219 W.Va. 266, 633 S.E.2d 22 (2006).....	6
<u>Haymaker v. Gen. Tire Inc.</u> , 187 W. Va. 532, 533, 420 S.E.2d 292, 293 (1992)	11
<u>In re Michael Ray T.</u> , 206 W. Va. 434, 525 S.E.2d 315 (1999).....	5
<u>Kanawha Banking & Trust Co. v. Gilbert</u> , 131 W.Va. 88, 46 S.E.2d 225 (1947).....	11
<u>Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro</u> , 158 W. Va. 708, 214 S.E.2d 823 (1975).....	15
<u>Meyer v. Alpine Lake Property Owners Assn., Inc.</u> , 2007 WL 709304 (N.D.W.Va. 2007).....	8, 9
<u>Moreland v. Suttmiller</u> , 183 W. Va. 621, 397 S.E.2d 910 (1990).....	9
<u>Pauley v. Gilbert</u> , 206 W. Va. 114, 522 S.E.2d 208 (1999).....	5
<u>Phares v. Vandevender</u> , 206 W. Va. 699, 527 S.E.2d 810 (1999)	5
<u>Sanson v. Brandywine Homes, Inc.</u> , 215 W. Va. 307 (2004).....	5
<u>State ex rel. Frazier & Oxley, L.C. v. Cummings</u> , 212 W.Va. 275, 569 S.E.2d 796 (2002).....	6
<u>State ex rel. McGraw v. Combs Servs.</u> , 206 W. Va. 512, 526 S.E.2d 34 (1999)	5
<u>State v. Green</u> , 207 W. Va. 530, 534 S.E.2d 395 (2000)	5
<u>State v. Paynter</u> , 206 W. Va. 521, 526 S.E.2d 43 (1999).....	5
<u>Stull v. Firemen's Pension & Relief Fund</u> , 202 W. Va. 440, 504 S.E.2d 903 (1998).....	6, 18
<u>Triad Energy Corp. v. Renner</u> , 215 W. Va. 573, 600 S.E.2d 285 (2004)	7, 8
<u>Waddy v. Rigglesman</u> , 216 W.Va. 250, 606 S.E.2d 222 (2004)	6
<u>Walker v. West Virginia Ethics Comm'n</u> , 201 W. Va. 108, 492 S.E.2d 167 (1997)	5

Other Authorities

Merriam-Webster's Collegiate Dictionary (10 th ed.).....	12
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III. STATEMENT OF THE CASE

This action arises out of a breached agreement between a natural gas developer, Classic Oil and Gas Resources, Inc., a corporation of the Commonwealth of Kentucky (“Petitioner”), and a well site construction company, Whitney Well Services, Inc., a West Virginia corporation, and its owner, Danny Webb (collectively “Respondents”).

The now central focus of the action surrounds a handwritten settlement agreement that was reviewed and signed by all parties on March 2, 2012, and reduced to a more formal typewritten document on March 5, 2012. (A.R. 0888-0892). At the mediation, Stanley West and William Kelly appeared as authorized representatives of Petitioner, along with Petitioner’s counsel, R. Ford Francis of Allen Kopet & Associates. J. Thomas Lane of Bowles Rice McDavid Graff & Love (“Lane”) appeared as the mediator. Danny Webb appeared as an authorized representative of Respondents, along with counsel, Joseph G. Bunn of Jones & Associates.

The mediation commenced at approximately 10:00 a.m., and the parties negotiated in good faith until approximately 8:00 p.m. when the parties signed the mediator’s notes, with counsel present, wherein the parties agreed to various terms, including, but not limited to, (i) assign to Whitney or WebbCo a 15% working interest in all wells located on well pads *built or improved* by Danny Webb, the principal of Whitney and WebbCo, (ii) transfer ownership of certain “mobile” equipment and their associated tools, (iii) assign to Whitney or WebbCo a 5% working interest in the Walker No. 1 Gas Well (“Walker Well”); (iv) allow Webb to conduct an accounting of Petitioner’s operations to ensure proper payment; and (v) Webb agreed to sign a joint operating agreement for all wells he obtained by virtue of the Contract. (A.R. 0888-0892).

On March 7, 2012, counsel for Petitioner objected to the settlement agreement stating, among other things, that Petitioner would not assign a 15% working interest on all wells capable of producing gas that are located on pads “improved by” Respondents because “we never agreed to give the working interest to Whitney in wells that were just improved.” (A.R. 0896).

The parties further discussed the Contract through subsequent phone calls and emails, most of which are in the index filed with the court (A.R. 0896-0904; 0914-0918). After being unsuccessful in attempting to reach a resolution, Respondent was left with no choice but to file Plaintiff’s Motion to Enforce Mediation Agreement. (A.R. 0868-0939). A hearing was held before the Circuit Court of Wyoming County, West Virginia (the “Trial Court”) on the Respondent’s Motion to Enforce Mediation Agreement on July 25, 2012. (A.R. 1053-1107).

On August 2, 2012, the Trial Court issued an Order Granting Motion to Enforce Mediation Agreement (the “Order”), wherein the Trial Court held that “the handwritten ‘Settlement Agreement’ [the “Settlement Agreement”] signed by all parties on March 2, 2012 [see A.R. 0891-0892], and reduced to a more formal typewritten document on March 5, 2012 [see A.R. 0888-0889] constitutes a valid and binding agreement, enforceable by either party.” (A.R. 0994-0998).

Upon receipt of the Order, Respondents’ counsel communicated to Petitioner’s counsel the steps necessary for full satisfaction of the Contract. (A.R. 1021-1022).

On August 24, 2012, Petitioner’s counsel responded indicating the steps he believed were necessary for full satisfaction of the Contract, which varied substantially from the steps identified by Respondents’ counsel on August 14, 2012. (A.R. 1050).

Respondents' counsel communicated to Petitioner's counsel that his interpretation of the Contract did not comport with the terms of the Contract, and accordingly, did not comport with the terms of the Order. (A.R. 1034).

On September 19, 2012, Respondents' counsel again notified Petitioner's counsel by letter ("Respondents' Demand Letter") that the Petitioner's interpretation of the Contract was incorrect, and added that the Responded would seek court intervention if an agreement was not possible among the parties. (A.R. 1036-1048).

On September 28, 2012, the Petitioner's counsel responded ("Petitioner's Response") to Respondents' Demand Letter and advocated a substantially different interpretation of the Contract. (A.R. 1133-1223).

On December 6, 2012, after no further success in enforcing the Contract, Respondents filed its Motion to Compel Petitioner's Performance under the Settlement Agreement and supporting Memorandum ("Respondents' Motion to Compel"). (A.R. 0999-1111).

On January 30, 2013, a hearing was held before the Trial Court regarding the Respondents' Motion to Compel. (Hearing transcript is not in the A.R.).

On February 4, 2013, Petitioner filed its response to Respondents' Motion to Compel, raising the same arguments it does here as to why the Settlement Agreement is unenforceable. (A.R. 1112-1226).

On April 19, 2013, The Trial Court granted Respondents' Motion to Compel and issued its final order in this matter. (A.R. 1267-1282).

IV. SUMMARY OF ARGUMENT

The Petitioner's brief focuses on the fact that the Settlement Agreement reached by the parties on March 2, 2012, is unenforceable because the terms of the Settlement Agreement were ambiguous and there was no meeting of the minds to constitute a valid binding contract. However, all requisite elements of a contract were present to constitute a valid agreement. Further, because the Settlement Agreement is a valid binding contract, the parties are obligated to perform all of the necessary provisions set for in the Settlement Agreement.

These provisions include, but are not limited to (i) granting Respondents a 15% working interest in *all* wells capable of producing gas that the Respondents have made improvements on including the Walker No. 1 Well; (ii) granting working interest in the Walker No. 1 Well to insure that the Respondents receive a \$6,000/year revenue stream based on 2011 projections; and (iii) requiring the Petitioner to provide certain tools to respondent.

At the time of the Trial Court's decision, the Petitioner had failed to conform to the foregoing provisions among others. It was not an abuse of the Trial Court's discretion to both compel the Petitioner to comply with the terms of the Settlement Agreement, and provide relief to the Respondents when Petitioner's non-compliance caused damages.

The Petitioner lacked the requisite facts and law to sway the Trial Court into setting aside the Settlement Agreement. The Trial Court used sound discretion in upholding the Settlement Agreement and its findings should not be disturbed by this Court.

This case is about nothing more than “buyer’s remorse.” Petitioner negotiated an agreement and agreed to the terms of the agreement in writing. However, after entering into the agreement, the Petitioner suddenly claimed there was no meeting of the minds. Petitioner’s argument skews the facts and ignores the law, and therefore, should be rejected.

V. ARGUMENT

The decision to compel performance of a party under a court order enforcing a settlement agreement rests in the sound discretion of the circuit court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse. Sanson v. Brandywine Homes, Inc., 215 W. Va. 307, 310-11 (2004); Burdette v. Burdette Real Improvements, Inc., 214 W. Va. 448, 452, 590 S.E.2d 641, 645 (2003).

In reviewing challenges to the findings and conclusions of the circuit court, the West Virginia Supreme Court of Appeals will apply a two-prong deferential standard of “review”: It will review the final order and the ultimate disposition under an abuse of discretion standard, and it will review the circuit court’s underlying factual findings under a clearly erroneous standard; questions of law are subject to a de novo review.¹

Under the abuse of discretion standard, the court will not disturb a circuit court’s decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances. Stull v. Firemen’s Pension & Relief Fund,

¹ Barney v. Auvil, 195 W. Va. 133, 466 S.E.2d 801 (1995); Candle Co. v. Citizens Nat’l Bank, 200 W. Va. 515, 490 S.E.2d 334 (1997); Walker v. West Virginia Ethics Comm’n, 201 W. Va. 108, 492 S.E.2d 167 (1997); Black v. State Consol. Pub. Retirement Bd., 202 W. Va. 511, 505 S.E.2d 430 (1998); Pauley v. Gilbert, 206 W. Va. 114, 522 S.E.2d 208 (1999); In re Michael Ray T., 206 W. Va. 434, 525 S.E.2d 315 (1999); State ex rel. McGraw v. Combs Servs., 206 W. Va. 512, 526 S.E.2d 34 (1999); State v. Paynter, 206 W. Va. 521, 526 S.E.2d 43 (1999); Phares v. Vandevender, 206 W. Va. 699, 527 S.E.2d 810 (1999); State v. Green, 207 W. Va. 530, 534 S.E.2d 395 (2000); Collins v. Collins, 209 W. Va. 115, 543 S.E.2d 672 (2000).

202 W. Va. 440, 504 S.E.2d 903 (1998); Collins v. City of Bridgeport, 206 W. Va. 467, 525 S.E.2d 658 (1999).

A. The Trial Court Did Not Err in Refusing to Set Aside the Mediation Agreement

The Settlement Agreement is a legally binding contract, and whether the terms of that contract are applied or construed, the Petitioner is in breach of its obligations and should be ordered to comply therewith. When the terms of a contract “are clear and unambiguous, they must be applied and not construed.” See Haynes v. DaimlerChrysler Corp., 228 W. Va. 441, 720 S.E.2d 564, 568-69 (2011); Syllabus Point 2, Bethlehem Mines Corp. v. Haden, 153 W.Va. 721, 172 S.E.2d 126 (1969); accord Syllabus Point 2, Orteza v. Monongalia County General Hospital, 173 W.Va. 461, 318 S.E.2d 40 (1984); Syllabus Point 3, Waddy v. Riggleman, 216 W.Va. 250, 606 S.E.2d 222 (2004).

If the contractual language of an agreement is ambiguous, it must be construed before it can be applied. See Estate of Tawney v. Columbia Natural Res., L.L.C., 219 W.Va. 266, 272, 633 S.E.2d 22, 28 (2006)(“[W]hen a contract is ambiguous, it is subject to construction.”). An agreement is deemed ambiguous if the terms are inconsistent on their face, or the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken. See Haynes, 720 S.E.2d at 568-69; Syllabus Point 6, State ex rel. Frazier & Oxley, L.C. v. Cummings, 212 W.Va. 275, 569 S.E.2d 796 (2002). See also Syllabus Point 4, Estate of Tawney, 219 W.Va. 266, 633 S.E.2d 22 (2006) (“The term ‘ambiguity’ is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.”).

The Settlement Agreement expressly indicates several clear and unambiguous terms. First, the Petitioner is required to assign to the Respondents a 15% working interest in all wells that were built or improved by the Respondents, and that are capable of producing gas. Second, the Petitioner is required to transfer possession and ownership of a Swab Rig, a Ditch Witch, and a Service Rig along with all associated tools by March 9, 2012. Third, the Petitioner is required to assign a five percent (5%) working interest in the Walker No. 1 Well, and any other working interests, if necessary, to create an annual revenue stream equal to Six Thousand Dollars (\$6,000) based upon 2011 performance. Fourth, the Respondents must sign a joint operating agreement establishing the rights of Petitioner, as the operator, and the rights of the Respondents, as working interest holders, with respect to the working interests conveyed in connection with the Settlement Agreement. Fifth, the Respondents may conduct an accounting of the operations of the Petitioner to ensure proper payment consistent with working interests. (A.R. 0888-0892).

Notwithstanding the foregoing facts, the Petitioner argues that it is excused from performing parts or all of the foregoing terms because they are ambiguous and in the alternative, there was no meeting of the minds to constitute a valid binding contract. See Petitioner's Brief, at p. 18.

In particular, the Petitioner directs the courts attention to two cases where there was no meeting of the minds to form a valid binding settlement agreement. See Triad Energy Corp. v. Renner, 215 W. Va. 573, 600 S.E.2d 285 (2004); Burdette v. Burdette Realty Improvement, 214 W. Va. 448, 590 S.E.2d 641 (2003).

In Triad, this Court looked at the issue of whether the unilateral adding of terms to a written settlement agreement constituted a meeting of the minds when those terms

differed from and went beyond the terms outlined on the record before the Circuit Court. Triad, 215 W. Va. at 574, 600 S.E.2d at 286. This Court concluded that there was no meeting of the minds to constitute a valid agreement because the terms of the agreement contemplated by the parties upon the record were different from those terms in the later written and memorialized settlement agreement. Id. at 578, 290.

Here, the parties entered into an agreement which was signed by all parties involved, with counsel present and the opportunity to review the agreement. However, unlike in Triad, only the terms agreed upon by both parties were contained in the Settlement Agreement. No additional terms were unilaterally added by either party. In fact, specific provisions of the Settlement Agreement were also initialed by each party. Clearly, all parties were aware of the provisions of the agreement and had an opportunity to review it before signing it, thus there was a meeting of the minds.

In Burdette, this Court had to decide whether there was a meeting of the minds when the agreement required further acts to finalize its consummation. Burdette, 214 W. Va. at 453, 590 S.E.2d at 646. The Court held that because the further acts contemplated under the total agreement had not been completed by the parties, there was no valid meeting of the minds and therefore the agreement was invalid and unenforceable. *Id.* The case *sub judice* differs because the parties signed a valid binding document which required no further acts to consummate the agreement and therefore a meeting of the minds occurred. Said differently, the Petitioner is not being asked to do anything in addition to what it agreed to do in writing.

Further, the Petitioner directed the Court's attention to Meyer v. Alpine Lake Property Owners Assn., Inc., 2007 WL 709304 (N.D.W.Va. 2007), to bolster its position that the settlement agreement reached by the parties contained no meeting of the

minds. See Petitioner's Brief, at p. 10. In Meyer, the parties never memorialized the terms of the settlement agreement, there was no written or audio record of the mediation process, and there was no written memorandum or other document contemporaneously memorializing the terms and conditions of the settlement reached during mediation. Meyer, at 2. Further, the only documents available for review by the court of the settlement were the post mediation documents prepared by each party asserting their respective positions. Id. The situation in Meyer differs drastically from the agreement reached by the parties here because the parties signed a memorandum of the mediator's notes at the conclusion of mediation with the advice of counsel.

While the Petitioner may wish that it did not sign the Settlement Agreement, the fact that it did cannot be refuted. As this Court has stated, "Once a competent party makes a settlement and acts affirmatively to enter into such settlement, his second thoughts at a later time as to the wisdom of the settlement [do] not constitute good cause for setting it aside. Moreland v. Suttmilller, 183 W. Va. 621, 625, 397 S.E.2d 910, 914 (1990).

After examining the Petitioner's arguments under the rules of contract construction, it is apparent, and was apparent to the Trial Court, that the Petitioner's arguments carry no weight. To state that the Trial Court abused its discretion under the weight of the circumstances is a feigned attempt at undoing a valid agreement.

B. The Trial Court Did Not Err in Ruling that Respondents Were Entitled to a 15% Working Interest on Well Sites in Which Respondents Performed Any Work Whatsoever

The express language of the Settlement Agreement places no limitation on the number of wells in which the Respondents may obtain a 15% working interest. As the

Court will note, the actual language of the Settlement Agreement requires “Assign – 15% all capable of producing wells located on pads built or improved by Webb.” (A.R. 0888-0892)

The foregoing provision is an obligation by the Petitioner to assign to the Respondents a 15% working interest in all wells built or improved by the Respondents that are capable of producing gas, including without limitation, the Walker No. 1 Well. The Court confirmed that the provision required “[a 15% working interest] in wells ‘capable of producing’ and ‘located on pads built or improved by the plaintiffs.’” However, the Petitioner argues that this provision is a fallacy and one that was not contemplated by it during mediation because it would not have made economic sense to enter into such an agreement. *See Petitioner’s Brief*, at p. 20-21.

The Petitioner contends that when it initially entered into a business relationship with Respondent, it never anticipated providing a

15% working interest to Respondents in exchange for Respondents doing some menial amount of work on a well site in the area surrounding a well site, particularly when Petitioner would be faced with the responsibility of hiring other contractors to do all the other necessary work not performed by the Respondents on the site. It is thus illogical to suggest that Petitioner would have ever agreed to give Respondents a 15% working interest in wells if Respondents only needed to perform some menial amount of work “to improve” the well site, or the area surrounding the well site, as it would have made no financial sense to do so.

Petitioner’s Brief, at p. 20-21.

It is impossible for the Respondents to gauge what was going through the Petitioner’s mind when it signed the Settlement Agreement. However, the Respondents would not have settled this lawsuit without the Petitioner’s agreement to convey a 15% working interest in all wells built or improved by the Respondents. It is irrelevant whether the terms make economic sense for the Petitioner. What is relevant is the fact

that the Petitioner agreed to this provision and the Respondents relied upon that agreement.

Additionally, the Petitioner's theory of the foregoing provision is untenable because its application violates the parol evidence rule. The parol evidence rule prohibits prior or contemporaneous statements of any of the parties to a clear and unambiguous agreement from contradicting, adding to, detracting from, varying or explaining the terms of the agreement. See Haymaker v. Gen. Tire Inc., 187 W. Va. 532, 533, 420 S.E.2d 292, 293 (1992); Kanawha Banking & Trust Co. v. Gilbert, 131 W.Va. 88, 101, 46 S.E.2d 225, 232-33 (1947).

The Petitioner claims that the parties had a pre-existing agreement, prior to execution of the Settlement Agreement, where the Respondents received a 15% working interest for all wells where the well was completely constructed and, after completion, the well ultimately produced gas. Based upon that prior agreement, the Petitioner argues that the Respondents should not receive a 15% working interest in wells that the Respondents merely improved. Instead the Petitioner argues that the Respondents should receive a 15% working interest in wells that the Respondents only improved by having built the well site and completed all of the other pre-production work on the site.

However, as stated earlier, Kanawha Banking & Trust Co. and its progeny clearly prohibit a properly executed agreement from being contradicted, added to, detracted from, varied or explained by a pre-existing agreement. Because the Petitioner's and the Respondents' prior agreement cannot modify the terms of the Settlement Agreement under the parol evidence rule, the Respondents are entitled to receive a 15% working interest in all wells that they improved no matter how much improvement occurred so long as some improvement occurred.

C. The Trial Court Did Not Err in Granting Respondents an Independent 15% Working Interest in the Walker No. 1 Well

The Petitioner also argues that the Respondents are not entitled to a 15% working interest in the Walker No. 1 gas well located in Wyoming County, West Virginia because “the Plaintiff did nothing more than clean out and clear some brush on an existing rough access road to a location where the drill site was originally going to be built, so that the surveyors could get access but which was never built.” Petitioner’s Brief, p. 21-22.

Again, the clear and unambiguous Settlement Agreement requires the Petitioner to grant the Respondents a 15% working interest in *all* wells built or improved by the Respondents if the wells are capable of producing gas. (A.R. 0888-0889). The word “improved” is a derivative of the verb “improve.” In Merriam-Webster’s Collegiate Dictionary (10th ed.), the word “improve” means “to enhance in value or quality: make better.” Based upon that information, it is nonsensical for the Petitioner to claim that the Respondents are not entitled to a 15% working interest in the Walker No. 1 gas well because cleaning out and clearing some brush is an act of improvement. Thus, Petitioner’s argument as to the Walker No. 1 gas well is also without merit.

Further, the Petitioner adamantly states that the Respondents did no work to substantiate a working interest in the Walker No. 1 well which was rebutted by evidence and an affidavit from the Walker Lessor, Raymond L. Walker (A.R. 0920-0921). Therefore, the Trial Court’s decision should not be disturbed in light of the evidence and it was not an abuse of discretion for the Trial Court to determine this provision in light of the Settlement Agreement entered into by the parties.

D. The Trial Court Did Not Err in Granting Respondents an Overall 24% Working Interest in the Walker No. 1 Well

The Settlement Agreement states that the Petitioner is to assign 15% working interest in “all wells capable of producing located on pads built or improved by Webb”, and an additional working interest in the Walker No. 1 Well or other wells equivalent to an interest that would produce a \$6,000.00 in revenue based on 2011 production data (A.R. 0888-0891).

Not only is the Petitioner obligated to grant a 15% working interest in the Applicable Wells, pursuant to Paragraph 5 of the Settlement Agreement (A.R. 0890-0891), the Petitioner is obligated to grant a 5% working interest in the Walker No. 1 gas well, and as many other working interests as necessary, to create a revenue stream of \$6,000 based upon 2011 production data.

After the Respondents moved this Court to compel the Petitioner’s performance under the Settlement Agreement (See Respondents’ Motion to Enforce Mediation Agreement, A.R. 0868-0939) , the Petitioner offered to comply with Paragraph 5 of the Settlement Agreement by granting an (i) 8% working interest in Walker No. 1, (ii) a 9.75% working interest in PCT 136, (iii) a 12.25% working interest in PCT 154, and (iv) 6.50% working interest in PCT 168. The Trial Court held that the Petitioner must grant a 24% working interest (15% plus 9%) in Walker No. 1 to comply with all applicable provisions of the Settlement Agreement. (See Trial Court’s Order, A.R. 1267-1282).²

Given the totality of the circumstances, the Trial Court found it reasonable to Order the Petitioner to grant an additional working interest of 8% in Walker No. 1 to

² As an aside, if the Petitioner gave consideration for something that it did not legally own, than it should be liable to the Respondents for fraudulent inducement and money damages would be proper.

comply with all applicable provisions of the Settlement Agreement in lieu of granting the Respondents a monetary award for the Petitioner's non-compliance with the Settlement Agreement. This was not an abuse of discretion.

E. The Trial Court Did Not Err in Granting a 15% Working Interest in Certain Wells First Identified in Respondents' Proposed Final Order

The Trial Court held that the Respondents are entitled to a 15% working interest in any gas well of the Petitioner if (i) such gas well is capable of producing gas, and (ii) the area surrounding the gas well was built or improved *to any extent whatsoever* by the Respondents, including, without limitation, the Walker No. 1 gas well. (A.R. 1267-1282). After the Respondents moved this Court to enforce the Petitioner to perform under the Settlement Agreement, the Petitioner conceded that it had paid, and would continue to pay, the Respondents their amounts owed under a 15% working interest in the wells identified in the Trial Court's Order. The fact that the Petitioner had paid and will continue to pay the Respondents a 15% working interests in each of the Paying Wells is proof that the Petitioner owes the Respondents a 15% working interest in each of the Paying Wells.

Moreover, after the Respondents moved this Court to compel the Petitioner's performance under the Settlement Agreement, the Petitioner conceded that it owed the Respondents additional working interests in certain wells listed through recordable assignments and provisional assignments (collectively, the "Undisputed Nonpaying Wells").

Some of the recordable assignments, or provisional assignments, provided by the Petitioner indicate a working interest of less than 15%. However, the terms of the Settlement Agreement require the grant of a 15% working interest for all gas wells built

or improved by the Respondents. The mere fact that the Petitioner offered an interest, albeit a smaller one than is required under the Settlement Agreement, is sufficient evidence to conclude that the Respondents built or improved the sites of the Undisputed Nonpaying Wells. Accordingly, the Respondents were entitled to a 15% working interest in the Undisputed Nonpaying Wells.

The Respondents also provided evidence indicating that they are entitled to a 15% working interest in wells, other than the Paying Wells and the Undisputed Nonpaying Wells. In particular, the Affidavit of Mr. Kenneth D. Bias dated February 11, 2013 and the Affidavit of Mr. Ofie G. Helmick, Jr. dated February 10, 2013 indicate that the Respondents also built or improved other wells.

Other than the evidence of the affidavits, the Petitioner did not provide sufficient evidence to rebut the evidence provided by the Respondents. Thus, based upon the record, it is apparent that the Respondents are entitled to a 15% working interest in each of the Applicable Wells. Accordingly, given the evidence that the Trial Court had at its disposal, it found in favor of the Respondents. This was not an abuse of discretion.

F. The Trial Court Did Not Err in Awarding \$35,150.00 to Respondents for Lost Business Opportunities Related to Not Receiving a Replacement Title to the Service Rig Provided to Respondent by Petitioner as Part of the Mediation Agreement

Recoverable damages are those that “may fairly and reasonably be considered as arising naturally – that is, according to the usual course of things – from the breach of the contract itself.” See Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro, 158 W. Va. 708, 716, 214 S.E.2d 823, 827-28 (1975). (citing Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Reprint 145 (1854)). Considering that it was reasonable for the Respondents to conclude that they would receive the personal property indicated in the Settlement

Agreement by March 9, 2012, the Respondents are entitled to possession and ownership of such property.

Based upon the Affidavit of Ronald D. Dalrymple dated February 8, 2013, it is undisputable that the Respondents missed two clearly identifiable business opportunities worth between \$35,150 and \$48,250. This was a direct result of the Petitioner's nonconformance with the provisions of the Settlement Agreement.

Moreover, the Respondents are entitled to damages in the amount of \$35,150.00 for the valuable business opportunities missed due to the Petitioner's neglect in performing obligations under the Settlement Agreement where time was of the essence. The Petitioner breached the Settlement Agreement, and it is liable to the Respondents for damages that arose out of that breach.

G. The Trial Court Did Not Err in Ordering that as a Part of the Compliance With the Mediation Agreement that Petitioner Must Provide Certain Additional Tools to the Respondent

The mere fact that the Petitioner lost a Service Rig's title document and the Swab Rig's 2" string of tools does not excuse the Petitioner of its obligations to deliver such personal property pursuant to Paragraph 4 of the Settlement Agreement. Paragraph 4 of the Settlement Agreement expressly states "3 pieces of equip – w/ all assoc. tools." (A.R. 0891-0892). Underlying the primary condition of Paragraph 4, three bullet points list "will deliver swab rig," "ditch witch in garage," and "pick up service rig," respectively. In the left-hand margin of Paragraph 4, the Settlement Agreement states "by March 9." (A.R. 0891). A rational reading of Paragraph 4 would lead a reader to conclude that the Petitioner was required to transfer ownership and possession of a service rig, ditch

witch, and swab rig, along with all associated tools thereof, by bill of sale or title, whichever is applicable, by March 9, 2012.

At the time of Trial Court's Order, all parts of Paragraph 4 had been satisfied, except for delivery of the title to the Service Rig and delivery of a 2" string of tools associated with the Swab Rig. The Petitioner believes that it is excused from performing these portions of Paragraph 4 because (i) it lost the 2" string of tools associated with the Swab Rig before entering the Settlement Agreement, and (ii) it requested a replacement title from the West Virginia Department of Motor Vehicles, but such replacement title was never delivered. These arguments are flawed for the several reasons.

Here, the Settlement Agreement does not indicate the 2" string of tools were lost. Furthermore, in the Petitioner's Response, the Petitioner concedes that the Respondents were not informed that the 2" string of tools were lost until after the Settlement Agreement was executed. (A.R. 1116). In addition, on September 28, 2012, the Petitioner's counsel conceded in his correspondence to the Respondents' counsel that "the common understanding in the industry by those who are knowledgeable in rig operations, is that rig tools are tools used for working down-hole in a well, such as swabbing, drilling, sand pumping, bailing, etc." (A.R. 1135). Based upon these facts, it was reasonable for the Respondents to conclude that they would receive a 2" string of tools for the Swab Rig by March 9, 2012.

Again, nowhere in the Settlement Agreement does it indicate that the title document of the Service Rig was lost. Moreover, the Petitioner's counsel indicated on August 24, 2012 at 5:17 p.m. by electronic correspondence that the Petitioner would provide the Respondents "with a replacement title for the service rig from the DMV if that is possible." (A.R. 1050). The Petitioner's counsel also made another promise

regarding delivery of the title document of the Service Rig on September 28, 2012 wherein he stated the Petitioner “is in the process of obtaining a replacement title for the Service Rig . . .” (A.R. 1135). For similar reasons, it was also reasonable for the Respondents to conclude that they would receive a title document to the Service Rig.

At the time of the Trial Court’s Order, nearly one year has passed and the Respondents had not received the personal property they bargained for under the Settlement Agreement. This malfeasance on the part of the Petitioner caused the Respondents to miss many valuable opportunities. Therefore, it was not an abuse of discretion for the Trial Court to require the Petitioner to deliver the tools and additional tools necessary for the full execution of the Settlement Agreement.

H. The Trial Court Did Not Commit an Abuse of Discretion

As stated previously, under the abuse of discretion standard, the court will not disturb a circuit court’s decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances. Stull, 202 W. Va. at 447, 504 S.E.2d at 910; Collins, 206 W. Va. at 472, 525 S.E.2d at 663.

Here, the Trial Court found for the Respondents after considering all parties arguments and positions, considering the evidence, and considering the totality of the circumstances. While the Petitioner may not agree with the findings of the Trial Court, its decision should not be disturbed.

Further, the Petitioner reasons that the Trial Court abused its discretion in adopting the Respondents’ proposed order without making any alterations. This is not evidence that the Trial Court exceeded the bounds of permissible choices in light of the

circumstances and should not be interpreted as such. The parties had a hearing on the matter, both parties had an opportunity to submit Orders to the Trial Court, it just so happened that the Trial Court adopted the Respondents' proposed order containing the finding of facts and conclusions of law.

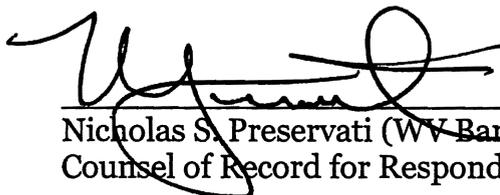
One simple fact remains, the Petitioner agreed in writing to the specific terms of the Settlement Agreement. The Petitioner reneged on that agreement and the Trial Court held it accountable. Based upon the evidence presented in this case, it is clear that not only did the trial court no abuse its discretion, it made the right decision. Correct decisions cannot be reversed for an abuse of discretion.

VI. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, the Respondents do not believe it necessary to set this matter for oral argument as the issues have been authoritatively decided by the trial Court and the Respondents believe that oral argument is unnecessary as the Trial Court did not commit any assignments of error.

VII. CONCLUSION

For these reasons, the Respondents believe that the Petitioner is not entitled to the relief it is requesting and the Trial Court's Order should not be disturbed.



Nicholas S. Preservati (WV Bar # 8050)
Counsel of Record for Respondents

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0601

**CLASSIC OIL AND GAS
RESOURCES, INC.**, a Kentucky
corporation licensed to do business
in West Virginia,

Petitioner

V.

Appeal from a final order
of the Circuit Court of Wyoming
County (07-C-149)

**WHITNEY WELL SERVICE,
INC.**, a West Virginia Corporation;
**DANNY WEB CONSTRUCTION
CO., INC.**, a West Virginia
Corporation; and **VELMA WEBB**,
an individual

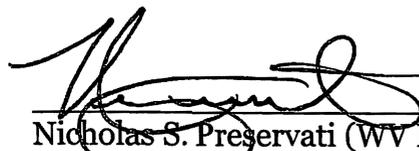
Respondent

CERTIFICATE OF SERVICE

I CERTIFY, that on the 4th day of October, 2013, I served a true copy of the foregoing ***Respondents' Brief*** via U.S. Mail, first-class, postage prepaid to the following:

R. Ford Francis
Allen Kopet & Associates, PLLC
P.O. Box 3029
Charleston, West Virginia 25331

Velma Webb
105 Sunny Road
Max Meadows, Virginia 24360-4034



Nicholas S. Preservati (WV Bar # 8050)
Counsel of Record for Respondents