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**IN THE SUPREME COURT OF APPEALS**

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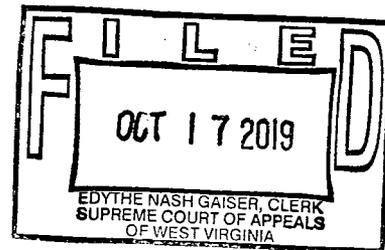
GULFPORT ENERGY CORPORATION,

Defendant Below/Appellant

v.

HARBERT PRIVATE EQUITY PARTNERS, LP

Plaintiff Below/Appellee



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**APPELLEE'S BRIEF**

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## **BRIEF OF THE APPELLEE, HARBERT PRIVATE EQUITY PARTNERS, LP**

### **I. ASSIGNMENTS OF ERROR**

Appellee makes no assignments of error.

### **II. STATEMENT OF CASE**

Harbert Private Equity Partners, LP, formerly known as Central Environmental Services, Inc., "hereinafter CES," provided services in the oil and gas patch to a variety of clients, including the Defendant Below/Appellant, Gulfport Energy Corporation. In particular, the services that CES provided to Gulfport were to provide containers for materials used in the process of drilling for oil and gas that were later hauled to a hazardous waste disposal. The charges that were made by CES to Gulfport were for providing the run-off boxes, cleaning run-off boxes after they had been used by Gulfport, and for making delivery of the hazardous waste materials to various sites.

Jeff Harper was the chief executive officer for CES during the relevant timeframe. Harper described the business services performed by CES with respect to waste removal. A profile of any waste generated is developed to determine how the waste is to be handled and which facility can receive the waste. See *Trial Transcript*, p. 10. If the waste is exempt from regulations, it does not require a profile, otherwise the material needs to be sent to a lab for analytical results. See *Trial Transcript*, p. 10. The lab then issues a profile number, which is put on the manifest which describes the waste, how much is there, who generated it and where it is to go to and for CES purposes, it also identifies the driver and the truck. See *Trial Transcript*, p. 10. CES responds to a dispatch from the oil and gas producer and will pick up the drop-off box and deliver it to the appropriate disposal site and then once delivered, the driver returns the paperwork showing the delivery, the time spent by the driver to CES who prepares appropriate invoices for customers and timesheets for its employee driver. See *Trial Transcript*, pp. 11 and 12.

With respect to Gulfport, there was a master service agreement entered into between Gulfport Energy and Central Environmental, which was dated May 21, 2012 and admitted into evidence by the court. See *Trial Transcript*, p. 13. The chief services provided by CES to Gulfport were transportation and disposal of flow-back and produce fluids, tank cleaning and also drill cuttings disposal and transportation. See *Trial Transcript*, p. 14. In practical operations, Gulfport would request a roll-off box from CES to be delivered to a particular site. Sometimes CES would profile the waste, on some occasions Gulfport would have the profiles prepared on the waste to be transported. CES only delivered waste to a list of Gulfport approved vendors. See *Trial Transcript*, p. 15. CES also hauled fluids from Gulfport sites that would be delivered either to CES injection wells or other injections wells. See *Trial Transcript*, p. 17. CES would also clean frack tanks from the sand and mud. See *Trial Transcript*, p. 18. Harper stated that on some of the occasions the materials that were placed in the roll-off boxes would set up like concrete and would need to be jackhammered out and that their invoices would reflect additional time and materials needed for the removal of material by jackhammer. See *Trial Transcript*, pp. 17, 35 and 36. With respect to liquid materials, CES would provide trucks for hauling oil and gas production fluids that were picked up by tank truck and then delivered to an injection well. See *Trial Transcript*, p. 18.

The process for generating an invoice for Central Environment Services was to generate a work order, which was issued to CES employees who would then perform the work and when the work was completed return the information to the CES office where an invoice was generated. Once an invoice was generated, it was taken to Gulfport for their signature. See *Trial Transcript*, pp. 19 and 20. Once a Gulfport employee signed off on the invoice, it was forwarded to Oklahoma for payment. CES was involved with business with Gulfport over a number of years

and number of their invoices paid through this process. See *Trial Transcript*, p. 20. The invoices that were subject of the suit were invoices for services where Gulfport employees had not signed the invoice. Mr. Harper described the problems that would occur when a Gulfport employee was not there for signature or when there was turnover and replacement Gulfport employees did not wish to sign for work that had been ordered by their predecessor. See *Trial Transcript*, pp. 20 and 21. During 2014 and 2015, CES and Gulfport were both working 24/7 365 days a year. See *Trial Transcript*, pp. 21 and 22. CES was not the only provider of services to Gulfport and if CES was not available to provide a service to Gulfport, the job would then be assigned to another company. See *Trial Transcript*, p. 22. CES' business grew during this timeframe from a small company to over 200 employees because of the volume of work in the oil and gas patch. CES even opened an office in Barnesville, Ohio essentially to serve Gulfport's needs. See *Trial Transcript*, pp. 22 and 23. The business relationship between Gulfport and CES came to an end in 2015. See *Trial Transcript*, p. 23.

Harper described his efforts to collect the unpaid invoices by having sales and office personnel from CES discuss the unpaid invoices with Gulfport employees. See *Trial Transcript*, pp. 24 and 25. The result of Harper's collections efforts on unpaid invoices was that some were paid and that the ones submitted at trial were not paid by Gulfport. See *Trial Transcript*, p. 25. At trial CES presented Exhibits 3, 4 and 5, which were comprised of invoices and backup materials which it had provided to Gulfport. Harper testified that the invoices and supporting documents were all generated by CES in the ordinary course of business.

The invoices submitted as Exhibit 3, related to transportation and services provided by CES. In some instances, when CES lacked manpower to provide services to Gulfport, it obtained those services from a third-party, which then billed CES and their invoice was passed on

to Gulfport with no write up of additional charges. Harper went into some detail in describing their invoices, which would contain a project number, usually generated by Gulfport but on occasion generated by CES. See *Trial Transcript*, pp. 28 and 29. Harper testified, pursuant to the Master Services Agreement, that CES was allowed to use third-party vendors and invoice was described from Mountain State Environmental as a third-party vendor which provided services to CES for Gulfport project. The documents that were produced in support of the invoices included the work orders, information respecting the driver or CES employee, which were signed by the CES employee. CES invoices were generated within a few days of the work being done. See *Trial Transcript*, pp. 32 and 33.

Mr. Harper testified that when third-party vendors were used, they were paid before the invoice was forwarded to Gulfport. All materials utilized by CES, that were outlined in the invoices, were paid by CES and the employees of CES who performed services for Gulfport were paid by CES. In other words, the invoice was reflected in the amounts billed, all of the expenses that CES had incurred in providing services to Gulfport.

In one instance described by Harper, Gulfport employees signed approving a credit for an invoice that had been negotiated between the parties but refused to sign the invoice for the work that was the subject of the credit. See *Trial Transcript*, pp. 37 through 48.

Harper testified, with respect to the invoices which were comprised of Exhibit 3, that CES performed all of the work that was outlined in each of the invoices and that each of the invoices had backup material which was kept by CES in the ordinary course of business. He further testified that the invoices had been presented to Gulfport for payment and that Gulfport refused to make payment. See *Trial Transcript*, pp. 48 and 49.

Exhibit 4 contained a number of invoices all related to box rentals from CES to Gulfport. See *Trial Transcript*, pp. 50 and 51. Roll-off boxes would be delivered to a Gulfport site and until retrieved and ultimately cleaned, Gulfport would be charged rental for that box pursuant to the agreement. See *Trial Transcript*, pp. 50 through 52. CES would keep records of when a box was moved, including where the box was moved to and from, and billed Gulfport. See *Trial Transcript*, pp. 50 and 51. Harper testified that the usual custom was to bill for the box rental after the boxes had been picked up. On occasion, if the roll-off box stated for an extended time, there would be one invoice for deliver and another invoice for pickup and the rental that had accrued during the elapsed time. See *Trial Transcript*, p. 53. Harper described that the invoices in Exhibit 4 were unpaid invoices for box rental. The invoices which comprised Exhibit 4 were submitted to the court with approximately two and one-half feet of documents to provide the backup for the invoices.

Harper gave examples of instances in which Gulfport had paid for the delivery of a roll-off box and paid for the pickup of a roll-off box but refused to pay the rental while it was on Gulfport's site between pickup and delivery. See *Trial Transcript*, pp. 54 and 55. On Page 57 of the *Trial Transcript*, Harper, utilizing Invoice No. 2203 as an example, which showed that Gulfport had paid for pickup and delivery, but did not pay for box rental used at a Gulfport site. Harper also identified a particular invoice that had been presented to Gulfport with a notation that Gulfport had refused to sign. See *Trial Transcript*, pp. 59 and 60. The documentation for that particular invoice showed that the landfill, when accepting materials, noted that it had a Gulfport profile number and acknowledged the delivery of the boxes pursuant to the profile number. See *Trial Transcript*, pp. 60 and 61. Once again Harper testified that all of the box rentals, shown in Exhibit 4, were records kept and maintained in the ordinary course of business and for work that

was done and performed by Gulfport and work for which CES employees had received their wages. See *Trial Transcript*, p. 61.

Exhibit 5 contained \$39,042.90 of invoices. Mr. Harper testified that the work was performed by CES for Gulfport for the invoices shown on Exhibit 5, but also acknowledged that he was unable to provide any backup to Gulfport for those invoices or to provide the court.

Harper testified that during CES' and Gulfport's contracts that problems would arise because of failure to sign the invoices. See *Trial Transcript*, pp. 63 and 64. Harper also testified that there are some invoices that had previously been submitted without signature that had been paid by Gulfport. Harper stated that all of the exhibits that were offered to the court and presented to Gulfport for payment were for charges for services provided by CES to Gulfport pursuant to their agreement. See *Trial Transcript*, p. 65. Harper testified that he had paid for the materials, the wages for his men, and that the services identified in the invoicing had all been provided to Gulfport, pursuant to the agreement. See *Trial Transcript*, pp. 65 and 66.

Harper described a meeting with Gulfport officials prior to filing suit. The exhibits presented to the court contained over 8,000 documents in support of CES' claim. Harper testified that Gulfport was under a duty in the contract to notify CES of any issues with respect to invoices and that CES never received any notifications for issues with the billings. Harper also testified that the invoices were presented to Gulfport with the documentation that was used in court. See *Trial Transcript*, pp. 111 and 112. Harper took all of the documentation, in March 2016, to meet with Gulfport to seek payment for the unpaid invoices. See *Trial Transcript*, p. 112. Harper identified, in Gulfport's Exhibit 10, an example of Gulfport making payment for box rentals where there was no Gulfport signature, but Gulfport used the same method for verification of the box rentals as detailed by CES and as testified to by Harper. See *Trial Transcript*, pp. 114 and 115.

Defendant's Exhibit 2, which was an internal e-mail from Jean Hale, a Gulfport employee, dated July 6, 2016, in which it was stated "I think we can agree that it is likely we owe the vendor for these services".

At the close of the plaintiff's evidence, plaintiff's claim was reduced from \$191,287.15 by the sum of \$5,692.00 by removing Invoice No. 49301 from the claim. A motion for directed verdict, made by Gulfport at the close of plaintiff's evidence, was denied by the court. See *Trial Transcript*, pp. 128 and 129.

Gulfport took the position that if there was not a signature on the invoice from the company man that there was no proof that the work was performed. See *Trial Transcript*, pp. 149 and 150. This testimony was offered even in light of invoices which showed materials, which contained a waste hazard profile from Gulfport and delivery under that profile to a waste site. See *Trial Transcript*, pp. 149 and 150.

Elaina Moscato, a Gulfport employee, testified that if there wasn't a signature that the work wasn't approved. Gulfport witness, Moscato testified that no vendor can get onto a Gulfport pad unless somebody from Gulfport calls and asks for them to provide services and that they would have to sign in at the gate which lead to each well site. See *Trial Transcript*, p. 157. Moscato, as shown by the *Trial Transcript*, when confronted with these facts started looking for help from counsel table, which was noted by the court. See *Trial Transcript*, pp. 157 and 158. Moscato then acknowledged that the company would have access to the guard logs, which would show the entry to each of the well sites and that Gulfport would possess the information to know whether CES had come to well sites for the particular invoices. See *Trial Transcript*, pp. 57 through 159. At the conclusion of Gulfport's witness, Moscato's testimony, she acknowledged that as of the day of the trial that she could not testify that one item of the work represented by the

invoices admitted into evidence hasn't actually been performed by CES. See *Trial Transcript*, p. 162.

Gulfport's witness also acknowledged that under the Master Services Agreement that there was no requirement that Gulfport's approval of work be in writing. The witness Moscato acknowledged the Agreement states "all contractor invoices shall identify the items related to the charges including, but not to limited to, receipts, timesheets, dates, hours, rate, labor classifications, and materials charges all with the appropriate approvals of company personnel". See *Trial Transcript*, p. 168. Regardless of the lack of signature, Gulfport acknowledged that it agreed with the documentation of \$33,000.00 of the total invoices presented at trial. See *Trial Transcript*, P. 146. Roger Wilson, a Gulfport employee, acknowledged that Gulfport, because of its total control of its site, had the ability to determine whether CES had been present to perform the services outlined in all of the invoices submitted. See *Trial Transcript*, pp. 195 and 196.

Rule 52 of the West Virginia Rules of Civil Procedure require that in actions tried upon the facts without a jury, that the court shall find the facts specially and state separately its conclusions of law therein and enter judgment pursuant to Rule 58. In this case Judge Wharton issued a written ruling, see Appendix P00001, Volume I, outlining his finding of facts and conclusions of law and entry of judgment in conformity with the Rule. The order was written by the Judge with no request for counsel to provide findings of fact and conclusions of law.

### **III. SUMMARY OF ARGUMENT**

CES provided services and materials to Gulfport as provided by a Master Services Agreement. CES and Gulfport had a contractual relationship, which covered a number of years and came to an end in 2015. When the relationship came to an end, there were unpaid invoices for materials and services provided. CES contends that it provided all of the materials and services as set forth in the invoices which were admitted in trial with backup documentation. These

documents totaled over 8,000 pages. CES claimed damages in excess of \$190,000.00 based upon the invoices, documentation of the invoices and the testimony of its CEO Jeff Harper. The excuse for non-payment asserted by Gulfport was that the invoices were not approved by Gulfport personnel at the time they were submitted. The testimony from CES CEO Jeff Harper was that the invoices were submitted for signature but signatures were unavailable for a variety of reasons, which included the unavailability of authorized Gulfport employees to sign, the refusal of Gulfport employees to sign where there had been a transition in the workplace and the employee on site had not placed the order. Gulfport acknowledged, in its testimony, that it had control of all sites where CES provided materials and could have verified CES' presence on the site at the date and time of the invoice service by checking their guard logs. Gulfport even testified that no vendor could enter Gulfport's site without having invited and having gone through security. Mr. Harper testified that Gulfport had paid a number of invoices where there was no signature from Gulfport as part of the parties' course of dealings.

It is CES' position that it performed its contract with respect to the invoices at issue and provided proper documentation and that the only reason for non-payment was the lack of Gulfport's approval signatures, which was beyond the control of CES. As indicated in the argument presented hereafter under West Virginia law, a party to a contract cannot prevent performance of a contract and then be allowed to benefit by receiving materials and services free of charge. The trial court, after reviewing all of the documents and determining the credibility of the witnesses, wrote a judgment order which complies with Rule 52 of the West Virginia Rules of Civil Procedure and made specific findings of fact with respect to the contract. The court then went on to note that CES would have been also entitled to recover under the theory of unjust enrichment. The trial court's review and findings of fact included appropriate reductions and the

invoices submitted by CES pursuant to the terms of the contract and also disallowed invoices for which there was insufficient documentation as required by the contract.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

It is the position of the Respondent that this case is a routine commercial case between a vendor of materials and services, CES, and a purchaser of materials and services, Gulfport, and that it involves no novel questions of law. The case was resolved by the trial judge upon a determination of the facts and the credibility of the witnesses. Although Respondent is happy to argue the case orally, it is Respondent's position that the Supreme Court does not need oral argument to resolve the issues brought forth on appeal.

#### **V. ARGUMENT**

##### **A. Standard of Review**

The cases recited by the Appellant regarding the standard of review are all applicable. In addition, the Appellee would note the following:

“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regards shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Rule 52, West Virginia Rules of Civil Procedure.

In this case, the decision of Judge Wharton is clearly based upon his review of the evidence and his opportunity to judge the credibility of the witnesses in that he specifically found that Gulfport failed to adhere to the contractual provisions requiring Gulfport to have its employees available to review and sign off on invoices. Further, Judge Wharton reviewed the invoices and documentation submitted by CES, which was comprised of over 8,000 pages of documents, and in his ruling found the documentation in Exhibit 3 to be in accordance with the contractual provisions saving invoice withdrawn by CES at the close of its evidence. He found that the documentation was suitable, under the contract, with respect to Exhibit 4, except that some of the

invoices contained materials not entitled to be compensated for by the Master Services Agreement and eliminated those and found that the invoices submitted as Exhibit 5 did not meet the requirements of the contract. His determination of the evidence and credibility of the witnesses led to his conclusion that CES should be awarded the sum of \$144,037.75 and under the appropriate standards of review should be affirmed by this court.

**B. The Circuit Court Erred by Awarding CES Judgment On Its Claim for Unjust Enrichment When A Written Contract Exists Which Expressly Provided for the Method by Which Invoices Were to Be Submitted to Gulfport for Payment.**

Gulfport's argument that the Circuit Court committed error ignores the findings of fact made by Judge Wharton. Specifically, Judge Wharton found, in the second paragraph of the Trial Order, that CES provided transportation in disposal of flowback and production fluids, tank cleanings, drill cuttings disposal and transportation pursuant to the parties' Master Services Agreement. The court also found against Gulfport on its defense, under the contract, namely that the CES invoices were not signed by Gulfport personnel. The court noted that the evidence showed that the employees of Gulfport Energy were transitory in nature and could not always be found for the approval. Gulfport cannot prevent or impair performance by CES under the parties' contract and then claim that it is entitled to benefit by having the services provided by CES to Gulfport free of charge.

Under West Virginia law, a contract must be construed as a whole, including all of its parts and attachments. See *Wood v. Sterling Drilling & Production Co.*, 188 W. Va. 32, 422 S.E.2d 509 (1992). A party to a contract, causing, by his own default, a breach of one of its subsidiary or collateral provisions, the purpose of which was to suspend the time of payment of money by him to the other, is deemed to have waived the benefit thereof and cannot rely upon the breach as a defense to an action for money. See *Boggess v. Bartlett*, 72 W. Va. 377, 78 S.E. 241 (1913). Also, under West Virginia law, it has been held that a party to a contract who prevents the

other party performing its obligations under the contract, has breached the contract. See *Polino v. Keck*, 80 W. Va. 426, 92 S.E. 665 (1917). Finally, in West Virginia, a written contract may be modified by the subsequent conduct of the parties relating to the same subject matter. See *Sanford v. First City Co.*, 118 W. Va. 713, 192 S.E. 337 (1937). A modification of a contract may be applied from the subsequent agreement or conduct of the parties. See *Azure v. Hunter*, 101 W. Va. 191, 132 S.E.2d 726 (1926). Under West Virginia law, a party may proceed on both contract claims and quantum meruit claims in the same civil action. See *Cochran v. Craig*, 88 W. Va. 281, 106 S.E. 633 (1921).

In essence, the Trial Order, which was entered by Judge Wharton without requesting either findings of fact and conclusions of law from either of the parties, found performance of the contract by CES with respect to the invoices set forth as Exhibit 4 for box rentals, less the retracted amount of \$5,692.00 for Invoice No. 49031 withdrawn by CES at the trial. The court found that the invoices admitted into evidence as Plaintiff's Exhibit 5, in the sum of \$39,042.90, did not meet the required contract provisions for documentation and they were denied. With respect to the invoices included in Plaintiff's Exhibit 3, the court found that those invoices and documentation met the contractual requirements with the exception certain charges excluded by the court for equipment and supplies, in the sum of \$77,044.75. The court then noted that CES had proved by a preponderance of the evidence that it had provided the work and materials in the invoices as described for the benefit of Gulfport and recited *Realmark Developments, Inc. v. Ranson*, 208 W. Va. 717, 542 S.E.2d. 880 (2000), in further support of the court's position that the contract issues aside, CES would be entitled to recovery under the law of unjust enrichment.

Gulfport cannot complain about Judge Wharton's ruling finding damages were owed to CES pursuant to the terms of the contract because the court specifically found that Gulfport failed to honor the contract by not having its employees available for approving the invoices. The testimony of the parties clearly showed that on many occasions, invoices without signature, had been approved and paid by Gulfport. This constitutes a modification of the contract by course of dealing. See *Sanford, supra* and *Azure, supra*.

Because both parties alleged a breach of contract, Judge Wharton could have found the contract to be unenforceable, which would have still allowed CES to recover under quantum meruit. Under West Virginia law, quantum meruit is recoverable in the absence of an enforceable contract where the plaintiff performs services with the knowledge of the defendant, the services were of benefit to the defendant, and the defendant actually knew or reasonably should have known that the plaintiff was performing the services with the expectation that the defendant would pay their reasonable value. See *Frye Racing Enters., Inc. v. Chapman*, 201 W. Va. 391, 497 S.E.2d 541 (1997).

Judge Wharton's Order is comprised of two portions. The first portion outlines the contractual obligations and then makes findings of fact as to whether or not CES performed under the contract and provided suitable documentation as the contract required. The court also noted that the defense under the contract, the signing of the invoices, was not valid as Gulfport had not made its personnel available for signing invoices. Accordingly, the court determined that Gulfport had failed to perform its contractual obligations and entered judgment in the sum of \$144,037.75 against Gulfport.

The second prong of the opinion provides that under the law of unjust enrichment, the results would have been the same and that Gulfport would have been required to pay CES the

sum of \$144,037.75. The court noted in its opinion that it believed that under the law of unjust enrichment as cited by the court in the *Realmark Developments, Inc. v. Ranson*, 208 W. Va. 717, 542 S.E.2d 880 (2000), that unjust enrichment would, if applied, support the recovery.

C. **The Circuit Court Erred by Basing Its Holding Upon *Realmark Development Inc. v. Ranson*, 208 W. Va. 717, 542 S.E.2d 880 (2000).**

The Trial Court was correct to rely on *Realmark Developments, Inc. v. Ranson*, 208 W. Va. 717, 542 S.E.2d. 880 (2000), with respect to the unjust and enrichment argument. However, by the Court's Order, the court reviewed the invoices that were submitted as Exhibits 3, 4 and 5, as pursuant to the terms of the Master Services Agreement. Invoices, which lacked documentation or were for services not covered by the Master Services Agreement, were clearly excluded by the court in its order. Services where documentation was provided, in accordance with the Master Services Agreement, were awarded. The court specifically noted that the terms of the Master Services Agreement and made specific findings of fact in conformity with the contract. Once again, Gulfport ignores the fact that the court made a specific finding that the failure to obtain signatures was shown by the evidence not to be a failure of CES but rather of Gulfport to have its personnel available for the approvals. Both parties contended that there was a breach of the Master Services Agreement by the other. The court, having an opportunity to view the witnesses, hear the testimony and review the over 8,000 pages of exhibits, concluded that CES had met its burden under the contract and that it was Gulfport that had failed to meet its contractual obligations by approving appropriately documented invoices. Then the court also discussed the fact, that under the law of unjust enrichment, Gulfport had received the benefit of the materials and services as outlined in the invoices approved by the court and found that under the law of unjust enrichment it would be unconscionable to permit Gulfport to avoid payment.

In *Realmark, supra*, the unjust enrichment was for services and materials that improved real property. The work and services provided by CES to Gulfport was for the purpose of allowing Gulfport to operate and drill for oil and gas. Thus, Gulfport's real property, its mineral interests, were developed and improved by CES' work and materials.

**D. The Circuit Court Erred in Denying Gulfport's Rule 52(c) Motion.**

In the Plaintiff's case, CES presented testimony from its chief executive officer that all of the invoices admitted into evidence had been for work and services that were performed by CES and at the rates and charges approved by Gulfport, in the Master Services Agreement. Jeff Harper also testified that Gulfport, at no time, provided any notice to CES that the invoices were improper, as required in the Master Services Agreement. The court found, in its order, that CES had indeed provided the services and materials, shown by the invoices.

Gulfport witness, Moscato, at the end of her testimony admitted that she could not state that any of the invoices from CES to Gulfport for work and services that had actually been rendered. Gulfport's employee, Chase, made the statement, in an internal memo, "I think we can agree that it is likely we owe the vendor for these services". Defendant's Exhibit 2.

The crux of the case and the dispute between the parties was that these invoices were for services that were incurred while Gulfport was actively drilling and creating an increase in demand upon CES for services. Mr. Harper testified that his number of employees grew to 200 and CES even opened an office for Gulfport near its Ohio and northern West Virginia operations. Mr. Harper explained to the court that the reason the invoices were not paid was because it could not obtain approval signatures from Gulfport employees. Harper testified that on some occasions the employees would change and would not sign off on the work that had been ordered by others, sometimes Gulfport employees could not be found for signatures, and on some occasion, Gulfport employees refused to sign. However, in the instances when there was refusal to sign there was not

notification back to CES as to why Gulfport was refusing to sign off on invoices. As Mr. Harper testified, CES did not have the ability to force a Gulfport employee to sign any documents.

The evidence from CES broke down into essentially three categories. The first category was for invoices for transportation and other services. In those instances, the materials that were being transported had profile number which was assigned to Gulfport because Gulfport is the responsible party for depositing either the waste or liquids into ejection wells. The invoices, presented in Exhibit 3, all had Gulfport profile number, which provided supporting evidence that the CES invoices were for services performed for the benefit of Gulfport.

Exhibit 4 was comprised of rentals of roll-off boxes. As Mr. Harper testified, the backup documentation for the roll-off boxes was provided in the form of showing where delivery slips had been paid for the boxes and invoices for the delivery of the boxes had been paid and invoices for the pickup of the boxes and delivery to either the hazardous waste site or to injection wells was paid, but the box rent was not paid for the number of days between pickup and delivery, which was an appropriate charge under the Master Services Agreement. Mr. Harper testified that in a number of instances Gulfport had paid for such charges based upon the same documentation. He testified that the roll-off box rentals, which were comprised by Exhibit 4, were not paid ultimately because there was no signature from a Gulfport employee on the invoice. Finally, the last set of invoices, submitted into evidence by CES, were the invoices which CES could not locate documentation and categorized in Exhibit 5. Judge Wharton denied CES recovery for all items contained in Exhibit 5 and CES has not pursued a counter-appeal with respect to those items.

Accordingly, in its case-in-chief, CES had the Master Services Agreement admitted into evidence as Exhibit 1 and provided testimony that CES complied with the contractual

provisions that related to invoicing for services and was denied collection because Gulfport employees would not sign or refused to sign the submitted invoices.

Accordingly, the directed verdict motion, at the close of the plaintiff's case, was properly denied because plaintiff had presented evidence that goods and services had been delivered to Gulfport for which there was no payment in accordance with the contract and that the justification for failure to make payment was lack of signatures by Gulfport employees. Gulfport solely controlled whether or not it had employees available for signature or whether or not employees should sign CES' invoice. At the close of the plaintiff's case, it was incumbent upon Gulfport to convince the court that either (a) the services and materials had not been provided or (b) that Gulfport was justified in not signing the invoices or in not processing invoices for payment where the documentation clearly indicated those services had been provided and that the only reason for denial was Gulfport's failure to sign off on invoices. CES had presented evidence, found by the court to be credible of performance of the contract. Further, CES had provided evidence that any failure to perform was caused by Gulfport. Gulfport cannot prevent performance by CES and deny their services and not pay for materials provided. See *Boggess, supra*, and *Polino, supra*.

#### **GOVERNING LAW AND VENUE**

Gulfport makes no showing to the court that it ever sought to enforce the choice of law provision in the parties' contract. After Judge Wharton's decision, Gulfport made no post-trial motion to bring the issue of Oklahoma law to the court's attention. Furthermore, at no time during the pendency of the case or during the pendency of the trial, did Gulfport assert any issues respecting Oklahoma law. In fact, in the pre-trial statement filed by Gulfport, under the contested issues of law, which is Appendix P00501, there is no mention of Oklahoma law. Further, and more importantly, under the legal authorities that were recited by Gulfport to be applicable to this

case as identified in Gulfport's pre-trial statement at P00503, all of the cases recited by Gulfport were West Virginia cases. Accordingly, Gulfport has waived any issue with respect to the application of Oklahoma law. The general rule is that on non-jurisdiction issues, questions which are not raised in the trial court will not be considered on appeal. *State ex rel, State Farm Auto Ins. Co. v. Bedell*, 228 W. Va. 252, 719 S.E.2d 722 (2011).

Finally, if Oklahoma law does mirror West Virginia law, then the issue would seem to be moot. As explained herein, it is the Respondent's position that Judge Wharton's decision was correct under either principle of contract law or unjust enrichment under existing West Virginia law.

**E. Even if Unjust Enrichment Was Applicable in the Face of a Binding Written Contract, the Circuit Court Erred When It Failed to Balance all the Equities Between the Parties.**

Gulfport's argument that the court did not consider all equities in making an award of unjust enrichment flies in the face of the Judge's opinion. The matters that were brought to the court's attention by Gulfport specifically were all remedied either by the actions of CES or by the court's specific finding of fact. Gulfport identified an invoice for a well pad claimed not to be owned by Gulfport in Invoice No. 49031 and the plaintiff withdrew that invoice and ask that its claim be reduced by that sum of \$5,692.00. The court specifically noted in its order that the total invoices for Exhibit were awarded, taking into account the reduction of \$5,692.00. In its finding of fact with respect to Exhibit 3, the court specifically identified and removed from several invoices, certain materials, equipment and supplies, which it deemed not to be covered. Accordingly, the court considered the invoices in Exhibit 3 and reduced those sums by \$2,514.50.

Gulfport does not acknowledge that Judge Wharton found that CES did the work and provided materials, shown by the evidence. The result of the order was a reduction of a claim for over \$190,000.00 to an award of \$144,037.75.

Judge Wharton finally excluded all undocumented invoices in Exhibit 5, totaling \$39,042.90, as not meeting the terms of the contract. If Wharton's Order is read to be only in equity, then he balanced equities by not awarding CES for its undocumented work, Exhibit 5, in the sum of \$39,042.90.

## VI. CONCLUSION

Wherefore, for all the reason stated herein, Appellee prays that Judge Wharton's Order granting the Appellee the judgment sum of \$144,037.75, to be affirmed.

HARBERT PRIVATE EQUITY  
PARTNERS, LP, Plaintiff Below/Appellee,

By Counsel,



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