APPEAL NO. 21-0934

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REDSTONE INTERNATIONAL, INC.,

Petitioner,

vs.

JF ALLEN COMPANY, AMEC FOSTER WHEELER ENVIRONMENT & INFRASTRUCTURE, INC., and MARKWEST LIBERTY MIDSTREAM & RESOURCES, INC.

Respondents.

ON APPEAL FROM THE CIRCUIT COURT (BUSINESS COURT) OF WETZEL COUNTY, WEST VIRGINIA

(The Honorable H. Charles Carl, III, Civil Action No. 16-C-82)

BRIEF OF RESPONDENT, AMEC FOSTER WHEELER ENVIRONMENT & INFRASTRUCTURE, INC.

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CERTIFICATE OF SERVICE

I, Vic L. McConnell, counsel for the Respondent, Amec Foster Wheeler Environment & Infrastructure, Inc. hereby certify that on this 1st day of April, 2022, a true copy of the foregoing "Brief of Respondent Amec Foster Wheeler Environment & Infrastructure, Inc" was served upon counsel that have previously appeared in the this matter, addressed as follows:

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COUNTERSTATEMENT OF THE CASE

The Petitioner, Redstone International, Inc. ("Redstone"), has asserted an assignment of error concerning the Circuit Court's dismissal of its claims against the Respondent, Amec Foster Wheeler Environment & Infrastructure, Inc. ("Amec") in the underlying matter. In response, Amec is of the position that the Circuit Court did not err in dismissing all such claims. Although Redstone has properly described the underlying project ("Project") and the relevant contractual relationships, further clarification is necessary for purposes of Respondent Amec's brief in opposition to the position of Redstone.

I. The MarkWest/JFA Contract.

The Respondent, MarkWest Liberty Midstream & Resources, Inc. ("MarkWest") and the Respondent, JF Allen Company ("JF Allen"), entered into a contract for JF Allen to design and build the subject retaining wall (the "Retaining Wall Contract") ("Wall"). JA 05563-5604. According to Exhibit A of the Retaining Wall Contract, "[i]t is the responsibility of the Contractor [JF Allen] *to complete the Wall design and provide all required engineering* and Wall construction services necessary to implement the design." JA 05584, Sect. 4. Based upon the foregoing contract language, it is clear that preparing and providing the retaining Wall design was an express contractual obligation owed by JF Allen to MarkWest.

Consistent with the foregoing, the Circuit Court found that JF Allen was designated as the "designer" of the Project by virtue of its Design/Build contract with MarkWest. According to the Judgment Order, the Circuit Court found that MarkWest and JF Allen "entered into a binding contract for the design and construction of the Wall." JA 00093, ¶ 107. The Circuit Court further held that "under the Design-Build Contract, J.F. Allen was responsible for designing the Wall." *Id.* In fact, the Circuit Court referred to the design/build contract as one

that "meant that a single contractor would be fully responsible for designing, procuring materials, and constructing, and would have full design freedom and responsibility." JA 00051, ¶16. Accordingly, for purposes of this case and this appeal, the applicable contracts provide that JF Allen is designated as the designer.

II. The Redstone/JF Allen Subcontract.

It is undisputed that Redstone entered into a direct subcontract with "Design/Builder" JF Allen titled "Subagreement Between Design/Builder and Subcontractor on the Basis of a Fixed Price." [JA 05200-5260; Petitioner Brief, p. 4]. As such, Redstone was a party to a contract with the "designer" of the retaining Wall. Based upon the foregoing, it is clear that JF Allen, as design/builder, contracted with Redstone and such contract entailed Wall design and construction obligations.

III. Redstone's Deficient Work.

During the course of performance of its work on the Project, Redstone did in fact perform deficient work which led to the need for substantial repairs to the Wall. JA 00099-100, ¶¶ 123, 124, 126, and 127. With regard to the damages awarded against Redstone, and in favor of JF Allen, the Court has already found that such damages were the result of construction errors by Redstone rather than design errors. *Id.* The Circuit Court ruling in this regard was correct and supported by the preponderance of the evidence.

IV. Redstone's Design Deficiency Claims.

With regard to Redstone's claim of negligence against Amec in its cross-claim, Redstone only claimed that the walers designed by Amec "were lacking required stiffeners, causing Redstone to perform additional work." JA 04798, ¶47. With regard to the proof at trial pertaining to allegations of design deficiency, Redstone only presented proof through its expert

James Collin of alleged design deficiencies related to: 1) allowing anchor testing at the face of the Wall which allegedly led to waler deformation (same as in cross-claim) and 2) the claimed lack of settlement calculations in the Amec design which allegedly contributed to anchor shearing that required certain repair work by Redstone. JA 06492. Given its direct contract with JF Allen, Redstone actually claimed damages related to the foregoing alleged design deficiency claims against JF Allen. JA 06375; 05838. More specifically, during the course of the Project, Redstone submitted change orders to JF Allen seeking the payment of damages related to "anchor repair" for $276,500 and "change in waler design" for $55,000. JA 05838. At trial, Redstone's expert testified as to such claims. JA 06375. Notwithstanding, the Circuit Court considered the change order claims of Redstone and found that they "were not supported by any documentation" and that Redstone failed to offer testimony to "substantiate or support the additional work." JA 00180-181; ¶¶ 305, 307.

Furthermore, the change order claim submitted by Redstone was actually evaluated by JF Allen through its expert Bryon Willoughby. JA 00181-182, ¶308. Considering the proof at trial, the Circuit Court accepted the opinion and testimony of Mr. Willoughby and recognized that Redstone would receive credit for the change order amounts verified by Mr. Willoughby in its preparation of the final Judgment Order. JA 00182, ¶310; JA 00187, ¶320; JA 00188, ¶322. As such, the claims of Redstone arising out alleged design deficiencies have been addressed by the Circuit Court thereby rendering moot any assignment of error regarding the dismissal of Redstone's negligence claim against Amec.

V. Redstone's Delay Claims.

With regard to Redstone's attempt to claim delay damages associated with the foregoing alleged design deficiencies, Redstone did not carry the burden of proof with regard to delay

damages. In fact, the Circuit Court found that Redstone contributed to project delays for numerous reasons including the lack of production from the start of the Project. JA 00101, ¶129. On the issue of delay, the Circuit Court also found that the opinions of Willoughby were most credible. *Id.* Because all of the above are factual determinations by the Circuit Court, under West Virginia law, they should not be disturbed on appeal.

SUMMARY OF ARGUMENT

The specific parameters of this case demonstrate that Amec had no independent duty to Redstone. Indeed, it is undisputed that JF Allen entered into a contract with MarkWest to serve as the "design/builder" for the Project. It is also undisputed that Redstone had a direct written contract with JF Allen as the "design/builder." Because JF Allen was the "design/builder" for the Project, any duty with regard to the sufficiency of the design was governed by the contract agreement between JF Allen and Redstone. As such, any design deficiency claims of Redstone were to be pursued (and were pursued) against JF Allen.

Given the particular circumstances of this case, Amec did not have an independent duty to Redstone and did not have a "special relationship" with Redstone. Even if a "special relationship" did exist, Redstone's negligence claim against Amec was barred by the "gist of the action" doctrine because Redstone pursued breach of contract damages against JF Allen related to the design deficiency claims it alleges against Amec. Because West Virginia law does not allow parties to recast breach of contract claims as tort claims, Redstone's negligence claim against Amec was properly dismissed. In any case, because Redstone pursued the recovery of design deficiency related damages against JF Allen and because the Circuit Court recognized that credit had been given by JF Allen for such claims (see JA 00188, ¶320), Redstone's negligence claim against Amec is moot and must remain dismissed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As it believes that Redstone's appeal is wholly without merit, Amec does not favor oral argument pursuant to the provisions of Rule 18(a) of the West Virginia Rules of Appellate Procedure.

ARGUMENT

I. Counterstatement of Standard of Review

Although Redstone correctly summarizes portions of the applicable standard of review, Redstone leaves out a very important aspect of the applicable standard of review. According to the Supreme Court of Appeals of West Virginia, when the Circuit Court's findings are based upon oral or documentary evidence, then such findings shall not be overturned unless clearly erroneous with due regard given to the opportunity of the circuit judge to evaluate the credibility of the witnesses. *Harlow v. E. Elec., LLC, 858 S.E.2d 445, 454 (W. Va. 2021).* Indeed, findings of fact in such cases are given "substantial deference" and this particular standard has been eloquently described as follows:

> [F]ollowing a bench trial, the circuit court's findings, based on oral or documentary evidence, shall not be overturned unless clearly erroneous, and due regard shall be given to the opportunity of the circuit judge to evaluate the credibility of the witnesses. *W. Va. R. Civ. P.* 52(a). Under this standard, if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety, we may not reverse it, even though convinced that had we been sitting as the trier of fact, we would have weighed the evidence differently. ***We will disturb only those factual findings that strike us wrong with the "force of a five-week-old, unrefrigerated dead fish."*** *Harlow v. E. Elec., LLC, 858 S.E.2d 445, 454 (W. Va. 2021) (quoting United States v. Markling, 7 F.3d 1309, 1319* (7th Cir. 1993), cert. denied, 514 U.S. 1010, 115 S.Ct. 1327, 131 L.Ed.2d 206 (1995)) (emphasis added).

Accordingly, the Circuit Court's findings in this case will be given ***substantial*** weight given its unique opportunity to consider and evaluate the voluminous documentary proof in this

complex Business Court dispute and given its opportunity to evaluate the credibility of numerous witnesses that testified during the lengthy 17-day trial.

II. The Circuit Court did not err in dismissing the Redstone negligence claim against Amec.

A. The economic loss doctrine bars Redstone's negligence action against Amec.

Redstone claims that its tort claim against Amec should not have been dismissed because Amec owed an independent duty to Redstone as a result of Redstone's "special relationship" with Amec. Redstone's argument is flawed for several reasons. First, any duty Amec may have had related to the Project arose solely out of its contract with JF Allen. As such, Amec had no "special relationship" with Redstone because its services were provided to JF Allen for the sole benefit of JF Allen as the "designer" of the Wall.

According to West Virginia law, the "special relationship" doctrine has been recognized as an exception to the application of the economic loss doctrine. In essence, recognition of a "special relationship" applies to allow tort claims for the recovery of purely economic losses in the absence of contractual privity. However, the doctrine has been repeatedly construed narrowly based upon the facts of each case. Indeed, considering the unique facts of the case at hand, Redstone cannot establish that a "special relationship" existed with Amec.

West Virginia has long recognized that the recovery of purely economic damages in tort in the absence of physical injury, property damage or a contract is barred except under certain limited circumstances. *Aikens v. Debow*, 208 W. Va. 486 (W. Va. 2000). As argued by Redstone, a "limited circumstance" that has been recognized is when there exist some "special relationship" between the plaintiff and alleged tortfeasor. *Id.* at 500. As the *Aikens* court put it, "[a]bsent some special relationship, the confines of which will differ depending upon the facts of each relationship, there simply is no duty." *Id.* Clearly, in this case, if a "special relationship"

regarding the supply of design services existed at all as to Redstone, such relationship would be with JF Allen (as the design/builder) not Amec.

Addressing the "special relationship" argument further, considering *Aikens*, the Supreme Court of Appeals later found that a "special relationship" existed in the construction context between a contractor and a design professional. *Eastern Steel Constructors, Inc. v. City of Salem*, 549 S.E.2d 266, 272 (W. Va. 2001). Examining only the unique facts of the particular relationship at issue, the *Eastern Steel* Court concluded that a contractor "who has relied upon the design professional's work product in carrying out his or her obligations to the owner" may maintain a negligence action against the design professional in the absence of contractual privity. *Id.* at 275. However, the *Eastern Steel* Court further recognized that "the exact nature of the specific duty owed by the design professional may be impacted by provisions contained in the ***various contracts entered among the parties***." *Id.* (emphasis added). In recognizing the foregoing, the *Eastern Steel* Court then held that "the specific parameters of the duty of care owed by a design professional to the contractor must be defined on a case-by-case basis." *Id.*

As stated before, Redstone contracted directly with JF Allen (the Design/Builder) to build portions of the Wall in accordance with the *wall design* supplied by JF Allen via its contract with MarkWest. In fact, Redstone sued JF Allen for breach of contract due to the alleged wall design deficiencies. Accordingly, because the duties at issue were covered by the Redstone contract with JF Allen and the design deficiency tort action by Redstone did not "arise independent of the existence of the contract," a "special relationship" cannot and does not exist between Redstone and Amec.

B. Even if a "special relationship" existed between Redstone and Amec, Redstone's tort claim against Amec is barred by the "gist of the action" doctrine.

Because Redstone claimed design deficiency damages against JF Allen via its breach of contract claim, Redstone is now improperly seeking to recast its breach of contract claim against JF Allen as a tort claim against Amec. In seeking to prevent the recasting of a contract claim as a tort claim, courts apply the "gist of the action" doctrine. Under this doctrine, recovery in tort will be barred when ***any*** of the following factors are demonstrated:

> (1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.

Gaddy Eng'g Co., 231 W. Va. at 586 (internal citations omitted). Succinctly stated, whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are defined by contract. *Id.*

"Contract law has been traditionally concerned with the fulfillment of reasonable economic expectations. Tort law, on the other hand, is concerned with the safety of products and the corresponding quantum of care required of a manufacturer." *Star Furniture Co. v. Pulaski Furniture Co.*, 171 W. Va. 79, 83 (W. Va. 1982) (internal citation omitted). Under the gist of the action doctrine, whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are defined by the relevant contractual agreements. *Tri-State Petroleum Corp. v. Coyne*, 240 W. Va. 542 (W. Va. 2018).

Here, the liability for any alleged deficient design clearly arises from the contract between Redstone and JF Allen. Indeed, it is clear that the negligence alleged is directly tied to the duties and obligations assumed in the Redstone/JF Allen contract. *Gaddy*, 231 W. Va. at

586. In other words, the claims do not arise independently of the existence of a contract. *See Lockhart v. Airco Heating & Cooling*, 211 W. Va. 609, 614 (W. Va. 2002). Rather, the alleged liability for these claims "stems from" the Redstone/JF Allen contract.

Under West Virginia law, parties cannot recast what is in reality a breach of contract action as a tort action. The West Virginia "gist of the action" doctrine ensures that contracting parties pursue relief in accordance with their contract agreement and empowers trial courts to dismiss mislabeled tort claims. The case at hand is a breach of contract action implicating commercial or "economic" losses awardable, if at all, through the vehicle of contract law. As such, Redstone's negligence claim against Amec is barred by the "gist of the action" doctrine. Certainly, to the extent Amec bears any responsibility for the claims alleged against it by Redstone (which is vehemently denied), such were resolved via Redstone's breach of contract claim against JF Allen.

Dismissal of similarly alleged tort claims under the "gist of the action" doctrine is common. In a case with significantly similar facts, a Pennsylvania court dismissed a negligent action against a downstream third tier subcontractor. *See Herman Goldner Co. v. Cimco Lewis Indus.*, 2001 Phila. Ct. Com. Pl. LEXIS 31, *2-3 (Pa. Commw. Ct. Sept. 25, 2001). In *Herman Goldner Co.*, a subcontractor (Herman Goldner) sued downstream sub-subcontractors due to the failure of certain refrigeration equipment supplied to a construction project. Specifically, Herman Goldner entered into a contract with a sub-subcontractor (HTT) to design and fabricate certain refrigeration equipment to be installed on a project. The sub-subcontractor (HTT) then entered into agreements with third tier subcontractors (Cimco and Klenzoid) to secure the design and fabrication of refrigeration equipment (Cimco) and to secure the design and manufacture of a water treatment/filtration system (Klenzoid). Due to the failure of the subject refrigeration

equipment and filtration system, Herman Goldner sued all defendants primarily on theories of breach of contract and breach of express warranty. Notwithstanding the absence of a direct contractual relationship with Klenzoid, Goldner also sued Klenzoid (the third tier subcontractor) for negligence. In recognizing the "gist of the action" doctrine, the court dismissed the negligence action against Klenzoid finding that "the duties Klenzoid is alleged to have breached arise solely from the various contracts between and among the Parties." *Id.* at *10.

Considering the foregoing, liability for the alleged design deficiencies in this case arise, if at all, from the contractual relationships between and among the parties. Indeed, the specific dispute at issue arises out of duties owed under the Redstone/JF Allen Contract. As multiple courts within and outside West Virginia have concluded in similar contexts, because this design/build construction dispute turns on the relevant contract agreements, recasting a breach of contract claim as a tort claim would be improper. Because the "gist of this action" for alleged design deficiencies is a contract claim, dismissal of Redstone's duplicative tort claim against Amec was proper.

C. The "gist of the action" doctrine bars tort claims that duplicate and coexist with breach of contract claims regardless of contractual privity arguments.

Redstone may attempt to argue that its design deficiency tort claim against Amec is proper because it has no contract with Amec and because it has not asserted a breach of contract claim against Amec; however, such argument is intrinsically flawed. In other words, Redstone may attempt to argue that the "gist of the action" doctrine only applies when one is in contractual privity with another and is attempting to duplicate a breach of contract claim with a separate negligence claim against the other. To be clear, it is undisputed that Redstone has asserted a breach of contract claim for alleged design deficiencies against JF Allen. It is also undisputed that Redstone pursued damages against JF Allen allegedly arising out of the identical design

deficiency claims that it now asserts against Amec. However, under the "gist of the action" doctrine, not only would Redstone's duplicative negligence claim against JF Allen be barred, but *any other* duplicative design deficiency tort claim against *any other party* would also be barred.

According to *Gaddy*, the purpose of the "gist of the action" doctrine is to bar a tort claim that is duplicative of a breach of contract claim. In this case, it is clear that Redstone's tort claim against Amec is duplicative of its breach of contract claim against JF Allen. The "gist of the action" doctrine was clearly created to bar tort claims that are duplicative of breach of contract claims arising out of the same alleged wrong. It does not matter that Redstone had no contract with Amec as ***all that matters under the "gist of the action" doctrine is whether a party is attempting to sue one in tort for the exact same relief it is seeking from another via a breach of contract claim***. Because that is exactly what Redstone is attempting in this case, its duplicative tort claim against Amec was properly dismissed by the Circuit Court.

As further support for Amec's position, recall that the Supreme Court of Appeals of West Virginia relied upon Pennsylvania law in adopting the "gist of the action" doctrine. Upon review of other Pennsylvania cases addressing the "gist of the action" doctrine *in cases with essentially identical fact scenarios*, it is crystal clear that the doctrine is not limited to direct privity of contract situations. Indeed, several Pennsylvania cases applying the *Gaddy* elements have routinely considered contractual relationships other than direct privity relationships.

For example, in *Fieldcrest Townhome Condo. Ass'n v. Garman Builders*, the plaintiff condo association ("Association") asserted tort claims against over thirteen contractors; most of which did not have direct contracts with the Association. 2014 Pa. Dist. & Cnty. Dec. LEXIS 10153, *4 (C.P. Lancaster Co. Nov. 18, 2014). Recognizing that the negligence counts against each defendant implicated duties that clearly stemmed from contractual obligations and "not

from the social policy underlying tort law," the court dismissed all negligence claims against all defendants. *Id.* at *4. In reaching its ruling, the court surmised that "[t]he duties at issue here arise from *one or more contracts* between *one or more parties* to this action, where *each party contracted with some other party* to perform specific work in exchange for a benefit." *Id.* (emphasis added). In light of the recognition of certain applicable contracts between parties not necessarily in privity of contract with the Association, the court held that the "gist of the action" doctrine bars all negligence claims of the Association inclusive of claims against defendants having no contract with the Association. *Id.* at *4-5.

Likewise, in *Alexander Mills Servs., LLC v. Bearing Distribs., Inc.*, using the exact same *Gaddy* analysis, the court dismissed all tort claims against both defendants under the "gist of the action" doctrine. 2007 U.S. Dist. LEXIS 72829, *10-14 (W.D. Pa. Sept. 28, 2007). In *Alexander Mills*, the plaintiff entered into a contract with a general contractor defendant who then entered into a subcontract with a subcontractor. *Id.* at * 4. When the work of the general contractor and subcontractor did not perform, the plaintiff filed suit against both defendants alleging several tort causes of action. *Id.* at *5. In response to motions to dismiss by the general contractor and subcontractor, the court recognized the "gist of the action" doctrine and dismissed the tort claims against both. *Id.* at *28. In ruling, the court recognized that the "gist of the action" doctrine "is designed to maintain the conceptual distinction between breach of contract claims and tort claims." *Id.* at *23 (internal citation omitted). It further recognized that "as a practical matter, the doctrine precludes plaintiffs from recasting ordinary breach of contract claims into tort claims." *Id.* (internal citation omitted). Finally, it reasoned that "a claim should be limited to a contract claim when 'the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied in the law of torts." *Id.* at *24 (citation

omitted). Based upon the foregoing, not only did the court dismiss all tort claims against the party in privity of contract with the plaintiff, but also *dismissed all tort claims against the subcontractor*. *Id.* at 27-28.

Based upon *Gaddy* and the foregoing authority applying the *Gaddy* elements in construction disputes essentially identical to this construction dispute, the "gist of the action" doctrine bars Redstone's tort claims against Amec. Although Redstone may attempt to counter the direct application of controlling law with an argument that such law does not apply because it had no contract with Amec, there is no controlling authority supporting such an argument.

Considering the elements of *Gaddy* and the breach of contract action of Redstone against JF Allen, any liability for alleged design deficiencies arise "solely from the contractual relationship" between Redstone and JF Allen, the alleged duties breached are "grounded in the [Redstone/JF Allen] contract," and liability for the alleged design deficiencies "stems from the [Redstone/JF Allen] contract." Perhaps most importantly, Redstone's tort claim against Amec "duplicates the breach of contract" claim it asserted against JF Allen. Given that all of the foregoing *Gaddy* elements have been met, the "gist of the action" doctrine applies to bar the tort claims alleged against Amec.

As further support for the above, the Circuit Court examined the claims of MarkWest against Redstone and specifically found that MarkWest's "negligence" claim against Redstone "clearly arises from its overarching contractual agreement with J.F. Allen." JA 00116, ¶167. For the very same reasons, Redstone's negligence claim against Amec clearly arises from its overarching contractual agreement with JF Allen (the design/builder). Accordingly, just as the Court held that MarkWest's "negligence claim against Redstone is barred by the gist of the

action doctrine" (see JA00116, ¶167), Redstone's negligence claim against Amec is barred by the gist of the action doctrine. As such, Redstone's action against Amec was properly dismissed.

E. The Trial Court correctly dismissed Redstone's negligence claims against Amec because Redstone's design deficiency claims were addressed by the Judgment Order.

According to the proof at trial, Redstone sought an award of damages against JF Allen for the cost allegedly incurred due to design errors via the submission of change orders. According to the Judgment Order, the Circuit Court considered the evidence presented by Redstone with regard to unpaid change orders and found such unsubstantiated. JA 00180, ¶305. The Circuit Court further found that "Redstone's Change Orders to J.F. Allen are unsupported by Redstone testimony and/or documentation." JA 181, ¶307. Finally, the Circuit Court found that "Redstone failed to meet its evidentiary burden necessary to establish that it is entitled to any damages against J.F. Allen." *Id.* Notwithstanding, the Circuit Court found that JF Allen's expert accounted for Redstone's claims by increasing Redstone's contract amount to account for Redstone's change order requests. JA 00187, ¶320. The Circuit Court then concluded that Redstone was not entitled to a damage award after extending credit to Redstone for change orders. Indeed, as it relates to sheared anchor repair costs, the Court ruled that "the costs for fixing the anchors that sheared . . . was taken into account when Mr. Willoughby analyzed the overpayment on the Redstone contract." JA 00188, ¶322.

Based upon the foregoing, even if the Circuit Court's dismissal of Redstone's claims against Amec were reversed, the outcome would be the same. Because all of Redstone's design deficiency claims were asserted against JF Allen and have been addressed and resolved by the Judgment Order, reversing the Circuit Court's judgment would not change the ultimate outcome of the case.

CONCLUSION

For the foregoing reasons, Respondent, Amec Foster Wheeler Environment and Infrastructure, Inc., respectfully prays that this Honorable Court affirm the decision of the Circuit Court.

Respectfully submitted,

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