No. 21-0934

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Redstone International, Inc.,
Petitioner,

v.

J.F. Allen Company, AMEC Foster Wheeler Environment & Infrastructure, Inc., & MarkWest Liberty Midstream & Resources, L.L.C.,
Respondents

MARKWEST LIBERTY MIDSTREAM & RESOURCES, L.L.C.'S RESPONSE BRIEF IN OPPOSITION TO PETITIONER REDSTONE INTERNATIONAL, INC.'S APPEAL

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ASSIGNMENTS OF ERROR AGAINST RESPONDENT MARKWEST

1. Did the Circuit Court err in ignoring Redstone's claims against MarkWest? (Redstone Assignment of Error #4)

2. Did the Circuit Court err by granting MarkWest's Motion to Dismiss Redstone's "Failure to Coordinate" Claim? (Redstone Assignment of Error #5)

3. Did the Circuit Court err by awarding MarkWest delay damages? (Redstone Assignment of Error #8)

STATEMENT OF THE CASE

Petitioner Redstone International, Inc. ("Redstone") appeals from a judgment order (the "Judgment Order") in the Circuit Court of Wetzel County (the "Circuit Court") after a 17-day bench trial. Redstone asserts eight assignments of error, of which only three (Assignment of Error Nos. 4, 5, and 8) are directed toward Respondent MarkWest Liberty Midstream & Resources, L.L.C. ("MarkWest"). Accordingly, pursuant to West Virginia Rule of Appellate Procedure 10(c)(4), MarkWest sets forth below the facts and procedural history relevant to the three Assignments of Error directed toward it.

Relevant Statement of the Facts

This appeal involves several issues relating to the design and construction of a hybrid retaining wall (the "Wall") in Wetzel County, West Virginia. JA 42.[1] MarkWest, which is engaged in the business of processing natural gas, contracted with Respondent J.F. Allen Company ("J.F. Allen") to construct the Wall at MarkWest's natural gas processing facility in Mobley, West Virginia (the "Mobley facility"). *Id.* at 42, 48. The Wall was to consist of steel solider piles with rock anchors and a reinforced soil slope. *Id.* at 51. J.F. Allen subcontracted with Respondent AMEC Foster Wheeler Environment & Infrastructure, Inc. ("AMEC") to design the Wall and provide quality control, and with Redstone to construct the steel pile anchored portion of the Wall. *Id.* at 42. At the time of the contracts at issue in this case, MarkWest already operated four natural gas processing plants at the Mobley facility known as Mobley I, II, III, and IV. *Id.* at 48.

MarkWest needed the Wall constructed to make room at the Mobley site for a fifth gas processing plant. On December 20, 2012, MarkWest entered into contracts with EQT Corporation ("EQT") wherein MarkWest agreed to maintain sufficient facilities to meet EQT's future natural

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gas processing needs at the Mobley facility. JA 48. As part of the relationship under the MarkWest-EQT contracts, EQT had the contractual ability to nominate an additional processing plant. In other words, EQT could require MarkWest to build an additional processing plant to handle its additional capacity at the Mobley facility. *Id.* These contracts were referred to during trial as "take or pay" contracts, meaning that upon EQT's nomination of a processing plant — and MarkWest's construction thereof — EQT agreed to produce a minimum amount of natural gas for processing, or in the alternative, it would pay a minimum amount of processing fees regardless of EQT's production. *Id.* at 49. Given the nature of the contracts between MarkWest and EQT, MarkWest was assured that EQT would either utilize the plant and generate revenue — thus creating a return on the investment of building the plant — or EQT would pay MarkWest for the capacity of the plant. Thus, EQT would either "take" the capacity created by the plant and compensate MarkWest through processing fees, or EQT would "pay" MarkWest for the unused opportunity to do so. *Id.*

In the spring of 2014, EQT nominated a fifth plant at the Mobley facility for the processing of its natural gas. Pursuant to the contracts between MarkWest and EQT, MarkWest had 24 months to construct the fifth plant and make it operational. JA 49. In order to add the fifth facility, which would be known as "Mobley V," MarkWest needed additional flat land. *Id.* at 49–50. Therefore, it planned to excavate the mountainous area immediately adjacent to the four existing Mobley facilities while constructing the Wall, and place the excavated dirt behind the Wall to create the necessary flat land for the new facility. *Id.* at 50–51.

MarkWest entered into a design-build contract (the "Contract") for construction of the Wall with J.F. Allen on September 5, 2014. JA 56. The Contract included a "Time is of the Essence" clause that required the completion of all Wall construction by no later than March 31, 2015. *Id.* at 58. The Contract provided that MarkWest would pay J.F. Allen $12,350,000 for the work to be

completed. *Id.* at 59. Notably, the Contract delegated complete authority to J.F. Allen for managing and coordinating its subcontractors, providing that the work "shall be performed by J.F. Allen as an independent contractor and J.F. Allen shall have the full power and authority to select the means, manner and methods of performing all work without supervision, direction or control by MarkWest." *Id.* (alterations omitted).

The Circuit Court found that the Wall construction commenced on or about September 15, 2014. JA 60. According to J.F. Allen's construction schedule, Redstone's solider pile beam installation was to begin on September 30, 2014, and was to conclude on November 3, 2014. *Id.* However, because the design was not finalized by J.F. Allen until mid-September and the beams were accordingly not ordered until September 16, 2014, the first solider pile beams were not delivered to the construction site until October 16, 2014. *Id.* Neither Redstone nor J.F. Allen sought a change order for additional time due to this delay in ordering, as the Contract contemplated. *Id.*; *see id.* at 58 (Contract providing that any changes to the scope of work "shall be accompanied only by a written change order issued by [MarkWest]"). Installation of the solider pile beams lagged as well. *Id.* at 60.

In November 2014, as a result of its concern with the lack of progress on the Wall, MarkWest hosted a meeting in which MarkWest representatives suggested that because of the slow pace of the Wall construction, it was considering cancelling the Contract and having the fill material hauled to an off-site location rather than placing it behind the Wall. JA 68. But J.F. Allen recommitted to meeting the deadlines set forth in the Contract and circulated a revised schedule and recovery plan. *Id.* at 69. However, due to more delays in soldier pile beam installation, the Wall construction was 28 days behind schedule as of November 19, 2014. *Id.* Beginning in early 2015, as construction continued, rock anchors then began to fail, breaking or "shearing" at the face of the

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SUPPLEMENTAL APPENDIX

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completed. *Id.* at 59. Notably, the Contract delegated complete authority to J.F. Allen for managing and coordinating its subcontractors, providing that the work "shall be performed by J.F. Allen as an independent contractor and J.F. Allen shall have the full power and authority to select the means, manner and methods of performing all work without supervision, direction or control by MarkWest." *Id.* (alterations omitted).

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Wall as a result of fill settlement, delaying completion of the Wall even further. *Id.* at 71, 76. Based on the evidence, the Circuit Court found that MarkWest project managers "were frustrated due to the lack of a sense of urgency with J.F. Allen and Redstone" and "[t]he lack of manpower of J.F. Allen and Redstone on the Project was a concern for MarkWest project managers throughout the performance of the Project." *Id.* at 77. As of March 28, 2015 — three days before the agreed-upon Wall completion date — progress "remained behind schedule and work coordination and progress issues between J.F. Allen and Redstone continued." *Id.* On August 24, 2015, with work on the Wall still not completed, J.F. Allen terminated Redstone for cause. *Id.* at 78.

After hiring another subcontractor, Coastal Drilling East, LLC ("Coastal"), J.F. Allen finally completed construction of the Wall on October 15, 2015 — nearly seven months after the original completion date agreed upon by J.F. Allen and MarkWest. JA 78. The Circuit Court found that after the Wall was completed, the "mechanical/electrical contract could commence construction on the electrical substation for [Mobley] V." *Id.* at 79. Daniel Rowlands, an engineer and part of the MarkWest project management team, testified at trial that the Wall construction "affected the ability to move forward with Plant construction" because the excavated fill had to be placed behind the Wall, and the Mobley V pad space had to be cleared so that "foundations and ultimately equipment and mechanical and electrical work for Mobley V could be completed." *Id.*

The Circuit Court found that J.F. Allen and its subcontractors caused significant delay in completion of the Wall, and it also found there were "defects in the Wall for which MarkWest shall be awarded damages for repair," including damage to lagging panels, dislodged lagging panels, broken anchors, corrosion, and repair braces and tabs. JA 94. In addition to the defects and delay in constructing the Wall, there were other delays associated with the construction of Mobley V itself, discussed below. Mobley V was finally in-service as of April 8, 2016. *Id.* at 83.

Procedural History

Pre-Trial

Due to the extensive damages suffered by MarkWest as a result of delays and defects associated with the Wall and their concomitant delays to Mobley V, MarkWest filed a Complaint in the Circuit Court on August 18, 2016, naming J.F. Allen, AMEC, and Redstone as Defendants.[2] JA 4710. With respect to J.F. Allen, MarkWest alleged that it breached the Contract and was negligent by, *inter alia*, failing to complete the Wall by March 31, 2015, and failure to construct the Wall in a workmanlike manner. *Id.* at 4723–25.

On October 11, 2016, J.F. Allen filed Cross-Claims and Counterclaims to MarkWest's Complaint. Pursuant to its Counterclaim against MarkWest, J.F. Allen alleged, *inter alia*, that it was still owed nearly $2 million on the Contract and that MarkWest breached the Contract in multiple ways. JA 4750–56. On November 8, 2018, Redstone filed Counterclaims against MarkWest, alleging failure to coordinate multiple prime contractors, unjust enrichment, and *quantum meruit*. *Id.* at 4785–89. Redstone also filed breach of contract and tortious interference claims against J.F. Allen, and a negligence claim against AMEC. *Id.* at 4797–4800.

On May 7, 2019, the Circuit Court granted in part MarkWest's motion to dismiss Redstone's claims against it. Specifically, the Circuit Court dismissed the failure to coordinate claim, explaining "this doctrine has not been accepted in West Virginia and [this court] declines to recognize the claim in the case at bar." JA 4945.

[2] MarkWest also named Civil & Environmental Consulting, Inc. (a civil engineering firm that provided consultation on the location and site plans for Mobley V), and Coastal as Defendants; however, those claims were settled, and those entities are no longer parties to this action.

Trial

The case progressed to a bench trial on September 21, 2020, and lasted 17 days. In its Judgment Order filed October 18, 2021, the court addressed the Contract between J.F. Allen and MarkWest. It concluded that J.F. Allen breached the Contract because, although the Wall was not "unworkmanlike," there were nonetheless "defects in the Wall for which MarkWest shall be awarded damages for repair." JA 94. The Circuit Court found that the "evidence presented throughout the course of trial established evidence of defects, including damage to lagging panels, such as cracks and spalling, dislodged lagging panels, broken anchors, corrosion, and the need for repair braces/tabs." *Id.*

Delay Damages

As part of the damages award to MarkWest, the Circuit Court awarded lost profit damages associated with the delay in completion of the Wall. On this point, MarkWest proffered that J.F. Allen was responsible for 8.8 months of delay, which resulted in $6,681,981 in profits lost under its contracts with EQT. JA 174. As explained, pursuant to MarkWest's agreement with EQT, as soon as Mobley V was up and running, EQT agreed to produce a minimum amount of natural gas for processing or, alternatively, it would pay a minimum amount of processing fees, regardless of whether EQT produced the minimum amount of natural gas for processing. *Id.* at 49. In other words, MarkWest stood to benefit from the "take or pay" contracts as soon as Mobley V was operational.

The Circuit Court explained that it "ha[d] already ruled, as a matter of law" that MarkWest "is entitled to recover its lost profits resulting from any delay in completion of the Wall for which J.F. Allen is responsible." JA 174. The Circuit Court also credited trial evidence that the expected profit from 8.8 months of Mobley V operation would be $8,338,046, then it subtracted anticipated

operating costs of $1,656,065, resulting in net lost profits of $6,681,981. *Id.* It then divided that number by 8.8 months, to arrive at the conclusion that MarkWest would make $759,316.02 in profits per month via MarkWest's contractual agreements with EQT. *Id.* at 175. Redstone does not dispute these monthly profit figures.

However, the Circuit Court rejected trial testimony regarding the 8.8-month delay, finding that MarkWest had not proven this length of delay by a preponderance of the evidence. JA 175. Instead, the Circuit Court credited testimony that the evidence supported a delay of only 5.82 months. *Id.* at 159, 175. The court then multiplied 5.82 months by the monthly calculation of $759,316.02 to result in $4,419,219.24 in lost profits due to delay. *Id.* at 175. Then, citing concurrent delays that were found to be the fault of MarkWest, the Circuit Court assigned 40% responsibility for the delay to MarkWest, reducing its damages to $2,651,531.54. Of this amount, the Circuit Court found Redstone responsible for 3.2 months of delay at $1,458,342.35.

$8,338,046 (Expected profit in 8.8 months of Mobley V operation)
– $1,656,065 (Operating costs for 8.8 months of Mobley V operation)
= $6,681,981 (Net Profits from 8.8 months of Mobley V operation)
/ 8.8 months
= $759,316.02 Per Month in Lost Profits
x 5.82 months (Amount of delay supported by preponderance of the evidence)
= **$4,419,219.24 in Lost Profits awarded to MarkWest**

MarkWest responsible for 40% = $1,767,687.70
J.F. Allen responsible for 60% = $2,651,531.54
Of J.F. Allen's delay, Redstone responsible for 3.2 months (55%)
= **$1,458,342.35 assigned to Redstone**

SUMMARY OF ARGUMENT

Redstone has failed to give this Court any viable reason to disrupt the Circuit Court's Judgment Order with respect to its rulings involving MarkWest.

First, Redstone asks this Court to remand this case for analysis of Redstone's quasi-contractual claims against MarkWest that the Circuit Court did not explicitly rule upon in the Judgment Order. But the Circuit Court did not need to rule on these claims. West Virginia law is clear that claims for unjust enrichment and *quantum meruit* may not lie when the subject matter of the claim is covered by an express contract, as it was here. Moreover, Redstone conceded to the Circuit Court that it was not entitled to damages on any of these claims in its Proposed Findings of Fact and Conclusions of Law. Because this Court can easily "determine what judgment should be finally rendered," remand is unwarranted and unnecessary. *Blevins v. May*, 212 S.E.2d 85, 86 (W. Va. 1975).

Second, Redstone asks this Court to reverse the Circuit Court's dismissal of Redstone's "failure to coordinate" claim against MarkWest, and it asks this Court to recognize such a cause of action for the first time. This Court should decline the invitation for multiple reasons. First, even if this Court recognized a coordination claim similar to other jurisdictions, the duty to coordinate arises from privity of contract between a project owner and its prime contractors. Such a claim would not exist here because Redstone was not a prime contractor in privity with MarkWest. Furthermore, MarkWest contractually delegated the responsibility to coordinate the Wall project and J.F. Allen's subcontractors (including Redstone) to J.F. Allen. Further, Redstone's failure to coordinate claim rested on the false premise that MarkWest "never delegated the duty to manage and coordinate the contractors and subcontractors working on the project." JA 4787. A glance at the plain language of the Contract belies this premise.

Finally, Redstone challenges the $1,458,342.35 delay damages award for "lost profits" for which the court found Redstone responsible and for which it ordered Redstone to indemnify J.F. Allen. First and foremost, MarkWest has received full satisfaction of its delay damages award from J.F. Allen and AMEC, as set forth in the Circuit Court's January 4, 2022 Order granting a Rule 60(b)(5) motion filed by J.F. Allen, AMEC, and MarkWest. This amount includes the $1,458,342.35 in damages for lost profits attributable to Redstone. By operation of that Order, the portion of the judgment order mandating that J.F. Allen pay delay damages to MarkWest no longer has prospective application, and Redstone does not appeal from or challenge the Order. Thus, MarkWest has no exposure on this issue. Even if it did, however, Redstone has provided no valid argument why the Circuit Court clearly erred in its award of lost profit damages. In fact, the entire Delay Damages portion of Redstone's opening brief appears to attack MarkWest's delay damages *claim*, not the Circuit Court's *decision on* that claim.

As set forth more fully below, this Court should reject Redstone's arguments in Assignments of Error 4, 5, and 8.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

MarkWest submits that oral argument is neither required nor necessary because the dispositive issues on appeal have been authoritatively decided, and "the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument." W. Va. R. App. Proc. 18(a)(3)–(4). Although Redstone asks this court to make new law, this Court need not and should not do so in disposing of this appeal.

STANDARD OF REVIEW

In reviewing challenges to the findings and conclusions of the Circuit Court after a bench trial, "a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard." Syl. Pt. 1, *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 480 S.E.2d 538, 540 (W. Va. 1996). "Questions of law are subject to a *de novo* review." *Id.*

ARGUMENT

I. The Circuit Court did not commit reversible error in failing to specifically address Redstone's quasi-contractual claims because Redstone conceded it was not entitled to relief under these claims, and remand is not warranted.

In Assignment of Error #4 of its opening brief, Redstone contends that the Circuit Court failed to adjudicate Redstone's claims for unjust enrichment and *quantum meruit*, in violation of West Virginia Rule of Civil Procedure 52(a). Rule 52(a) requires courts conducting bench trials to "find the facts specially and state separately its conclusions thereon." W. Va. R. Civ. Proc. 52(a). While the Circuit Court acknowledged these quasi-contractual claims, *see* JA 47, Redstone is correct that the Circuit Court did not specifically rule on them. Redstone claims the case should be remanded to the Circuit Court "for purposes of complying with the rule." Pet'r's Br. 22.

This Court should review this Rule 52(a) argument under a reversible error standard. *See Witte v. Witte*, 315 S.E.2d 246, 249 (W. Va. 1984) (applying a "reversible error" standard in determining whether to remand on a Rule 52(a) error). For the following reasons, any error on the part of the Circuit Court is not reversible, and remand is not warranted.

A. Redstone conceded that it was not entitled to relief under its quasi-contractual claims.

Redstone asserted counterclaims against MarkWest for unjust enrichment and *quantum meruit*, seeking damages for the additional work it performed to the benefit of MarkWest in repairing the defects in the Wall, which were allegedly "caused by the failures and negligence of other parties." JA 4788. But in Redstone's Proposed Findings of Fact and Conclusions of Law, it conceded that these quasi-contractual claims were no longer viable. It stated the following:

> As to Redstone's claim for quasi-contractual damages against MarkWest ***including unjust enrichment and quantum meruit*** the Court finds that those claims are offset by MarkWest's direct payments to Redstone's vendors. As such the Court does not award any additional damages from MarkWest to Redstone.

SA 71–72 (emphasis added).[3] This concession is underscored by the fact that Redstone did not object to or file a motion to amend the Final Judgment or for reconsideration when its quasi-contractual claims were not addressed. *See Wang-Yu Lin v. Shin Yi Lin*, 687 S.E.2d 403, 408 (W. Va. 2009) (per curiam) ("Because the appellants did not raise this issue below, this Court, consistent with ou[r] law, declines to consider the issue for the first time on appeal."). Considering these telling actions and inactions, this Court should refrain from offering Redstone another bite at the apple by remanding this case to the Circuit Court.

B. The Judgment Order sets forth findings and conclusions adequate to dispose of the quasi-contractual claims.

In any event, the rulings by the Circuit Court in the Judgment Order are sufficient for this Court to dispose of the quasi-contractual claims. West Virginia law is clear that claims for unjust enrichment and *quantum meruit* may not lie when the subject matter of the claim is covered by an express contract. *See, e.g.*, *Gulfport Energy Corp. v. Harbert Priv. Equity Partners, LP*, 851 S.E.2d

[3] Citations to the "SA" refer to the Supplemental Appendix. MarkWest has filed with its brief an unopposed motion to supplement the record and file the Supplemental Appendix with this Court.

817, 822 (W. Va. 2020) ("[T]he existence of an express contract covering the same subject matter of the parties' dispute precludes a claim for unjust enrichment." (internal quotation marks omitted)); *Ohio Valley Health Svcs. & Educ. Corp. v. Riley*, 149 F. Supp. 3d 709, 721 (N.D. W. Va. 2015) ("[Q]uasi-contract claims, like unjust enrichment or *quantum meruit*, are unavailable when an express agreement exists because such claims only exist in the absence of an agreement."). Redstone recognized as much in the proceedings below. For example, in its May 7, 2019 Order granting in part MarkWest's motion to dismiss, the Circuit Court recognized, "Redstone avers it is not looking to recover from [MarkWest] that which it may recover in breach of contract from J.F. Allen." JA 4948.

The Circuit Court specifically found that the work performed by Redstone was covered by its subcontract with J.F. Allen. *See* JA 65 ("J.F. Allen entered into a subcontract agreement with Redstone whereby Redstone agreed to construct the Wall portion of the Project . . . in accordance with the Wall design."). Therefore, Redstone's quasi-contractual claims would be barred in any event. Accordingly, the Judgment Order contains the requisite findings and conclusions of law to dispense with those claims.

C. Any perceived error of the Circuit Court in failing to comply with Rule 52(a) is not reversible in any event, and remand is not warranted.

Finally, any error committed by the Circuit Court was harmless and not reversible, and remand to the Circuit Court would not further the purpose of Rule 52(a). In interpreting Rule 52(a)'s substantially similar federal counterpart,[4] the Fourth Circuit has explained, "Appellate courts generally, and wisely, have taken a flexible view about [Rule 52(a)], eschewing hypertechnicality in assessing the sufficiency of particular findings made under this wisely non-

[4] *See Painter v. Peavey*, 451 S.E.2d 755, 758, n.6 (W.Va. 1994) (noting that "[b]ecause the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules" the Court gives substantial weight to federal cases in determining the meaning and scope of its rules.).

specific rule directive." *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 576 (4th Cir. 1985). Indeed, the main purpose of the Rule is to "better enable the reviewing court to apply the law to the facts." *Golden v. Bd. of Educ. of Harrison Cty.*, 285 S.E.2d 665, 668 (W. Va. 1981). This Court's review is not hindered by the failure of the Circuit Court to specifically address the unjust enrichment and *quantum meruit* claims for all the reasons discussed above.

Relatedly, remand is required "[w]here the record does not clearly reveal what actually transpired in the proceedings below and it is impossible for an appellate court to determine what judgment should be finally rendered." *Blevins v. May*, 212 S.E.2d 85, 86 (W. Va. 1975); *cf.* syl. pt. 2, *South Side Lumber Co. v. Stone Constr. Co.*, 152 S.E.2d 721, 722 (W. Va. 1967) ("When the record in an action or suit is such that an appellate court can not [sic] in justice determine the judgment that should be finally rendered, the case should be remanded to the trial court for further development."). Again, for all the reasons stated above, the "judgment that should have been rendered" is clear from the record; therefore, to the extent the Circuit Court committed a Rule 52(a) error, it is harmless and remand is unnecessary.

II. The Circuit Court did not err in dismissing Redstone's "Failure to Coordinate" Claim because West Virginia does not recognize such a cause of action, and this Court should refrain from making new law and creating such a cause of action based on the facts of this case.

Next, Redstone asks this Court to reverse the Circuit Court's May 7, 2019 Order dismissing Redstone's "failure to coordinate" claim (the "Dismissal Order"). Redstone contends there is a "good faith basis for new law, or a change in existing law, for coordination claims in West Virginia." Pet'r's Br. 23. Redstone also submits that the Circuit Court "made significant rulings . . . explicitly recognizing the legal basis for the claim it previously dismissed." *Id.* This Court reviews the Circuit Court's dismissal of the failure to coordinate claim *de novo*. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516, 521 (W. Va. 1995).

A. West Virginia does not recognize a cause of action for "failure to coordinate," separate and apart from any existing contractual obligations.

Redstone does not dispute that West Virginia does not currently recognize a cause of action against an owner for failure to coordinate, separate and apart from any existing contractual obligations. No West Virginia court has ever found that a prime contractor has an implied duty to coordinate its general contractor and the general contractor's subcontractors, which is the type of claim Redstone is necessarily asking to be recognized in this appeal.

B. Even if West Virginia recognized a failure to coordinate cause of action, Redstone's claim against MarkWest would not survive because Redstone was not a prime contractor in privity with MarkWest and because MarkWest delegated its coordination responsibility to J.F. Allen in the Contract.

Even if West Virginia recognized such a failure to coordinate claim, or even if this Court decides to recognize one going forward, such a claim would not survive under the facts of the case at hand because MarkWest was not in privity with Redstone, and it contractually delegated the responsibility to coordinate the Wall project to J.F. Allen in the Contract.

1. Redstone was not a prime contractor in privity with MarkWest.

In its brief, Redstone cites to several non-controlling cases for the proposition that a construction project owner that enters into several prime contracts impliedly assumes a duty to coordinate the various contractors to prevent unreasonable delays. But in these cases, the contractors to which the project owners owed a duty to coordinate were, unlike Redstone, prime contractors in privity of contract with the project owner. *See, e.g.*, *APAC-Georgia, Inc. v. Dep't of Transp.*, 472 S.E.2d 97, 100 n.1 (Ga. App. 1996) (contract at issue "contained a provision expressly placing on [project owner] the duty to coordinate" and duty was to coordinate prime contractors, not the prime contractors' subcontractors); *Shea-S&M Ball v. Massman-Kiewit-Early*, 606 F.2d 1245, 1250 (D.C. Cir. 1979) (discussing the duty to "compel cooperation among contractors,"

where agreement explicitly provided that prime contractor "shall fully cooperate with . . . other contractors"); *Bolton Corp. v. T.A. Loving Co.*, 380 S.E.2d 796, 800 (N.C. App. 1989) (recognizing "an owner's duty to cooperate and its ancillary duty to coordinate may be delegated in a contract"). In these cases cited by Redstone, the "duty to coordinate" was a contractual duty, not a standalone duty *apart from* the contract, as Redstone would have this Court recognize.

2. MarkWest delegated its coordination responsibility to J.F. Allen.

Redstone also bases its failure to coordinate claim against MarkWest on a supposed extra-contractual supervisory power a project owner owes to all contractors and subcontractors. Again, Redstone's argument is undermined by case law it cites. If a project owner "could engage some third party or one of the contractors to perform all the coordinating functions," then "the owner *would have no supervisory function.*" *Broadway Maint. Corp. v. Rutgers, State Univ.*, 447 A.2d 906, 912 (N.J. 1982) (emphasis added). In such a situation, the "subcontractors [such as Redstone] would have no claim against the owner for failure to coordinate." *Id.* Only if "*no one were designated to carry on the overall supervision*, the reasonable implication would be that the owner would perform those [coordination] duties." *Id.* (emphasis added).

Perhaps to shoehorn its claim into this case law, in its "Failure to Coordinate" claim, Redstone alleged that MarkWest "never delegated the duty to manage and coordinate the contractors and subcontractors working on the project." JA 4787. This is absolutely false. The Contract could not be clearer that MarkWest delegated the duty to manage and coordinate work on the project to J.F. Allen:

> Independent Contractor. The Scope of Work shall be performed by Contractor [J.F. Allen] as an independent contractor, and Contractor's employees shall at all times be under Contractor's supervision, direction and control. ***Contractor shall have full power and authority to select the means, manner and methods of***

> ***performing all work without supervision, direction or control by Company.***

JA 5267 (emphasis added). And the Circuit Court concluded "that under the [] Contract, J.F. Allen was responsible for . . . coordinating subcontractors." *Id.* at 93. Thus, pursuant to the Contract, and according to the case law Redstone itself cites to, MarkWest retained no supervision, direction, or control of the work on the Wall. Rather, J.F. Allen was exclusively responsible for the control and supervision of the Wall construction. As such, MarkWest could not be liable for violating a duty to coordinate when it contractually delegated that duty to another party. Simply put, Redstone has given no valid reason why this Court should create a new cause of action for failure to coordinate on these facts.

In this vein, Redstone also relies on the Circuit Court's finding in the Judgment Order that MarkWest was partially to blame for the delays to the project because it failed to coordinate its prime contractors, including J.F. Allen, the Lane Construction Company ("Lane") (excavation contractor), Chapman Corporation ("Chapman") (foundation contractor), and Westcon Bilfinger, Inc. ("Westcon") (mechanical/electrical contractor). Pet'r's Br. 23. Redstone argues that in making that finding, the Court was "explicitly recognizing the legal basis for the claim it previously dismissed." *Id.*

Contrary to Redstone's contention, however, the Circuit Court did not find MarkWest had "a duty to coordinate" *beyond* its contracts with its prime contractors. Redstone obscures that the Judgment Order only found MarkWest's failure to coordinate material with respect MarkWest's claim against J.F. Allen, with which it was in privity of contract. Therefore, to the extent the Judgment Order recognized a legal basis for a failure to coordinate, such basis stems only from contractual agreements, not from some implied duty to those with which MarkWest has no direct contractual relationship.

For these reasons, Redstone's argument on Assignment of Error # 5 must fail.

III. Redstone is precluded from bringing Assignment of Error #8 against MarkWest because MarkWest's judgment regarding delay damages has been satisfied. In any event, Redstone has not demonstrated how the Circuit Court clearly erred in calculating the lost profits attributable to Redstone.

Redstone does not take issue with the entire delay damages award to MarkWest, but rather, it challenges only the $1,458,342.35 award for "lost profits" for which the court found Redstone responsible and for which it ordered Redstone to indemnify J.F. Allen. Pet'r's Br. 32. Redstone claims there was insufficient evidence supporting this award. *Id.* It also contends that MarkWest's delay damages claims were predicated on the opinion of their expert, Bradley Wolf, and that Mr. Wolf's "entire opinion lacked a factual basis" and was unreliable. *Id.*

The Circuit Court's findings on these issues "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. Proc. 52(a). Under this standard, if the court's "account of the evidence is plausible in light of the record viewed in its entirety," this Court may not reverse it, "even though convinced that had [it] been sitting as the trier of fact, [it] would have weighed the evidence differently." *Brown v. Gobble*, 474 S.E.2d 489, 493 (W. Va. 1996). For the reasons that follow, Redstone's argument is either precluded or underdeveloped, and the Circuit Court's findings on the delay damages attributable to Redstone were factually sound.

A. Redstone's delay damages argument against MarkWest is precluded by the Circuit Court's Order deeming the judgment against MarkWest satisfied.

To begin, MarkWest has received full satisfaction of its delay damages award from J.F. Allen, as set forth in the Circuit Court's January 4, 2022 Order granting a Rule 60(b)(5) motion filed by J.F. Allen, AMEC, and MarkWest (the "Rule 60(b) Order"). SA 414–15. This amount includes the $1,458,342.35 in damages for lost profits attributable to Redstone. By operation of the

Rule 60(b) Order, the portion of the judgment order mandating that J.F. Allen pay delay damages to MarkWest "no longer has prospective application." *Id.* at 415. Importantly, however, the Order did not pertain to J.F. Allen's indemnification judgment against Redstone, and Redstone did not join the Rule 60(b)(5) motion. *See id.* at 410 n.1.

Redstone did not file an amended Notice of Appeal and does not challenge the validity or effect of the Rule 60(b) Order in its opening brief. *See Tiernan v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 578, 583 n.10 (W. Va. 1998) ("Issues not raised on appeal . . . are deemed waived."); *see also* Syl. pt. 6, *Addair v. Bryant*, 284 S.E.2d 374, 376 (W. Va. 1981) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived."). Therefore, the Rule 60(b) Order remains in full effect for purpose of this appeal. *Cf. Frazier v. Slye*, --- S.E.2d ---, 2022 WL 557283, at *2 n.3 (W. Va. Feb. 24, 2022) (issue resolved in separate order not challenged on appeal "remains in effect"). As a result, if Redstone is successful in this appeal on the delay damages issue (and for the reasons below, it should not be), such result would *only* affect Redstone's obligation to J.F. Allen, not any damages award related to MarkWest.[5]

B. The Circuit Court correctly calculated and awarded the lost profit damages attributable to Redstone.

Without abandoning the argument that MarkWest has no exposure in this appeal, MarkWest will proceed to address the merits of Redstone's eighth Assignment of Error. To the extent Redstone argues that MarkWest should not have been awarded the $1,458,342.35 amount in delay damages attributed to Redstone, it has fallen painfully short of explaining how this award was

[5] Redstone acknowledges as much in its Statement of the Case, stating, "***Redstone is appealing the damages awarded against it to [J.F. Allen], and seeks to have those awards reversed*** for the reasons identified in the assignments of error. Because some of those damages flow through from damages awarded to MarkWest against [J.F. Allen], Redstone is appealing the delay damages for lost profits awarded to MarkWest." Pet'r's Br. 7 (emphasis supplied).

clearly erroneous. Redstone advances the following arguments, which, for the reasons stated, fall flat.

(1) First, Redstone suggests that it "could [not] reasonably have anticipated" that any delay in the Wall construction would cause delay in the opening of the Plant. Pet'r's Br. 32 (quoting Syl. pt. 2, *Desco Corp. v. Harry W. Truchel Constr. Co.*, 413 S.E.2d 85 (W. Va. 1991)). This argument must fail. By design, the Wall was necessary for operation of the Plant. Indeed, the Instructions to Bidders provided that the purpose of the Wall was "to allow MarkWest to proceed with construction of what would be known as Plant 5." JA 55 n.4. All parties understood that the two projects went hand-in-hand, with completion of the Plant dependent upon completion of the Wall. The Circuit Court found that J.F. Allen "understood . . . that the Wall was going to accommodate a gas processing plant." *Id.* at 55. Redstone's own President, Heath Kefover, admitted at trial that at the pre-bid meeting for the Wall construction project, that he understood the wall was being constructed "[t]o get rid of the mountain . . . where [Mobley V] was going to go." *Id.* at 3207. It was certainly foreseeable that any delays with Wall construction would necessarily delay in-service operation of Mobley V, and it is absurd to suggest that Redstone did not anticipate such a cause-and-effect. In fact, that is exactly what happened. The Circuit Court found that the contractors performing work on the Mobley V foundation "w[ere] delayed because of J.F. Allen's failure to take fill consistent with its own schedules," causing MarkWest to "h[o]ld back Chapman from mobilizing for just over four months." JA 165.

(2) Next, Redstone challenges the Circuit Court's award of delay damages in favor of MarkWest because "there was insufficient underlying evidence" to support it; specifically, Mr. Wolf's expert testimony "lacked a factual basis" and "was unreliable." Pet'r's Br. 32. "[T]he standard of review for judging a sufficiency of evidence claim is not appellant friendly." *Brown*,

474 S.E.2d at 493. This Court reviews the findings underlying the Circuit Court's delay damages decision for clear error, meaning this Court must be "left with the definite and firm conviction that a mistake has been committed." *Phillips v. Fox*, 458 S.E.2d 327, 331 (W. Va. 1995) (internal quotation marks omitted). 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." *Brown*, 474 S.E.2d at 493. When findings are based on credibility determinations, this Court owes "even greater deference to the trial court's findings." *Phillips*, 458 S.E.2d at 331 (internal quotation marks omitted). Redstone does not come even close to approaching satisfaction of this standard.

Crucially, the Circuit Court *did not* rely on Mr. Wolf's testimony. *See, e.g.*, JA 159 ("[T]he Court finds [Mr. Wolf's] analysis unreliable for multiple reasons."). In fact, the Circuit Court rejected Mr. Wolf's testimony at almost every turn,[6] explaining it "does not find Mr. Wolf's testimony and opinion of an 8.8 month delay to be credible because he used schedules that were 'impossible' and 'lacked logic,' according to MarkWest's own witness, Mr. Rowlands." *Id.* at 174–75.

Instead, the Circuit Court considered the testimony of J.F. Allen's expert Bryon Willoughby to be credible, "wherein he opined . . . that there were 5.82 months of delay to allocate, attributing one month to J.F. Allen for weather and concurrent delays, 3.2 months to Redstone for the failed rock anchor issue, and 1.6 months to AMEC to tie back and wailer issues." JA 175. Further, the Circuit Court credited the testimony of Mr. Rowlands as well, relying on much of the evidence Redstone urges this Court to consider in its opening brief. *See, e.g.*, *id.* at 160 (crediting Mr. Rowland's testimony that Mr. Wolf's schedule was not workable); *id.* at 158 (considering Mr.

[6] The Circuit Court relied on Mr. Wolf's monthly profit calculation figures from Mobley V in calculating lost profit damages, a calculation which Redstone does not challenge in this appeal.

Rowland's testimony on separate Mobley V delays). In Assignment of Error #8, Redstone neither recognizes that the Circuit Court relied on Mr. Willoughby's and Mr. Rowland's testimony, nor does Redstone make any challenge to this testimony as it related to delay damages awarded to MarkWest. In fact, MarkWest submits that the entire Delay Damages portion of Redstone's opening brief appears to attack MarkWest's delay damages *claim*, not the Circuit Court's *decision on* that claim.

Therefore, because the bulk of Redstone's delay damages argument concerns challenges to Mr. Wolf's opinion, and because the Circuit Court agreed that Mr. Wolf's opinion on the pertinent issues were unreliable, Redstone's argument on this point fails.

(3) Finally, Redstone argues that delays in the Wall project could not have caused delays in the completion of Mobley V because Mobley V had its own series of delays unrelated to the Wall. To be sure, there were delays associated with the Mobley V construction project, and the Circuit Court found that "regardless of any work, or delays in the work on the [Wall] Project, Plant V would have been delayed." JA 152. Although the Circuit Court recognized that the Wall project contributed to the delay of the Plant, it also explained it was "not the only cause." *Id.* at 173.

Importantly, the Circuit Court explicitly considered the concurrent delays attributable to MarkWest in its lost profit calculations. The court found "MarkWest is responsible for 40% [of the lost profit damages] due to concurrent delays associated with the remainder of the [Mobley] V Project," JA 175, including delays in mechanical and electrical completion, extensions and delays relating to the Mobley V contracts, and a flare study rework of Mobley V, *id.* at 152. Therefore, the Circuit Court properly considered the delays to Mobley V of which Redstone complains in its delay damages calculation and accordingly reduced MarkWest's award.[7]

[7] Redstone mentions in passing that the Circuit Court found MarkWest responsible for some of the delay damages for failure to coordinate, and MarkWest did not delegate coordination responsibility. It is

For these reasons, Redstone has failed to demonstrate how the Circuit Court erred in its $1,458,342.35 award of lost profit damages to MarkWest.

CONCLUSION

Redstone has failed to give this Court any reason to disturb the Circuit Court's rulings regarding Redstone's quasi-contract claims, failure to coordinate claim, and lost profit damages attributable to Redstone. For the foregoing reasons, this Court should affirm the Circuit Court's Final Judgment as to Assignments of Error #4, 5, and 8.

Respectfully submitted,

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not clear what argument Redstone attempts to make, but regardless, it is not sufficiently developed for this Court's review. *See* W. Va. R. App. Proc. 10(c)(7) ("The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal."). Moreover, as explained above, MarkWest clearly delegated coordination responsibility to J.F. Allen in the Contract. *See* JA 5267 ("[J.F. Allen] shall have full power and authority to select the means, manner and methods of performing all work without supervision, direction or control by Company.").

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2022, a true and correct copy of the foregoing RESPONDENT MARKWEST LIBERTY MIDSTREAM & RESOURCES, L.L.C.'S RESPONSE BRIEF IN OPPOSITION TO PETITIONER REDSTONE INTERNATIONAL INC.'S APPEAL was served via U.S. Mail and/or electronic mail on the following counsel of record:

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