IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0510

GULFPORT ENERGY CORPORATION, ***Petitioner***

v.

CENTRAL ENVIRONMENTAL SERVICES, LLC, ***Respondent***

Honorable Jason A. Wharton, Judge
Circuit Court of Wood County
Civil Action No. 17-C-65

BRIEF OF THE PETITIONER

Counsel for Petitioner
J. Kevin West (WV Bar #13313)
Steptoe & Johnson PLLC
Huntington Center – Suite 2200
41 South High Street
Columbus, OH 43215
614-458-9889
kevin.west@steptoe-johnson.com

Melanie Morgan Norris (WV Bar #8581)
Steptoe & Johnson PLLC
1233 Main Street, Suite 3000
P.O. Box 751
Wheeling, WV 26003-0751
304-231-0460
melanie.norris@steptoe-johnson.com

Counsel for Respondent
Robert L. Bays, Esq. (WV Bar # 274)
Bowles Rice LLP
501 Avery Street, 5th Floor
Parkersburg, WV 26101
304-420-5530
rbays@bowlesrice.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in basing its decision upon the equitable theory of unjust enrichment where there was undisputed evidence that an express contract existed between the parties governing the terms of the parties' relationship and specific obligations at issue.
2. The Circuit Court erred in denying Gulfport's motion for directed verdict brought pursuant to WVRCP 52(c) where it was established during Plaintiff's case-in-chief that: (a) CES was required to obtain Gulfport employee signatures verifying work reflected in the invoices, but the Subject Invoices lacked the required signatures and (2) Plaintiff's case-in-chief failed to provide any documentary evidence that the invoices were timely submitted under the terms of the MSA.
3. To the extent that the Circuit Court's reliance on the theory of unjust enrichment was appropriate, then this Court erred by failing to properly review and balance all equities where the Trial Order was completely devoid of any analysis or even mention of the evidence offered by Gulfport regarding the resources and expenses it incurred to investigate and help CES try to substantiate the Subject Invoices, which Subject Invoices were ultimately determined by Gulfport to be incapable of substantiation.
4. The Circuit Court erred by misapplying West Virginia law where the provisions of the MSA dictated that Oklahoma law was to govern the interpretation of the MSA and where Oklahoma law prohibits recover on an unjust enrichment claim when an express contract exists.
5. The Circuit Court erred by basing its decision upon *Realmark Development Inc. v. Ranson*, 208 W.V. 717, 542 S.E.2d 880 (2000) because that case did not involve a claim for non-payment of allegedly rendered services under an express contract and is therefore inapplicable.

II. STATEMENT OF THE CASE

This is an appeal from a trial order entered May 1, 2019, following a non-jury trial on November 14, 2018 ("Trial Order") before the Honorable Judge Jason Wharton of the Circuit Court of Wood County, West Virginia ("Circuit Court").

The underlying matter arose out of a Master Services Agreement ("MSA") entered into between Gulfport Energy Corporation ("Gulfport") and Central Environmental Services LLC ("CES")[1] in May of 2012 in which CES agreed to provide, among other things, roll-off box rentals to various Gulfport jobsites. Under the terms of the MSA, CES was required to "submit invoices *as Work is completed* unless Company approves other invoicing arrangements at the time it requests the Work. . . ." The MSA also required invoices to be prepared and submitted as follows:

> All contractor invoices shall identify (i) the items related to the charges (including but not limited to, receipts, time sheets, dates, hours, rate, labor classifications, and material charges, *all with appropriate approvals of Company personnel*), (ii) whether prices are published, negotiated, or bid prices, (iii) charges by, as applicable, block name and number, lease number and name, or platform name and number, and well number. . . .[2]

The MSA permitted Gulfport to withhold payment until CES provided verification satisfactory to Gulfport of the work performed in the manner set forth in the MSA.

Over the course of their three-year relationship, Gulfport paid CES for countless invoices totaling $8,405,956.03.[3] In late 2015 and early 2016 CES presented unpaid invoices to Gulfport for payment.[4] All of the invoices were stale and failed to include the "appropriate approval of Company personnel". Notwithstanding these deficiencies, Gulfport agreed to review the invoices

---

[1] This Court has since granted Appellee's Motion to Substitute Harbet Private Equity Partners, LP as the Plaintiff Below/Appellee herein.
[2] App P00227 [MSA, ¶8(a) (emphasis added)]; see also P00645, Gulfport Ex. 1.
[3] App P00240; *see also* P00645, Gulfport Ex. 2.
[4] App P00683, p.139.

and pay those that Gulfport was satisfied were capable of independent substantiation.[5] As a result, Gulfport ultimately paid additional invoices in the amount of approximately $100,000.00 to CES during 2016.[6] Remaining unpaid were those invoices Gulfport did not believe were substantiated. These invoices range in date from March of 2014 through August of 2015 and total $191,287.15 (hereinafter "Subject Invoices").[7]

On February 17, 2017, CES filed suit alleging breach of contract against Gulfport for the Subject Invoices. On June 12, 2017, Plaintiff filed its Amended Complaint, adding an alternative theory of unjust enrichment. The parties engaged in written discovery and Gulfport submitted its motion for summary judgment on November 21, 2017, which was denied by the Court by Order dated February 8, 2018.[8] CES eventually produced approximately 8,133 pages of documents in no particular order that it contended substantiate that the services billed for in the Subject Invoices had actually been performed, on a Gulfport jobsite, and at the request of Gulfport, *despite the lack of the requisite signature or other approval of Gulfport personnel.*

A one-day bench trial was conducted on November 14, 2018. CES's sole witness at trial was Jeff Harper, its Chief Executive Officer. Mr. Harper essentially testified as to the existence of the MSA that governed the contractual relationship with Gulfport, the types of services CES provided to Gulfport, and the manner in which CES generated invoices for payment.[9] Mr. Harper candidly acknowledged that none of the Subject Invoices contained the signature of Gulfport personnel or otherwise reflected the "appropriate approval of Company personnel" as required under the MSA.[10] Nonetheless, Mr. Harper claimed that invoices totaling $146,552.25 were

[5] App P00693, p. 179.
[6] App P00693, p.180.
[7] App P00693-95, pp.180-81, 185.
[8] App P00707.
[9] App P00652-53, pp. 13, 15-18.
[10] App P00671; *see also* App P00226-234.

payable because the 8,133 documents that CES produced contained driver notes, CES schedules, landfill tickets, etc., that substantiated the work was performed.[11,12]

At the conclusion of CES' case-in-chief, Gulfport moved for judgment under West Virginia Civil Procedure Rule 52(c). It demonstrated that it was entitled to a directed verdict because the terms of the MSA controlled the parties' contractual relationship, and the Plaintiff had failed to present any evidence during its case-in-chief to prove that it had complied with the MSA requirements, specifically the requirement that an invoice had to reflect the approval of Gulfport personnel in order to be paid.[13] The Circuit Court denied the Rule 52(c) motion, concluding that there was sufficient evidence to proceed forward.[14]

Gulfport called two witnesses during its case-in-chief, Elaina Moscato, a drilling engineer technician employed by Gulfport, and Roger Wilson, the Billing and Operations Manager for Gulfport over Ohio and Oklahoma.[15] Both witnesses explained the general procedures for obtaining "appropriate approval of Company personnel" as well as the practical importance of the contractual requirement.

The general practice for obtaining "appropriate approval of Company [Gulfport] personnel" on a third-party invoice was to have a Gulfport employee or "company man" present at the jobsite sign the invoice when the work was performed. ("Q: And under the terms of the MSA all of your invoices were to contain the appropriate approval of Gulfport personnel, true? A: I believe so, yes.").[16]

---

[11] App P00683, pp.139-40, P00692, p. 176; *see also* P00227.
[12] As noted in the Circuit Court's Trial Order, during trial Mr. Harper conceded that of the $191,287.15 worth of unpaid invoices claimed, $39,042.90 [CES Ex. 5] contained no "back-up" documentation to support CES' claim the work was performed. During closing arguments, CES's counsel withdrew the request for payment on invoice 49031, totaling $5,692.00 on the basis that the "back-up" documentation was incorrect. *See* App, p. P00001.
[13] App P00680-81, pp. 128-29.
[14] *See id.*
[15] App P00681, p. 130, P00691, p. 170.
[16] App P00682 p. 133; *see also* P00671, p. 89.

To facilitate the invoice approval process, Gulfport developed a specific stamp to be placed on all invoices which is signed by Gulfport personnel, who also fills in the appropriate cost code, department, and well name so that Gulfport knows where to attribute the cost.[17] Gulfport then shares the cost with its joint interest partners who have ownership interests in the particular well to which the cost is attributed.[18] Because Gulfport is audited by its joint interest partners, it is crucial that all of Gulfport's records reflect accurate detail aligning the costs with the correct well or jobsite and also reflecting the signature of Gulfport personnel approving the invoice.[19]

Gulfport employees or independent contractors, sometimes referred to as "company men", are present on the jobsite twenty-four hours a day to sign invoices and work orders.[20] If for some reason a vendor is unable to locate a Gulfport employee or company man on the jobsite, then the vendor can request that the person at the jobsite guard shack radio a company man for signature. Alternatively, the vendor can go to the local Gulfport field office to obtain a signature.[21] There is always somebody available to provide a signature. (Q: Is there always a manner by which to get in touch with a company man when you're on a Gulfport well site? A: Yes).[22]

Gulfport company men have authority to, and do, refuse to sign improperly submitted invoices. Circumstances under which a refusal may be made include when the item delivered is not what Gulfport ordered, the work was not performed as requested, or the cost exceeds what Gulfport agreed to pay.[23] Gulfport personnel may also refuse to sign if the invoice contains incorrect well information or incorrect dates.[24]

---

[17] App P00691, p. 172.
[18] App P00694, pp. 181-184.
[19] *See id.*
[20] App P00682, p. 133.
[21] App P00682, pp. 134-135.
[22] App P00982, p. 135.
[23] App P00695, p. 187.
[24] App P00683, p. 138.

On May 1, 2019, the Court entered its *Trial Order*, awarding judgment to CES in the total amount of $144,037.75, plus interest at the statutory rate until paid.[25] The judgment award reduced CES' original amount claimed of $191,287.15, by the $39,042.90 [CES Trial Ex. 5] worth of invoices that Mr. Harper conceded contained no "back-up" documentation as well as the amount of $5,692.00 which reflected CES' withdraw of invoice 49031 during closing argument.[26]

The Circuit Court further reduced the claimed amount by $2,514.50 for multiple invoices for personal protective equipment which the MSA excluded from allowable costs. Notwithstanding the Court's reliance on the MSA to render the deduction, the Court's ultimate decision to award judgment in favor of CES was based upon of its unjust enrichment claim:

> Taking all of the testimony and exhibits into consideration, the Court FINDS that Central Environmental Services has established by a preponderance of the evidence that the work set forth in the invoices as described above was provided for the benefit of Gulfport Energy. "Under the law of unjust enrichment, if benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefore, the law requires the party receiving the benefits to pay their reasonable value." *Realmark Developments, Inc. v. Ranson*, 208 W. Va. 717, 542 S.E. 2d 880 (2000). The Court having removed the inappropriate charges as set forth herein, finds the reasonable value of the services was $144, 037.75.

Following entry of this Order, Gulfport timely filed its notice of appeal. CES subsequently moved this Court to substitute Harbert Private Equity Partners, LP as Appellee, which this Court subsequently granted.

III. SUMMARY OF ARGUMENT

The Circuit Court erred in awarding judgment in favor of CES on the theory of unjust enrichment.

---

[25] App P00001.
[26] *See id.*

First, the Circuit Court erred by awarding judgment to CES based upon unjust enrichment where the indisputable evidence was that a written contract exists which governs the submission of invoices at issue in the suit.

Second, the Circuit Court erred by basing its holding upon this Court's *Realmark Development Inc. v. Ranson* opinion which is entirely distinguishable from this case.

Third, the Circuit Court erred by denying Gulfport's W. Va. Civ. Pro. R. 52(c) motion where the evidence submitted during CES' case-in-chief established that none of the Subject Invoices had the "appropriate approval of Company [Gulfport] Personnel" as expressly required under the terms of the MSA.

Fourth, even assuming that the theory of unjust enrichment was a permissible ground for recovery, the Circuit Court erred by failing to conduct a thorough balancing of the equities between the parties before awarding CES equitable relief.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

R. App. P. 19(a)(1), (2) and (3) oral argument is appropriate in this case as it involves an "assignment[ ] of error in the application of settled law", "an unsustainable exercise of discretion where the law governing that discretion is settled" and a "result against the weight of the evidence."

V. ARGUMENT

A. STANDARD OF REVIEW

The standard of review for the appeal of a bench trial judgment entry is as set forth in syllabus point 1 of *Public Citizen, Inc. v. First National Bank*, 198 W. Va. 329, 480 S.E.2d 538 (1996):

> In reviewing challenges to the findings and conclusions of the circuit court made 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. Questions of law are subject to a *de novo* review.

See also Morton v. Unknown Heirs of Van Camp, 221 W. Va. 299, 654 S.E.2d 621 (2007).

"[T]he appellate standard of review for a circuit court order either granting or denying a motion for judgment as a matter of law in a bench trial, made pursuant to Rule 52 of the West Virginia Rules of Civil Procedure, is *de novo*." *Waddy v. Riggleman*, 216 W. Va. 250, 256, 606 S.E.2d 222, 228 (2004).

Applying the applicable standards of review, this Court should set aside the judgment, reverse, and remand to the Circuit Court of Wood County with directions for further proceedings consistent with this Court's opinion because the Circuit Court misapplied the applicable law.

B. <u>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.</u>

CES' Amended Complaint set forth two alternative theories of relief: (1) Count I - breach of contract or (2) Count II - unjust enrichment. An unjust enrichment claim is quasi-contractual in nature. "It is a well-rooted principle of contract law that '[a]n express contract and an implied contract, relating to the same subject matter, can not co-exist.'" *Bright v. QSP, Inc.*, 20 F.3d 1300, 1306 (4th Cir. 1994), applying W. Va. law and citing to *Case v. Shepherd,* 140 W.Va. 305, 84 S.E.2d 140, 144 (1954). As such, "when the parties have clearly and plainly expressed in writing the actual contract between them" no quasi-contractual recovery is possible. *See id.*, citing to *Shanks v. Wilson,* 86 F.Supp. 789, 794 (S.D.W.Va.1949).

The uncontroverted evidence presented at trial was that CES and Gulfport entered into a written MSA in 2012 that governed the terms of the parties' relationship and obligations. (Q: Is there [sic] [referencing MSA] the governing contractual document for your [CES'] dealings with

Gulfport that we are here about today? A: Yes).[27] The subject matter of CES' claim against Gulfport – namely submission and payment of invoices for roll-off and transportation services allegedly provided to Gulfport – falls precisely within the scope of the MSA. The MSA specifically requires:

> All contractor invoices shall identify (i) the items related to the charges (including but not limited to, receipts, time sheets, dates, hours, rate, labor classifications, and material charges, *all with appropriate approvals of Company personnel*), (ii) whether prices are published, negotiated, or bid prices, (iii) charges by, as applicable, block name and number, lease number and name, or platform name and number, and well number. . . .[28]

Although the Trial Order recited pertinent provisions of the MSA reflecting the requirements for proper submission of invoices for payment, the Circuit Court's ultimate holding and judgment in favor of CES was based entirely upon unjust enrichment:

> Taking all of the testimony and exhibits into consideration, the Court FINDS that Central Environmental Services has established by a preponderance of the evidence that the work set forth in the invoices as described above was provided for the benefit of Gulfport Energy. "Under the law of unjust enrichment, if benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefore, the law requires the party receiving the benefits to pay their reasonable value." *Realmark Developments, Inc. v. Ranson*, 208 W. Va. 717, 542 S.E. 2d 880 (2000). The Court having removed the inappropriate charges as set forth herein, finds the reasonable value of the services was $144, 037.75.

Because the undisputed evidence was that a written contract exists which expressly governs the parties' obligations including the requirements for proper submission of invoices, the Circuit

[27]App P00652, p. 13.
[28]App P00227 [MSA, ¶ 8(a) (emphasis added)]; *see also* P00645, Gulfport's Ex. 1.

Court erred as a matter of law when it entered judgment in favor of CES on the equitable basis of unjust enrichment.

The Circuit Court's reliance on CES's unjust enrichment claim was also erroneous under Oklahoma law. The undisputed evidence is that the MSA governed the terms of the parties' obligations and relationship. Paragraph 25 of the MSA admitted into evidence provides:

> **GOVERNING LAW AND VENUE**
> THIS AGREEMENT SHALL BE CONSTRUED AND THE RELATIONS BETWEEN THE PARTIES DETERMINED IN ACCORDANCE WITH, TO THE EXTENT APPLICABLE, THE GENERAL MARITIME LAW OF THE UNITED STATES OF AMERICA, AND TO THE EXTENT SUCH GENERAL MERITIME LAW IS NOT APPLICALBE, THE LAWS OF THE STATE OF OKLAHOMA, NOT INLCUDING, HOWEVER, IN EITHER SITUATION ANY CONFLICTS OF LAW RULES OR PROVISIONS WHICH WOULD DIRECT OR REFER TO THE LAWS OF ANOTHER JURISDICTION.[29]

As such, the "relations between the parties" including CES' claim to recovery on the Subject Invoices which Gulfport contends were stale and lack appropriate approval of Gulfport personnel, is governed by the laws of Oklahoma. As is also the case under West Viginia law, under Oklahoma law "a party is not entitled to pursue a claim for unjust enrichment when it has an adequate remedy at law for breach of contract." *American Biomedical Group, Inc. v.Techtrol, Inc.*, 374 P.3d 820, 2016 OK 55 (2016).

Because both West Viginia and Oklahoma law preclude CES' reovery under a theory of unjust enrichment where an express contract exists under which CES could present a claim for breach of contract, it was error for the Circuit Court to base its judgment upon West Virignia case law regarding the equitable theory of unjust enrichment.

[29] App P002362; *see also* App P00645, Gulfport's Ex. 2.

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

In awarding CES judgment on its unjust enrichment claim, the Circuit Court relied exclusively on this Court's opinion in *Realmark Development Inc. v. Ranson*, 208 W. Va. 717, 542 S.E.2d 880 (2000). *Realmark*, however, is entirely inapplicable to the facts of this case, and the Circuit Court's reliance on the opinion constitutes error. In *Realmark*, after commercial tenants vacated the premises upon expiration of a lease, the landlord filed suit to recover past due rent and real estate taxes. The tenants filed a counterclaim, alleging that the lease had contained an option to purchase that the tenants intended to exercise, and that an oral promise had also been made by the landlord to assist with financing for the purchase.[30] In alleged reliance on the oral promise, the tenants expended $100,000.00 in building improvements.[31] The landlord ultimately refused to assist with financing and sold the premises for a sum of $270,000.00, $100,000.00 of which the tenants claim was due solely to the improvements they had made.[32]

The tenants filed a counterclaim against the landlord for breach of contract on the basis that the landlord refused to credit the tenants with a portion of the rent paid toward the purchase price.[33] The tenants also filed a claim for unjust enrichment based upon the alleged oral promise of the landlord to assist with financing.[34] The Circuit Court granted summary judgment to the landlord.

On appeal, this Court focused on the benefit the landlord had received from the tenants' physical improvements to the premises, which were not part of the actual contract:

---

[30] *Realmark*, 208 W. Va. at 719, 542 S.E.2d at 882.
[31] *See id.*
[32] *Realmark*, 208 W. Va. at 720, 542 S.E.2d at 883.
[33] *Realmark*, 208 W. Va. at 721, 542 S.E.2d at 884.
[34] *See id.*

> The law of unjust enrichment indicates that if one person improves the land of another either through the direction of services to the land, or through the affixation of chattels to the land, that person is entitled to restitution for the improvements if certain other circumstances are present.[35]

Because there was evidence that the tenants made $100,000.00 or more in improvements to the premises in question, the Court determined that the tenants' unjust enrichment claim should proceed to trial.[36]

Unlike the tenants' claims in *Realmark*, CES' claim is within the confines of an express written contract, including CES' provision of services and the contractual requirements for proper submission of invoices billing for said services. There was no evidence that CES, like the tenants in *Realmark*, relied upon oral promises from Gulfport that resulted in CES performing services outside those contemplated within the MSA. Unlike the physical improvements to the premises in *Realmark*, there was no evidence that CES made physical improvements to the real property of Gulfport. Rather, the only evidence at trial was that CES submitted invoices without the "appropriate approval of Gulfport personnel" as required under the terms of the MSA, but nonetheless wanted Gulfport to issue payment. The express terms of the MSA control, and it was error for the Circuit Court to rely on *Realmark* to enter a judgment in favor of CES.

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

At the conclusion of CES' case-in-chief, Gulfport made a motion for judgment pursuant to West Virginia Civil Procedure Rule 52(c). The basis of Gulfport's motion was that CES had failed to meet its burden of proof because its sole witness, Mr. Harper, admitted: (1) the MSA governs the terms of the parties' relationship; and (2) none of the Subject Invoices were signed or

[35] *Realmark*, 208 W. Va. at 721, 542 S.E.2d at 884.
[36] *Realmark*, 208 W. Va. at 722, 542 S.E.2d at 885.

otherwise reflected the "appropriate approvals of [Gulfport] personnel" as required under the express terms of the MSA for all invoices submitted for payment.[37] The Court denied the Rule 52(c) motion, determining that there was sufficient evidence to proceed.[38]

When faced with a motion for judgment as a matter of law, the Court must view the evidence in the light most favorable to the nonmovant, however, judgment should be granted to the moving party when "only one reasonable conclusion as to the verdict can be reached." *Waddy v. Riggleman*, 216 W. Va. 250, 256, 606 S.E.2d 222, 228 (2004). Only when "reasonable minds could differ as to the importance and sufficiency of the evidence" should a directed verdict be denied or reversed. *Id.*

Here, the evidence presented during CES' case-in-chief led to only one reasonable conclusion – that CES could not prove compliance with the terms of the MSA. Mr. Harper admitted that pursuant to the express provisions of the MSA, all invoices submitted by CES were to bear the appropriate approval of Gulfport personnel. (Q: And under the terms of the MSA all of your invoices were to contain the appropriate approval of Gulfport personnel, true? A: I believe so, yes.).[39] Mr. Harper acknowledged that CES workers would usually obtain Gulfport approval via a signature from someone in the field, but that CES could also obtain signatures from someone within Gulfport's office.[40] Mr. Harper admitted that CES had, over the years, properly submitted a number of invoices that were paid by Gulfport.[41] In fact, Mr. Harper agreed that over the course of their three year relationship, CES received payments from Gulfport for invoices totaling over $8.4 million dollars.[42]

---

[37] App P00680-81, pp. 128-29.
[38] App P00681, p. 130.
[39] App P00666, p. 70.
[40] App P00653, p. 17.
[41] *See id.*, p. 18.
[42] App P00667, p. 74.

Because CES' sole witness admitted that a written contract exists which governs the parties' relationship and submission of invoices, CES could only prevail by proving the necessary elements of a breach of contract claim against Gulfport. There was no such evidence presented because CES's sole witness admitted that the Subject Invoices did not bear the "appropriate approval of Gulfport personnel" as required under the MSA. The fact that Mr. Harper conveniently testified that it was sometimes "difficult" to obtain Gulfport personnel approval does not relieve CES of its contractual obligation to do so prior to the submission of an invoice. Moreover, the fact that Mr. Harper admitted CES had previously been paid by Gulfport for over $8.4 million dollars' worth of invoices reflects that CES was certainly able to obtain the "appropriate Gulfport personnel approval" on a multitude of prior occasions.

Based on the evidence submitted at the close of CES' case-in-chief, the only reasonable conclusion that could be reached was that CES had failed to carry its burden of proof, and the Circuit Court erred by denying Gulfport's Rule 52(c) motion.

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.

Unjust enrichment is a form of equitable relief. *See Absure, Inc. v. Huffman*, 213 W. Va. 651, 584 S.E.2d 507 (2003) ("[T]o be entitled to equitable relief for unjust enrichment, a party mus show that a payee received money to which he was not entitled and that the payment was the result of a mistake). Because the Circuit Court found in favor of CES on the theory of unjust enrichment, the Circuit Court was required to balance all the equities between the parties but failed to do so. The Circuit Court merely took the total amount CES claimed for the "Subject Invoices" and subtracted (1) invoice amounts CES admitted had no accompanying documentation, and (2) charges for personal protective equipment that was an excluded cost under

the MSA. The Circuit Court then awarded CES judgment for the remaining invoiced amounts without taking into consideration the time and expense incurred by Gulfport both pre- and post-litigation to substantiate CES' improperly submitted invoices.

As noted *supra*, the MSA required that all invoices be submitted upon completion of work and with the appropriate approval of Gulfport personnel.[43] It is the vendor's obligation to properly present invoices for payment.[44] Gulfport does not typically perform a review of voluminous documents to help vendors substantiate improper or incomplete invoices.[45] Ms. Moscato and Mr. Wilson both had multiple meetings with CES prior to the underlying litigation regarding the Subject Invoices.[46]

Upon receipt of CES' document production consisting of 8,133 pages, Ms. Moscato and four other full-time employees spent 60 hours reviewing each page to try and substantiate for CES the work reflected in the Subject Invoices.[47] The time and costs that Gulfport spent both pre- and post- litigation to substantiate CES' invoices should have been considered, analyzed, and taken into consideration in the balance of the equities between the parties before judgment was awarded. The Circuit Court erred when it failed to conduct a complete balancing of the equities between the parties, and in particular, the expense and time incurred by Gulfport as a result CES' failure to properly submit the invoices pursuant to the requirements of the MSA.

VI. CONCLUSION

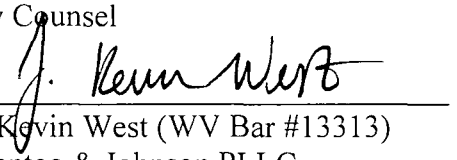
WHEREFORE, Petitioner, Gulfport Energy Corporation, respectfully requests that this Court reverse the Trial Order of the Circuit Court of Wood County entering judgment in favor of

[43] App P00666, pp. 69-70; *see also* App P00226-234 [MSA].
[44] App P00685, p. 146.
[45] *See id.*
[46] App P00683, p. 139-140; App P00687, p. 154; App P00692-93, pp. 176-179.
[47] App P00685, p. 146.

the Respondent Central Environmental Services, LCC (now Harbet Private Equity Partners, LP) and remand with directions to enter judgment for Gulfport Energy Corporation.

GULFPORT ENERGY CORPORATION

By Counsel



J. Kevin West (WV Bar #13313)
Steptoe & Johnson PLLC
Huntington Center – Suite 2200
41 South High Street
Columbus, OH 43215
614-458-9889
kevin.west@steptoe-johnson.com

Melanie Morgan Norris (WV Bar #8581)
Steptoe & Johnson PLLC
1233 Main Street, Suite 3000
P.O. Box 751
Wheeling, WV 26003-0751
304-231-0460
melanie.norris@steptoe-johnson.com