IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0510

GULFPORT ENERGY CORPORATION, *Petitioner*

v.

CENTRAL ENVIRONMENTAL SERVICES, LLC, *Respondent*

REPLY BRIEF OF THE PETITIONER

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I. INTRODUCTION

Petitioner Gulfport Energy Corporation ("Gulfport") submits this reply in support of its appeal from the Circuit Court's May 1, 2019 judgment entry ("Judgment Entry") in favor of the Respondent, Harbert Private Equity Partners, LP, formerly known as Central Environmental Services, Inc. ("CES"). The Circuit Court erred in awarding judgment in favor of CES on its claim for unjust enrichment when an express contract exists governing the terms of the parties' relationship and the submission of invoices for payment. The Court's Judgment Entry speaks solely in terms of equity and fails to include any findings for breach of contract. Second, the Court's Judgment Entry errantly relies upon *Realmark Development Inc. v. Ranson*, which is not only a case based upon unjust enrichment, it is also entirely distinguishable from the facts of this case.

Third, the Circuit Court erred by denying Gulfport's Rule 52(c) motion where the evidence CES submitted during its case-in-chief established that CES had failed to properly submit the invoices for payment with the "appropriate approval of Company [Gulfport] Personnel" as required under the MSA.

Finally, even if the Circuit Court was justified in basing its holding upon unjust enrichment, the Circuit Court nonetheless erred by failing to conduct a thorough balancing of all the equities between the parties, including evidence of Gulfport's significant time and expense incurred trying to substantiate the unpaid invoices for CES.

This Court should reverse the Circuit Court's Judgment Entry of May 1, 2019, with instructions to enter judgment in favor of Gulfport.

II. STATEMENT OF THE CASE

Contrary to CES' suggestion, Gulfport advised CES of the deficiencies of the unpaid invoices submitted by CES for payment. Gulfport employee, Elaine Moscato, met with representatives of CES in 2015 and 2016 to go over the invoices, explaining the deficiencies and what documentation was needed to correctly submit the invoices for payment.[1] CES failed to cure the deficiencies with respect to those invoices that became the subject of this litigation.

Ms. Moscato did not summarily deny the invoices for lack of a Gulfport personnel signature as contended by CES. Ms. Moscato testified that Gulfport deals with 500 to 600 vendors per year in just the Appalachia area.[2] Given the large number, Gulfport has established clear guidelines on proper submission of invoices for approval of Gulfport personnel. Once this litigation ensued, Ms. Moscato again personally reviewed all of the invoices attached to CES' complaint in this matter, along with the 8,133 pages of document production produced in response to Gulfport's discovery requests.[3] Ms. Moscato testified that none of the invoices were properly payable under Gulfport's guidelines.[4] She saw no evidence that any of the invoices had been timely submitted to Gulfport as the work was completed.[5] Even excluding the timeliness and lack of signature, there were still a "multitude" of problems according to Ms. Moscato, including lack of solid dates reflecting the work completed, the wells identified on the invoices were not Gulfport wells, invoices lacked box rental numbers, etc.[6]

It is true that Ms. Moscato quite logically testified that she could not personally state that the services reflected in the invoices had not actually been performed. However, she likewise

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[1] APP P00687, p. 153-54.
[2] APP P00681, p. 131.
[3] APP P00684, p. 141-42.
[4] *See id.*
[5] *See id.*
[6] APP P00683, p. 139; APP P00684, p. 143-44.

testified that even after reviewing 8,133 pages of CES' document production, she did not believe the invoices were properly substantiated and payable.[7]

CES' response brief misleadingly refers this Court to an email from Jean Hale – a non-witness at the trial of this matter – for the proposition that Gulfport believed the invoices were properly payable. The email from Ms. Hale was directed to Roger Wilson, who was present and offered testimony at trial. Mr. Wilson testified that Ms. Hale's email was generated after she received stale (i.e., untimely under the MSA) invoices from CES.[8] The email was drafted as a suggestion to resolve (i.e., settle) CES' demand for payment of the stale and unsubstantiated invoices.[9] Mr. Wilson thereafter responded to Ms. Hale, advising her that Gulfport was not ready to do so because it had not yet verified the invoices.[10] According to Mr. Wilson, some of the invoices were ultimately verified through substantiating documentation and paid to CES.[11] The remainder are those that are the subject of this litigation because they were never properly verified.

III. ARGUMENT

A. 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.

The Circuit Court erred by awarding CES judgment based entirely upon the claim for unjust enrichment when the parties had a written Master Services Agreement contract ("MSA") which expressly governed the parties' relationship and the method by which CES was to submit invoices to Gulfport for payment.

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[7] APP P00689, p. 162-63.
[8] APP P00693, p. 182.
[9] APP P00693-94, pp. 181-85.
[10] APP P00694, p. 185.
[11] *See id.*

Respondent does not dispute, nor could it, the following crucial facts: (1) an express contract (the MSA) existed between the parties governing the terms of their relationship and obligations; (2) under the express terms of the MSA the Respondent was required to submit all invoices with "appropriate approvals of [Gulfport] personnel"[12]; (3) CES knew how to obtain "appropriate approvals of [Gulfport] personnel" because it had managed to do so for countless invoices submitted from 2012 through 2015 totaling $8,405,956.03[13], and; (4) the invoices that were the subject of the underlying trial lacked the "appropriate approvals of [Gulfport] personnel" as required under the terms of the MSA.

Because it is undisputed that a written contract existed between the parties governing the issue that was before the Court, i.e., the submission of invoices, the Court erred in basing its Judgement Entry solely upon the quasi-contractual claim for unjust enrichment. See, e.g., *Case v. Shepherd,* 140 W.Va. 305, 84 S.E.2d 140, 144 (1954) (noting that "when the parties have clearly and plainly expressed in writing the actual contract between them" no quasi-contractual recovery is possible).

CES attempts to recast the Judgment Entry as being "two-pronged" and based upon both a breach of contract and unjust enrichment. CES' argument is belied by not only the plain language contained within the entry but also by the noticeably absent language. The term "breach" does not appear anywhere within the Judgment Entry. On the other hand, the Court's findings very clearly set forth the language and elements associated with an unjust enrichment claim:

> The Court finds . . . that the work reflected in said invoices [in Exhibit 4] was completed by Central Environmental Services for the **benefit** of Gulfport.

[12] App P00227 [MSA, ¶ 8(a) (emphasis added)]; *see also* P00645, Gulfport's Ex. 1.
[13] App P00240; *see also* P00645, Gulfport Ex. 2.

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> The Court finds in reviewing the invoices [in Exhibit 3] that Environmental Services did, however, complete the work described therein for the **benefit** of Gulfport. . .[14]

The Court's determination that services were completed for the **benefit** of Gulfport is consistent with the elements necessary to establish an unjust enrichment claim, not a breach of contract claim. See *Realmark Development Inc. v. Ranson*, 208 W. Va. 717, 542 S.E.2d 880, 884-885 (2000) ("[I]f benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving the **benefits** to pay their reasonable value.") (emphasis added). In fact, after making the above findings, the Judge Entry then quotes the relevant standard from *Realmark*:

> 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.[15]

Although the Judgment Entry does cite to the pertinent provisions of the MSA, the complete failure to make any findings of breach, along with the Court's reliance upon the necessary elements to establish an unjust enrichment claim clearly indicate that the Judgment Entry was based entirely upon the claim of unjust enrichment despite the existence of a written contract.

CES' similar attempts to recharacterize the Judgment Entry as containing findings that the

[14] App P00001-2 (emphasis added).
[15] App P00001-2.

MSA was unenforceable due to a mutual breach or modified by course of dealings likewise must fail. The terms modification, waiver, unenforceability or quantum meruit appear nowhere in the Judgment Entry. Nonetheless, CES argues that there was either a mutual breach rendering the MSA unenforceable, or alternatively, that the MSA was modified by Gulfport's "fail[ure] to honor the contract by not having its employees available for approving the invoices."[16] The judgment entry, however, does not include any finding that Gulfport failed to honor the contract. The only statement by the Court on this issue was:

> The Court further finds that the evidence showed that the employees at Gulfport Energy were somewhat transitory in nature and could not always be found for the approvals required by the Master Services Agreement.[17]

Contrary to CES' argument, the above sentence does not translate into a holding of breach of contract on the part of Gulfport.

CES' argument also ignores the plain testimony of its own sole witness, Jeff Harper, who clearly testified that 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 if no personnel was available on site.[18] Mr. Harper's testimony on this point was consistent with the testimony of Gulfport's own witnesses:

> Q: Now, to the extent that someone would contend that there is nobody available to sign on a Gulfport well site when a vendor delivers a box or performs a service, I think that you indicated that a company man is always on site, what else could somebody do to get their invoice signed and approved if the company man for some reason is not available?

[16] Resp. Brief, p. 13.
[17] App P00001-2.
[18] App P00653, p. 19-20.

> A: There is always a party of contact. There is always somebody that calls the vendor to the site. The vendor does not just appear on site to do the work at random. Whoever called to get the work order would be their point of contact. Then there is also the office in St. Clairsville that they are willing to come in and answer any questions.[19]

It also contradicts Mr. Harper's own testimony that CES was able to correctly submit invoices with approval of Gulfport personnel on countless prior occasions, totaling $8,405,956.03.[20] Finally, Respondent's argument assumes that the invoices should have been approved as opposed to rejected in the first place. There was significant evidence before the Court that the invoices lacked Gulfport signatures for a reason. Elaina Moscato was involved with reviewing the CES allegeldy unpaid invoices back in 2016, and she testified that there were multiple problems:

> Q: When was the first time that you became invovled in the discussions with Central Environmental Services concerning unpaid invoices?
>
> A: I believe it was 2015, 2016.
>
> Q: What do you recall was the nature of the problem with the invoices at that time?
>
> A: There was lack of signatures form company men. There was lack of solid dates for the work completed. There were wells that were not ours. A multitude of issues.[21]

Ms. Moscato went on to testify that the invoices lacked box rental numbers and that there was no substantiating documentation that the rental period charged for corresponded with the length of time actually requested by Gulfport for the rental.[22] The evidence at trial was that Gulfport personnel had authority to refuse approval of CES' invoices if the services were not performed as

[19] APP P00683, p. 137
[20] App P00667, p. 74.
[21] APP P00683, p. 139.
[22] APP P00684, p. 143-44

requested, or if the cost exceeded what Gulfport had agreed upon.[23] In fact, some of the invoices at issue in this case were specifically rejected by Gulfport personnel on the basis that the box pick-ups were late.[24]

Similarly, there was no finding of contract modification by the Circuit Court. Nor could there have been based upon the testimony presented. Again, CES' sole witness, Mr. Harper, testified that he "believed" other invoices lacking Gulfport signatures or stamps had been paid:

> A: I think that we submitted some without a stamp [signature] at this point.
>
> Q: Are you able to identify or produce anything here today that verifies that you received payment for things [invoices] without stamps [signatures] on a regular basis?
>
> A: I am not.
>
> Q: And we agree that stamps [signatures] were required, correct?
>
> A: Yes.[25]

As noted above, CES' arguments must fail because the Circuit Court made no findings of contract modification. Even so, Mr. Harper's testimony that he "thinks" some invoices may have been paid without the required Gulfport approval is not sufficient to establish a modification of the MSA through course of dealing.

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

The fact that the Circuit Court erred by basing its ruling entirely upon unjust enrichment

[23] App P00698, p. 187.
[24] App P00671, p. 90-91.
[25] App P00667, p. 75.

despite the existence of a written contract is further highlighted by the Circuit Court's reliance, in error, upon the holding in *Realmark Development Inc. v. Ranson*, an unjust enrichment case. Again, CES attempts to entirely recharacterize the Judgment Entry, arguing that the Circuit Court concluded CES met its contractual obligations while Gulfport had failed to meet its contractual obligations "by approving appropriately documented invoices." As noted, *supra*, there are no such findings contained within the Judgment Entry. The Circuit Court never determined whether either party had breached the MSA; rather, it based its holding entirely upon unjust enrichment and the *Realmark Development* case which, for the reasons set forth in Petitioner's Brief is completely distinguishable from the facts of this case. Respondent's Brief makes no attempt to counter the distinguishable differences between *Realmark Development* and this case.

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

The Circuit Court erred by denying Gulfport's motion for judgment made at the conclusion of CES' case-in-chief and based upon the admissions of CES' sole witness, Jeff Harper, that (1) the MSA governs the terms of the parties' relationship; and (2) none of the Subject Invoices were signed or otherwise reflected the "appropriate approvals of [Gulfport] personnel" as required under the express terms of the MSA for all invoices submitted for payment.[26]

Ironically, the primary argument advanced by CES in opposition to Gulfport's assignment of error is the testimony of Gulfport's witness, Ms. Moscato, which was only given after the Court errantly denied Gulfport's motion for judgment following CES' case-in-chief. Such testimony was not on the record at the time the Court committed error and cannot therefore be taken into consideration. *See* W. Va. Civ. Pro. R. 52.

[26] App P00680-81, pp. 128-29.

CES further argues that there was sufficient evidence presented to proceed forward with the trial because Mr. Harper had testified that CES performed the services reflected in the invoices and was not paid only because Gulfport personnel "would not sign or refused to sign the submitted invoices."[27] As argued *supra*, CES' argument in this regard completely ignores Mr. Harper's additional testimony that there were times that Gulfport would refuse to sign an invoice on the basis that the services were improperly or untimely provided. For instance, invoice 50092, was specifically rejected by Gulfport personnel for approval on the basis that "the boxes should have been picked up way before."[28] The invoice was marked "will not sign."[29] Mr. Harper acknowledged that CES charges Gulfport by the day for box pick-up, such that untimely pick-up would result in a larger bill.[30] (Notably, the Circuit Court, after deducting a portion of the costs on invoice 50092 for non-covered materials, ordered Gulfport to pay the remaining balance thereof despite the clear evidence that the invoice had been rejected by Gulfport personnel for approval.)[31]

At the close of CES' case-in-chief, the Circuit Court had undisputed evidence before it that the MSA applied, the MSA required Gulfport signature on invoices to be approved for payment, and that Gulfport personnel had the discretion to reject signature on improper invoices. Because reasonable minds could not have differed as to the lack of sufficiency of the Mr. Harper's testimony as presented by CES during its case-in-chief, the Circuit Court's ruling denying Gulfport's Rule 52 motion was in error. See, e.g., *Waddy v. Riggleman*, 216 W. Va. 250, 256, 606 S.E.2d 222, 228 (2004) (noting that a Rule 52 motion should be denied only when reasonable minds could differ as to the sufficiency and importance of the evidence.).

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[27] Resp. Brief, p. 17.
[28] App P00671, p. 90.
[29] *See id.*
[30] App P00671, p. 91-92.
[31] App P00001-2.

D. 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.

If the Circuit Court properly based its Judgment Entry on the quasi-contractual claim of unjust enrichment, then it was incumbent upon the Circuit Court to balance all the equities between the parties. CES' argument that the Circuit Court balanced the equities when it reduced the amount original claimed is without support in the facts or the law. The Circuit Court reduced the amount originally claimed because it concluded that CES had failed to meet the necessary burden of proof that the services reflected therein had actually been performed –it had nothing to do with a balancing of the equities.

The Judgment Entry is completely devoid of any reference to the undisputed evidence submitted by Gulfport that Elaina Moscato and four other full time employees spent over 60 hours (at a significant cost to Gulfport) trying to substantiate the invoices submitted by CES despite the fact that it was CES' responsibility and contractual obligation to substantiate its own invoices.[32] Because the Court failed to even mention, let alone take into consideration, Gulfport's own costs and efforts spent performing CES' own obligation – namely providing sufficient documentation to substantiate its stale invoices – the Court failed to fully balance all equities.

VI. CONCLUSION

For all of the foregoing reasons and for the reasons stated in the Brief of Petitioners, this Court should reverse the Circuit Court's Judgment Entry and remand this action with instructions to enter judgment for Gulfport Energy Corporation

Respectfully submitted this 5th day of November 2019.

[32] App P00685, p. 146; App P00683, p. 139-140; App P00687, p. 154; App P00692-93, pp. 176-179.

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