IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 19-0535

NORTHSTAR ENERGY CORPORATION,

Defendant Below, Petitioner

v.

(On Appeal From)
(Harrison County Circuit Court)
(Business Court Division)
(Civil Action No. 15-C-405-3)
(Honorable Paul T. Farrell)

RILEY NATURAL GAS COMPANY,

Plaintiff Below, Respondent

PETITIONER'S BRIEF

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Dated: September 3, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

I. ASSIGNMENTS OF ERROR

A. The Circuit Judge erred in granting summary judgment based upon his finding that the Agreement between the parties was for the purpose of the Plaintiff's marketing of the natural gas produced by Petitioner and sold to the Respondent, and not the sale of the natural gas produced by Petitioner and sold to Respondent.

B. The Circuit Judge erred in granting summary judgment based upon his finding that the Delivery Point for the natural gas produced and sold by the Petitioner to the Respondent was at Oxford, Pennsylvania at the intersection of two interstate pipelines not referenced in the Agreement. This led the Circuit Judge to erroneously find that Petitioner was liable to the Respondent for the transportation charges under the Agreement.

C. The Circuit Judge erred in granting summary judgment by relying upon pre-contract negotiations when making his findings as to the terms of the Agreement between the parties.

D. The Circuit Judge erred in granting summary judgment based upon his finding and conclusion that, because the Petitioner had had not previously contended that the Delivery Point for the sale of natural gas purchased by Respondent from Petitioner was at some other location than Pennsylvania, Petitioner could not contest the charges imposed by Respondent, nor could Petitioner now contest that the Delivery Point for the sale of its natural gas was at the meter near Chelyan,

Kanawha County, West Virginia, which meter was designated in the Term Sheets issued by Respondent as the Delivery Point.

E. The Circuit Judge erred in finding that the terms of the Agreement precluded the Petitioner from terminating the Agreement.

II. STATEMENT OF THE CASE

A. THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

Respondent Riley Natural Gas Company (hereinafter "Respondent") filed a Complaint and an Amended Complaint seeking declaratory and monetary relief from Petitioner Northstar Energy Corporation (hereinafter "Petitioner"), claiming that Petitioner breached the Agreement and by failing to pay Respondent for firm transportation capacity on Dominion Transmission Inc.'s Appalachia Gateway Project Facilities natural gas pipeline. App. 23-34; 63-81.

In its Counterclaim and Amended Counterclaim Petitioner sought a declaration that the Delivery Point for the natural gas which Petitioner produced, sold and delivered to Respondent, pursuant to the Agreement was not subject to transportation charges which were alleged to be due and owing; that Respondent wrongfully withheld from the proceeds of the gas delivered and sold the amount of those transportation charges; that Petitioner was entitled to recover a money judgment against Respondent for the transportation charges which had been deducted from the proceeds of the gas it delivered and sold, and that it was entitled to terminate the Agreement. App. 41-54; 83-98.

Both parties filed Motions and Memorandums for Summary Judgment and did argue their respective positions to the Court. The transcript of that argument appears as a part of the Appendix to this proceeding. App. 467-540. On April 16, 2019, Judge Paul T.

Farrell, sitting as the Presiding Judge of the Business Court Division of the Circuit Court of Harrison County, West Virginia, made his ruling in favor of the Respondent. Thereafter, on May 10, 2019, at the request of the parties in order to allow for an immediate appeal of his decision, the Circuit Judge entered his "Amended Order Granting Plaintiff Riley's Motion for Summary Judgement and Denying Defendant's Motion for Summary Judgment on Findings of Fact and Conclusions of Law" (the "Order"). App. 1. In those Orders the Court denied Petitioner any relief.

As required by the Order, the parties conferred and agreed upon the amount of damages which the Respondent was entitled to recover of and from the Petitioner based upon the Circuit Court's findings and conclusions. The Circuit Court then issued a money judgment in favor of the Respondent and against the Petitioner in the amount of Five Million, Five Hundred Thirty-Eight Thousand Three Hundred Fifty-One Dollars and Thirty Seven cents ($5,538,351.37). App. 463-65.

B. STATEMENT OF THE RELEVANT FACTS

In late March and early April of 2008, Dominion Transportation ("DTI"), asked for an expression of interest of gas producers and others in their ability to deliver and fill the firm transportation capacity ("FT") which DTI projected to have available on the Dominion pipeline system. DTI was planning to construct 109 miles of pipeline and add or upgrade some of its existing compressor stations. This project was called DTI's Appalachia Gateway Project Facilities and was to be in service by November of 2010. App. 142; 145.

On or about August 1, 2008, Petitioner Northstar as "Seller" and Respondent Riley as "Purchaser" entered into an Agreement dated August 1, 2008, wherein Respondent agreed to

purchase and receive, and Petitioner agreed to sell and deliver, natural gas in accordance with a series of Term Sheets to be issued by Respondent to Petitioner (the "Agreement"). App. 73.[1]

The Agreement described the "Delivery Point(s)" for the gas sold by Petitioner to Respondent by providing that "[t]he point of sale and Delivery Point(s) shall be the Meter(s) as set forth in the applicable Term Sheet." Agreement, ¶4, App. 74. The Term Sheet attached to the Agreement as Exhibit A, and later Term Sheets for subsequent periods, provide that the Delivery Point for the sale of the gas production from Petitioner to Respondent, that is, the point where Respondent took title to and control of the gas from Petitioner, was and is Meter #215530, known as the Northstar Energy Corporation Carbon Fuel interconnection into the Dominion Transmission Pipeline identified as pipeline TL-263 near Chelyan in Kanawha County, West Virginia at Slaughter's Creek. App. 78; 317-31; 374-449. The costs for the installation of the gas line tap into the Dominion Transmission TL-263 pipeline, and the purchase price of the meter and its installation were paid for by Petitioner in 1999. Deposition of James Abcouwer, p. 19, ll. 5-8, App. 240.

The Agreement, and the Term Sheets which were incorporated as a part of the Agreement, were clear in setting forth the amounts and which party (that is, either the seller or the buyer under the Agreement) would pay the charges which were imposed for transportation and other costs for gas sold by Petitioner to Respondent and delivered pursuant to the terms of the Agreement. Agreement, ¶2, App. 73. Among the charges set forth in the Agreement were separate charges for transportation, which either were borne by the Respondent as the purchaser under the Agreement, if the Delivery Point of the natural gas it purchased was not delivered

[1] The Agreement appears numerous times in the Appendix, as attachments to various documents, including the Amended Complaint, and both parties Motions for Summary Judgment. Petitioner will utilize the initial appearance when citation to the Agreement in the Appendix is called-for.

directly into the Dominion Transportation Appalachia Gateway pipeline system, as Petitioner contends. *Id.*

Any transportation of gas upon any pipeline system (which does not belong to the owner of the pipeline system) is performed under some contract or other agreement relating solely to the transportation of that gas. Such a contract is separate and apart from the contract between the producer (in this case Petitioner) and the purchaser (in this case Respondent) who becomes the shipper of the gas following its purchase of the gas at the receipt point. Following the sale at the receipt point the producer (Petitioner) no longer has any responsibility, or "say" in the movement of the gas or its subsequent sale.

Respondent made specific provisions in its Agreement with Petitioner for the responsibility for the payment of the costs to transport the gas to an end user or subsequent purchaser. The Agreement recognized that two alternative scenarios were possible. First, gas could be delivered into the existing Dominion Transmission pipeline system and thus was not a part of the newly-constructed DTI Appalachia Gateway Project Facilities. In such a circumstance the "pricing" provisions of the Agreement provided that Respondent, as the purchaser of the gas under the Agreement, would be responsible for the payment of the transportation cost "downstream" of the Delivery Point. *Id.*, ¶2(b).

Second, gas could be delivered into the newly-constructed DTI Appalachia Gateway Project Facilities. In such a circumstance the "pricing" provisions of the Agreement provided that Petitioner would be responsible for the payment of the transportation cost "downstream" of the Delivery Point. *Id.*, ¶2(a).

These provisions of the "Price" paragraph of the Agreement entitled "Price" sets forth how these transportation costs would be borne as follows:

> Seller and Purchaser agree to the Price at the Delivery Point(s) as set forth in the applicable Term Sheet, as such Price may be amended from time to time by mutual agreement of the parties or otherwise amended as set forth in this Agreement in the Term Sheet. Seller shall be responsible and liable for all charges of any kind upstream of the Delivery Point(s) . . . In addition, charges downstream of any Delivery Point(s) shall be borne as follows:
>
> (a) for any Delivery Point(s) not into DTI's Appalachia Gateway Project facilities, Purchaser shall be responsible and liable for payment of all charges that are Downstream of such Delivery Point(s); and
>
> (b) for any Delivery Point(s) into DTI's Appalachia Gateway Project facilities, the terms set forth on Exhibit B, "ADDITIONAL TERMS FOR ANY DELIVERY POINT(S) INTO DTI'S APPALACHIA GATEWAY PROJECT FACILITIES" Shall also apply."

Agreement, ¶ 2, App. 73.

Under the Agreement Respondent designated a Delivery Point which determined whether or not the gas moved through the new DTI Appalachia Gateway Project Facilities. Prior to the inception of service under this new contract, Respondent indicated that the Delivery Point would be into a Texas Eastern pipeline, or variously into points such as at Southpointe in western Pennsylvania. Such designation, when the service began, would have triggered provision 2(b) of the contract written by Respondent. App. 142, 145. However, the Agreement and the Term Sheets designated the Delivery Point for the sale of the gas differed from these pre-contract discussions, a vital point which was overlooked and misunderstood by the Court below. Agreement, Ex. A., App. 78.

Instead, on every Term Sheet Respondent designated the Delivery Point for the sales of Petitioner's gas to Respondent as Mid Meter #215530 at Chelyan, in Kanawha County, West Virginia, which triggered provision 2(a) of the Agreement. App. 78; 317-31; 374-449. The Petitioner produced, then delivered and sold the gas to Respondent, and Respondent purchased the gas, at Meter #215530 on Dominion's pre-existing pipeline TL-263 from 2008 until

November 2015, when Respondent refused to purchase Petitioner's gas due to its high btu content. Deposition of James Abcouwer, pp. 143, l. 12, through p. 145, l. 24, App. 271.

The price paid by Respondent for the gas purchased from Petitioner continued to fall to a point where Petitioner's very existence was jeopardized. Upon receipt of the latest Term Sheet the Petitioner's chief executive officer examined the documents more closely and discovered that, if Petitioner was not satisfied with the proposed price, then it could terminate the Agreement. At this point the price paid per dekatherm by Respondent for the purchase of Petitioner's gas had dropped from $9.10 in early 2009 to $1.104 during November, 2015.

Petitioner then realized that, because the gas sold to Respondent was not delivered into the newly-constructed DTI Appalachia Gateway Project Facilities, the transportation cost for such gas, under paragraph 2(a) of the Agreement, was the responsibility of Respondent and not Petitioner. Agreement, ¶2(a), App. 73.

Petitioner also realized that the Delivery Point under the Agreement was not into DTI's newly constructed DTI Appalachia Gateway Project Facilities, but was instead into the very same pipeline, and at the very same meter, where it had delivered natural gas since Petitioner paid for the installation of the tap and meter in 1999. Petitioner had been paying Respondent for transporting gas through the Dominion Transportation System when, under the Agreement, it was the Respondent, as the purchaser, who was to bear such a cost. *Id.*, ¶2(b), App. 73.

On December 7, 2015, Petitioner received the December 1, 2015 Term Sheet. Petitioner's counsel by tele-copy advised Respondent of its request that the Agreement be terminated in accordance with the provisions of paragraph numbered 3 of the Agreement. App. 371. The Agreement provides that the Agreement shall be terminated upon the making of such a "request" for termination, and the provisions of paragraph numbered 3 of the said Agreement

provide that termination shall be effective on the last day of the third calendar month following the month that Respondent received Petitioner's written notice. Agreement, ¶ 3, App. 74.

III. SUMMARY OF ARGUMENT

The Petitioner believes that the Circuit Court misinterpreted the terms of the written Agreement between these parties in a number of ways.

First, the Court found that the Agreement was a marketing agreement, when the terms of the Agreement clearly and unambiguously state that the Petitioner agreed "to sell and deliver" natural gas which it produced to the Respondent, which it did "agree[] to purchase and receive." Agreement, Introductory Paragraph, App. 73.

The Agreement contained all of the indicia of a contract between parties for the sale of a commodity. It set forth a description of the commodity to be sold, the place where it was to be delivered to the buyer (the Respondent), how the price would be determined, when and how payment was to be made, and the nature of any warranty which attached to the product sold. App. 73-75.

For the Circuit Court to misconstrue the Agreement as one for the marketing of the natural gas to be sold and purchased was clearly erroneous. Unfortunately, the error of this initial finding caused additional errors to follow.

Second, the Circuit Court erroneously found that the point of sale or, as it is designated in the Agreement, the "Delivery Point" for the sale of the Petitioner's natural gas to the Respondent was at Oakford, Pennsylvania. Abundant evidence was provided by both parties that the Agreement specified that the "Delivery Point" for the natural gas to be sold was at a specific measurement meter which the Petitioner had paid to be installed on a Dominion Transmission pipeline at Cheylan, in Kanawha County, in the 1990s. Agreement, ¶ 4, App. 74; 488-89.

This error was, in turn, based upon the Circuit Court's consideration of a series of pre-contract information provided by the Respondent to other producers during the period when the Respondent was negotiating for other gas purchase contracts. However, the Petitioner's chief executive officer testified that he had never seen those materials. App. 268.

While the Circuit Court's reliance upon the documents was erroneous based upon well-established principles of contract law, it was especially egregious when there was unrefuted testimony that the Petitioner's management had never seen or reviewed the documents. Deposition of James Abcouwer, p. 130, ll. 3-18; p. 131, ll. 2-23; p. 132, l. 3; p. 133, l. 2, App. 268.

As a result, the findings of the Circuit Court were in error both as findings of fact and as conclusions of law, and the Summary Judgment Order into which they were included must be reversed.

The Circuit Court found and held that, because the Petitioner had not contested the Delivery Point for the sale of the natural gas it produced and sold to the Respondent during the short three years in which the Agreement had been operational, it could not contest the charges which were imposed by the Respondent for the transportation of the natural gas. The Petitioner's Counterclaims asserting these issues were made in this litigation within a three year period and immediately upon learning of what it believed to be unsupported charges. Such assertions were well within the applicable statute of limitations for contracts under West Virginia law, and were asserted in response to the Respondent's collection Complaint. App. 49-54, 92-98. The Circuit Court's ruling that Petitioner could not assert them as a defense to the Complaint filed against it was an error of law which must be reversed by this Court.

Lastly, the Circuit Court found that the Petitioner had no right to terminate the

Agreement. The Petitioner demonstrated the factual and legal bases within the Agreement which gave it such termination rights. As noted above, the Circuit Court's erroneous findings and conclusions as to the "Delivery Point" for the natural gas sold to the Respondent were the cause for this erroneous finding.

This matter should be remanded to the Circuit Court with this Court finding that the Agreement was a sales contract and not a marketing agreement between the parties. This Court should simply apply the unambiguous terms of the Agreement to find that the Delivery Point for the natural gas sold to the Respondent was at a pre-existing pipeline connection in Kanawha County, West Virginia and not into newly-constructed pipeline facilities in Western Pennsylvania, thereby relieving the Petitioner of transportation charges imposed upon it by the Respondent, and allowing it to terminate the Agreement when its terms became uneconomical, as was the Petitioner's right under the Agreement.

IV. STATEMENT REGARDING ORAL ARGUMENT

This matter should be set for argument pursuant to Rule 20 of the Rules of Appellate Procedure because of the importance of the issues which are presented: issues of contract interpretation but involving the plain reading and application of the terms of an unambiguous contract by the Circuit Court, which contract was erroneously construed and resulted in a verdict against the Petitioner in the amount of Five Million, Five Hundred Thirty-Eight Thousand Three Hundred Fifty-One Dollars and Thirty Seven cents ($5,538,351.37) .

V. ARGUMENT

A. STANDARD OF REVIEW

Petitioner asserts that the Circuit Court erred in granting Summary Judgment to the Respondent, and in holding the Petitioner liable to the Respondent for money damages as a

matter of law. The Court reviews a circuit court's entry of summary judgment *de novo*. *Painter v. Peavy,* 192 W.Va. 189 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*.").

"The interpretation of [a] contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment, shall be reviewed *de novo* on appeal. *Riffe v. Home Finders Associates, Inc.,* 205 W.Va. 216, 517 S.E.2d 313 (1999), Syl. Pt. 2.

Additionally, Respondent challenges the Circuit Court's conclusion of law which resulted in a money judgment against it in the amount of Five Million, Five Hundred Thirty-Eight Thousand Three Hundred Fifty-One Dollars and Thirty Seven Cents ($5,538,351.37) because that judgment was founded upon the Court's summary judgment ruling. App. 463-65. "Generally, findings of fact are reviewed [by this Court] for clear error and conclusions of law are reviewed *de novo*. However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo." State ex rel. Cooper v. Caperton,* 196 W.Va. 208, 470 S.E.2d 162 (1996), Syl. Pt. 1.

B. ASSIGNMENTS OF ERROR

1. The Agreement Between the Parties was For the Sale of the Petitioner's Natural Gas Production to Respondent And Not a Marketing Agreement.

Prior to 2008 Petitioner was engaged in the business of producing natural gas and selling such gas to the Respondent. On August 1, 2008 the parties executed a written Agreement which stated that Respondent "agrees to purchase and receive" and Petitioner "agrees to sell and deliver" to Respondent natural gas according to the terms of their Agreement, its exhibits and the applicable executed Term Sheet (the "Agreement"). Agreement, Introductory para., App. 73.

It is true that Respondent is engaged in the business of buying, selling, and marketing natural gas. However, contrary to Judge Farrell's findings, the primary purpose of the Agreement was not to facilitate the marketing by Respondent of Petitioner's natural gas; instead the primary purpose of the Agreement was to govern the purchase and sale of the Petitioner's natural gas to the Respondent. *Id.*.

Although there is no mention of the word "marketing" anywhere in the Agreement, Judge Farrell's ruling references the term numerous times, and he went on to find that the parties entered into the Agreement for the primary purpose of facilitating the purchase, sale and **marketing** of Petitioner's natural gas into the DTI Appalachia Gateway. *See*, Order, Findings of Fact, Section A, ¶¶ 3, 4 and 10, App. 2-3. However, Judge Farrell found that

> It is undisputed that RNG and Northstar entered the Agreement for the purchase, sale and **marketing** of Northstar's natural gas by RNG into DTI's Appalachia Gateway Project Facilities, and for Northstar's corresponding payment to RNG of Gateway Charges.

Id., Section B, ¶ 60, App. 11. Emphasis added. This finding is clearly erroneous, as the overwhelming evidence shows that the Agreement between the parties was one for the sale of natural gas by Petitioner to Respondent, and was not a "marketing agreement."

In making that finding the Court ignored those essential attributes of the Agreement which make it a contract for the sale and delivery of the product. The Agreement states that Petitioner "agrees to sell and deliver" to Respondent natural gas, and that Respondent "agrees to purchase and receive" such natural gas so delivered. Agreement, Introductory para., App. 73.

As anyone drafting a sales contract would expect to do, the parties' Agreement sets forth the quantity of the product—the natural gas—to be delivered and sold, and received and purchased, by the respective parties. Like so many other provisions of the Agreement it does so

by reference to a "Term Sheet," which sheets were provided by the Respondent to the Petitioner on a more or less monthly basis. *Id.*, ¶ 1, App. 73.

The Agreement specifies the "point of sale" of the natural gas to be delivered thereunder, and provides that "[t]itle to the Gas shall pass to and vest in [Respondent] at the point of sale." Until it reaches the point of sale the risk of loss of the gas to be delivered is on the Petitioner. The "point of sale" is named the "Delivery Point" in the Agreement, and is stated to be "the Meter(s) as set forth in the applicable Term Sheet." *Id.*, ¶ 4, App. 74.

The Petitioner, as the Seller in the Agreement, "warrants generally its title to all Gas delivered by it," as well as that it has the right to sell the same and that it is free of all liens and adverse claims. *Id.*, ¶ 8, App. 75.

The Agreement also sets forth the price to be paid by the Respondent to the Petitioner for the natural gas to be sold and purchased thereunder. Once again, it does so by reference to the "Term Sheet" to be provided by the Respondent to the Petitioner. *Id.*, ¶ 2, App. 73.

The Agreement sets forth a mechanism for the providing of statements setting forth the volumes of gas sold thereunder, as well as the time and method of payment. *Id.*, ¶ 6, App. 74.

Among a number of other provisions, the Agreement also sets forth the "term" or length of the Agreement, although the parties differ in its interpretation. *Id.*, ¶ 3, App. 74. Their disagreement is among the issues set forth *infra*. *See,* discussion at part 4 hereof.

The Agreement also specifies that it is to be governed by West Virginia law. *Id.*, ¶ 11, App. 75.

Any "marketing" of the Petitioner's natural gas was not as a result of the Respondent's obligation to do so under the Agreement. Under the terms of the Agreement, the Respondent took title to the natural gas at the Delivery Point specified in the Agreement, Agreement, ¶ 4,

Appendix 74, that is at Meter #215530 at Chelyan in Kanawha County, and it was at that point that the price to be paid by the Respondent to the Petitioner for the gas so sold was determined.

The price was determined in advance for the specified period which appeared upon each of the Term Sheets provided by Respondent to the Petitioner. Some prices were a sum certain, such as so much per dekatherm, and others were tied to an index, such as the "'Gas Daily' Daily Index" price less $0.10 for a specified period. *See, e.g.,* App. 420.

Any "marketing" to be done by the Respondent would not benefit the Petitioner—it could not receive a higher price that that set forth in the Term Sheet – although apparently the Circuit Court believed otherwise. However, the Respondent could derive a profit from such marketing efforts on its own behalf by obtaining a higher sales price in the marketplace than that which it had agreed to pay Petitioner, for the gas which Respondent was able to sell downstream of the Delivery Point.

Nowhere in the Agreement did the Respondent agree to undertake efforts to market the Petitioner's gas, and the Agreement is silent as to how Respondent was to be compensated for any such efforts. Any such "marketing agreement" must set forth those terms, and the Agreement failed to address any marketing terms in any way whatsoever.

Under West Virginia law, "the function of a court is to ascertain the intent of the parties as expressed in the language used by them" in their contract. *Davis v. Hardman,* 148 W.Va. 82, 89, 133 S.E.2d 77, 81 (1963). In doing so, the courts must read contracts "as a whole, taking and considering all the parts together." *Maddy v. Maddy,* 87 W.Va. 581, 105 S.E. 803 (1921), pt. 1, syllabus.

This Court has said that, reading the contract as a whole, a court interpreting a written agreement must be mindful that "specific words or clauses . . . are not to be treated as

meaningless, or to be discarded, if any reasonable meaning can be given them consistent with the whole contract." *Dunbar Fraternal Order of Police, Lodge No. 119 v. City of Dunbar,* 218 W.Va. 239, 244, 624 S.E.2d 586, 591 (2005) (per curiam).

The Petitioner submits that the Circuit Court ignored this guidance, and instead substituted its view and "discarded" the clearly-articulated words which, when read as a part of the entire Agreement, made it internally consistent.

A circuit court's finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Board of Education v Wirt*, 192 W.Va. 568, 579 n. 14, 453 S.E.2d 402, 413, n. 14 (1994), *quoting United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766 (1948).

> Clear error (and all its variants in legal language) describe a mistake of law, procedure, or evidence, that is sufficiently apparent that there can be little or no doubt that the deciding court . . . made a mistake. The differences between the various phrases expressing clear error matter, because each one is used in different contexts and case law. Even so, the primary inquiry in each case is whether the effect of the mistake, for one reason or another, requires reversal."

The Wolters Kluwer Bouvier Law Dictionary Desk Edition. 2012.

The lower Court's finding that the Agreement between the parties was also a "Marketing Agreement" is clearly erroneous, and was the cause of additional errors. Because the Court's Order makes findings which ignore the essence of the Agreement as a contract for the sales and purchase of a commodity the same must be reversed by this Court.

2. The Delivery Point for The Gas Produced and Sold By Petitioner To Respondent Was Designated In Each Contract Term Sheet To Be At Chelyan, Kanawha County, West Virginia, and Not at Oakford, Pennsylvania

The Agreement between the parties, wherein Respondent "agrees to purchase and receive," and Petitioner "agrees to sell and deliver," the natural gas produced by Petitioner, has a specific provision which controls the Delivery Point of the gas. Paragraph numbered 4 of the Agreement specifies the location where Respondent would take title to the gas sold by Petitioner. This paragraph provides as follows:

> 4. Delivery Point(s)
>
> The point of sale and Delivery Point(s) shall be the Meter(s) as set forth in the applicable Term Sheet. Title to the Gas shall pass to and vest in purchaser at the point of sale. As between the parties hereto, Seller shall be deemed to be in exclusive control and possession of Seller's Gas. . . until the same shall have been delivered to Purchaser at the point of sale and Delivery Point(s) referenced in this Paragraph 4, after which Delivery Point(s) Purchaser shall be deemed to be in exclusive control and possession thereof . . .

App. 74.

Petitioner believes beyond any doubt that this language of the Agreement clearly sets forth that the price for the natural gas produced by Petitioner and sold to Respondent shall be determined by reference to the "Meter" set forth "in the applicable Term Sheet." Agreement, ¶2, App. 73. Such a Term Sheet was attached to and made a part of the Agreement at the time of its execution, Appendix 78, and subsequent Term Sheets were provided by the Respondent to the Petitioner on an irregular basis: sometimes monthly, sometimes more or less frequently.

A number of such Term Sheets were produced by the parties during the discovery phrase of the litigation. Each of the Term Sheets specified the same Meter; all specified that the Delivery Point of the gas to be Meter #215530, also known as the Carbon Fuel interconnection

into the Dominion Transmission Pipeline TL-263 at Chelyan in Kanawha County, West Virginia near Slaughter's Creek. App. 78; 317-31; 374-449.

Under the Agreement this Delivery Point is the "point of sale" of the natural gas to be delivered thereunder, and provides that "[t]itle to the Gas shall pass to and vest in [Respondent] at the point of sale." Agreement, ¶4, App. 74. This Delivery Point is the place where Respondent took title to, and control of, the gas which it purchased from Petitioner.

The governing Term Sheet attached to the Agreement as Exhibit A, and later Term Sheets for subsequent periods, all state that the Delivery Point for the sale of the gas production from Petitioner to Respondent is at the aforesaid Meter #215530 located at Cheylan, Kanawha County, West Virginia. None of the Term Sheets—which the Agreement provides are the instruments governing where the natural gas is sold and purchased by the parties—reference either the Appalachia Gateway Facilities or DTI's Oakford Interconnection with Texas Eastern Transmission, LP or Oakford, Pennsylvania, as being the Delivery Point.

A comparison of the Term Sheet at Appendix 408 (prior to the completion and commencement of operations of the DTI Appalachia Gateway Project Facilities) with that appearing at Appendix 410 (the first Term Sheet for the commencement of the operation of the DTI Appalachia Gateway Project Facilities), reveals that neither the Delivery Point (at Meter 2155301) or the pipeline system ("Into Dominion") have changed. The point of sale and the system into which the gas is delivered have remained the same, both being the same as they were before Dominion Transmission's Appalachia Gateway Project Facilities became operative.

This Court has held that "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction on interpretation but will be applied and enforced according to such intent." *Arnold v. Palmer*, 224

W.Va. 495, 503, 686 S.E.2d. 725, 733 (2009). "When a written contract is clear and unambiguous[,] its meaning and legal effect must be determined solely from its contents[,] and it will be given full force and effect according to its plain terms and provisions. Extrinsic evidence of the parties to such contract, or of other persons, as to its meaning and effect will not be considered." *Capitol Chrysler-Plymouth, Inc. v. Megginson*, 207 W.Va. 325, 532 S.E.2d 43 (2000), Syl. Pt. 4.

There can be no doubt that the clear and unambiguous provisions of the Agreement between these parties specifies the Delivery Point of the gas, and for the Circuit Court to hold otherwise was error.

a. The Circuit Court wrongly relied upon Pre-Contract Documents and Negotiations In Determining the Delivery Point under the Agreement

The Circuit Court was presented by the Respondent a number of materials relating to pre-contract negotiations between these parties, as well as a contract between the Respondent and DTI, the pipeline through which it planned to transport the gas it purchased from the Petitioner. Respondent contended that these documents and materials demonstrated that the Delivery Point for the natural gas which Petitioner produced and sold to the Respondent was delivered to it at Oakford, Pennsylvania, and not at the location set forth in the Agreement.

The period of these negotiations, and the documents which they exchanged, covered a period of some 4 months prior to the execution and delivery of the Agreement. Some of these materials referenced a delivery point for natural gas moving upon the DTI pipeline system from points in West Virginia to a point in Oakford, Pennsylvania. Ex. 4 and 5 to Resp. Motion For Summary Judgment, App 144-150.

During the discovery phrase of the litigation between the parties Northstar's chief executive officer's deposition was taken. He testified in response to a series of questions that he did not recall seeing any of these pre-contract presentations or reviewing pre-contract documents during negotiations, such that no matter what their content might be, they were irrelevant to the Circuit Court's consideration of the issues. Deposition of James Abcouwer, p. 130, ll. 3-18; p. 131, ll. 2-23; p. 132, l. 3; p. 133, l. 2, App. 268. This information was provided to the Circuit Court to provide the factual basis which supported Petitioner's legal contention that the Circuit Court could not utilize any pre-contract negotiations to explain an unambiguous contract, especially where the contract's terms were clear upon its face.

In addition to the bar of the parol evidence rule, in light of Mr. Abcouer's statements that he did not recall seeing these exhibits before entering into the Contract they served no purpose and could not have been considered by the Circuit Court in any way.

The document upon which the Court below relied to find that the "Delivery Point," or as he sometimes referred to it, the "Receipt Point," was styled as a "Non-Binding Request Form" between Petitioner and Dominion Transmission which was sent to Dominion on April 24, 2008. App. 143. Consideration of this **Non-Binding** Request Form was error by the Circuit Court. Petitioner never entered into any agreement with Dominion for the natural gas it produced and sold to the Respondent. Clearly, the transaction which might have been contemplated at this point—over three months prior to the entry by the Petitioner and the Respondent, not Dominion Transmission, into the Agreement, never came to be.

For the Circuit Court to utilize this transaction and the documents which relate to it in its interpretation of the Agreement was erroneous.

In addition, the Circuit Court conflated the receipt point for the natural gas sold by the Petitioner to the Respondent under the Agreement with the point where the Respondent then sold the gas for its own account or made a further delivery of the gas which it had purchased at Chelyan.

Unfortunately, the Circuit Court utilized them to interpret one of the essential terms of the Agreement between the parties: An Agreement which was unambiguous and required no such interpretation.

All of the documents were irrelevant and should not have been considered by the Court in making its findings and rulings. The use of such pre-contract negotiations are barred under the so-called "parol evidence" rule and cannot be considered by this Court in reviewing and applying the terms of an otherwise unambiguous written agreement. This Court has made this position very clear:

> The general rule that all prior negotiations are merged in the written contact finally agreed upon and apparently complete and unambiguous, and that parol evidence is not admissible to add to or vary its terms, is well settled. Likewise as a general rule, parol testimony is not admissible to contradict or vary the terms of a written instrument, either by attempting to show prior negotiations or a contemporaneous oral agreement. The rule is not one of evidence merely, but strictly speaking one of substantive law. Elliott on Contracts, Com. Sup. 1913-1923 Sec. 1621.

Jones v. Kessler, 98 W.Va. 1, 16, 126 S.E. 344, 350 (1925).

The Circuit Court's ruling on this issue, and utilizing these documents and negotiations as the basis for the findings and conclusions contained within the Order granting Respondent Summary Judgment, constitute error and the decision of the Circuit Court must be reversed.

3. Petitioner Did Not Unduly Delay in Contesting the Charges Imposed by Respondent, or Issues Involving the Delivery Point Until the Filing of Respondent's Complaint.

The Circuit Court was clearly erroneous in finding that because the Petitioner had not previously contended, prior to the filing of its pleadings in the underlying case, that the Delivery Point for the sale of natural gas purchased by Respondent was at some other location than Pennsylvania, the Petitioner could not contest the charges imposed by Respondent. In addition, the Court held that the Petitioner could not contest that the Delivery Point was at the meter near Chelyan, Kanawha County, West Virginia, the meter designated in the Term Sheets issued by the Respondent. Order, ¶73, App. 14.

The Circuit Court's Order stated that "At no time prior to being sued in this matter did Northstar assert that the Delivery Point was other than at Oakford, Pennsylvania" and that "Northstar never alleged the Delivery Point was anywhere other than into the DTI Gateway until it responded to the Complaint alleging breach of the Agreement." Order, ¶¶ 32, 38, App. 6-7.

The Court further found ". . . it is undisputed that, prior to responding to RNG's complaint, Northstar never suggested to RNG that it believed the Delivery Point was anywhere other than into the DTI Gateway." *Id,*

Petitioner had no reason or cause to contest the Delivery Point for the gas it produced and sold to the Respondent until the occurrence of two events which, in combination threatened its existence. The first of these occurred over time, and that was the decreasing price for the gas which Petitioner was receiving from the Respondent for the gas so sold and purchased under the Agreement.

Indeed, the combination of the fees charged by Respondent essentially meant that Petitioner received no monies with which to pay its operating expenses. It could also not pay the

royalties due to the landowners under the very leases allowing Petitioner to operate upon their land, because those royalties were calculated based upon the gross sales price, before the fees were deducted from that price by the Respondent.

The second factor which caused Petitioner to closely scrutinize its Agreement with Respondent occurred when Dominion Transportation refused to accept into its pipeline system the gas Petitioner was selling to Respondent because of its high btu content. In other words, even though Petitioner had gas to sell to Respondent, the pipeline system through which Petitioner was delivering the gas it sold refused to transport it. Deposition of James Abcouwer, pp. 143, l. 12, through p. 145, l. 24, App. 271.

Nonetheless, Respondent continued to charge Petitioner transportation and other fees.

Although the Circuit Court did not specify the legal theory upon which it relied to hold that the Petitioner could not contest either the Delivery Point for the sale of its natural gas to the Respondent, it would appear that there are only two such theories available in light of the procedural posture of this matter. Those two theories would be waiver or laches. The Petitioner believes that neither theory would provide support to the Circuit Court in denying the Petitioner relief.

This Court has held that

> [T]o establish waiver there must be evidence demonstrating that a party has intentionally relinquished a known right.[2] This intentional relinquishment, or waiver, may be expressed or implied. However, where the alleged waiver is implied, there must be clear and convincing evidence of the party's intent to relinquish the known right. Furthermore, the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.

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[2]"There is no requirement of prejudice or detrimental reliance by the party asserting waiver." *Potesta v. U. S. Fidelity & Guar. Co.*, 202 W.Va. 308, 316, 504 S.E.2d 135 143 (1998). "While we believe we have adopted the better rule, we recognize that some courts have apparently adopted alternate rules that require a showing of prejudice." 202 W. Va. at 317 n.13, 504 S.E.2d at 144 n.13.

Potesta, 202 W. Va. at 315, 504 S.E.2d at 142 (citations omitted).

Here the Petitioner has alleged that its failure to assert any claims was based upon a change in circumstances, e.g., the changing economic conditions which caused it to look carefully at the terms of the contracts under which it operated. Consequently, it was unaware of the specifics of those contracts and, thus, could not have intentionally relinquished its right to contest those terms or to seek relief from them. Given these facts, there is no reasonable basis for the Circuit Court to have found the existence of waiver and thereby preclude it relief.

A second possible ground upon which the Circuit Court might have relied is laches.

> Modern decisions have somewhat changed the original theory of laches, and time alone is not now considered a controlling factor in the application of the doctrine. It has been defined as such neglect as leads to a presumption that the party has abandoned his claim and declines to assert his right.
>
> > "It is delay in the enforcement of one's rights as works a disadvantage to another; or, such delay without regard to the effect it may have upon another as will warrant the presumption that the party has waived his right."
>
> 6 Digest, Va. & W.Va. 602.

Hoffman v. Wheeling Savings & Loan Association, et al, 133 W.Va. 694, 707, 57 S.E.2d 725, 732 (1950).

This Court has held to a more modern theory that delay alone will not ordinarily constitute laches.

> "The general rule in equity is that mere lapse of time, unaccompanied by circumstances which create a presumption that the right has been abandoned, does not constitute laches. Syllabus Point 4, *Stuart v. Lake Washington Realty Corporation*, 141 W.Va. 627, 92 S.E.2d 891 (1956)."

Carlone v. United Mine Workers of America Welfare and Retirement Fund, 161 W.Va. 351, 242 S.E.2d 454 (1978) Syl. Pt. 3.

The failure of the Petitioner to assert any claims prior to the commencement of the litigation below is based on a change in circumstances, e.g., newly discovered information, and as such laches cannot bar its claims. In other words, without knowledge of this new information, it was reasonable for the Petitioner to not assert its claims. Furthermore, the facts do not indicate that the Respondent would suffer any prejudice or hardship because of the Petitioner first asserting its claims in response to the Respondent's collection action, and thus were not untimely.

The only remaining prohibition for the contesting of the charges of other claims which Petitioner had determined existed, including wrongful transportation charges made by the Respondent because the Delivery Point was not into the newly constructed DTI Appalachia Gateway Project Facilities would have been the bar of the Statute of Limitations.

This litigation is an action for breach of contract. West Virginia *Code* §55-2-6 states that the time limit to within which such an action must be brought is ten years from the date of the breach.

> Every action to recover money . . . on any contract other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have accrued, that is to say . . . within ten years.

Here the improper charges for the transportation component were first charged to Petitioner by Respondent in September of 2012. This can be discerned by comparing the Term Sheet at Appendix 408 (prior to the completion and commencement of operations of the DTI Appalachia Gateway Project Facilities) with that appearing at Appendix 410 (the first Term Sheet for the commencement of the operation of the DTI Appalachia Gateway Project Facilities).

Moreover, until those changes were incurred Petitioner had no reason to begin to examine both the charges being made and the operations of the pipeline system.

As a general rule, the statute of limitations commences to run against a cause of action at the time it accrues. *Cann v. Cann*, 40 W.Va. 138, 20 S.E. 910, 1894 W. Va. LEXIS 25 (1894); *Pickens v. Coal River Boom Co.*, 66 W.Va. 10, 65 S.E. 865, 1909 W.Va. LEXIS 117 (1909).

Syllabus point 2 of *Steeley v. Funkhouser*, 153 W.Va. 423, 169 S.E.2d 701 (1969) holds that "The general rule is that a statute of limitations commences to run on a cause of action when the right to institute an action thereon arises." *See*, *State ex rel. Magun v. Sharp*, 143 W.Va. 594, 103 S.E.2d 792, 1958 W.Va. LEXIS 35 (1958). Here, the DTI Appalachia Gateway Project Facilities were not completed until September, 2012.

The matter of *Harris v. Cnty. Comm'n of Calhoun Cnty.* 238 W.Va. 556, 797 S.E.2d 62, 2017 W. Va. LEXIS 69 (2017) concerned a retired county employee who sued the defendant county commission for breach of contract regarding his contractual pension rights. In a discussion of statute of limitations the Court quoted Richard A. Lord, *Williston on Contracts* §79:14 (4th ed. 2004):

> The general rule governing the commencement of the running of the statute of limitations is that the statutory period is computed from the time when the right of action that the plaintiff seeks to enforce first accrued; ordinarily, in an action based on a contract, accrual occurs as soon as there is a breach of contract, with some courts qualifying this by stating that accrual occurs when the promisee discovers or should have discovered the breach, and others stating that accrual occurs upon breach, whether or not the promisee is then aware of the breach.

238 W.Va. at 561, 797 S.E.2d at 67.

The Agreement executed between the parties was dated August 1, 2008. The initial charges by the Respondent for transportation charges based upon Respondent's position that the Delivery Point was into the DTI Appalachia Gateway Facilities were first made in September of

2012. Clearly, Petitioner's claims did not accrue until that time, and it first asserted its claims in a timely way.

Respondent filed its suit in 2015, well within the ten year period, and within three years of the initial charges, Petitioner filed its Counterclaims, so there can be no question as to the Petitioner's timely right to file a Counterclaim as to the charges and the Delivery Point under the Agreement. The Circuit Court's findings and conclusions of law that the Petitioner was precluded from asserting or contesting in the litigation its claims that the contract interpretation and transportation charges incurred by the Respondent were wrong is clearly erroneous and must be reversed by this Court.

4. The Contract Between the Parties Allows for Termination, and Petitioner Elected to Terminate the Agreement

The Petitioner's notice terminating the Agreement that was sent to the Respondent in December, 2015, was made ineffective when the Circuit Court denied the Petitioner's relief in its Order granting Respondent's Motion for Summary Judgment.

The Term Sheets issued under the Agreement make it clear that the Delivery Point of Petitioner's gas to Respondent was at Meter #2155301 and "into Dominion" or "Dominion Transmission" and not into the newly constructed DTI Appalachia Gateway Project Facilities. App. 78; 317-31; 374-449. This designation of where the natural gas would be delivered cannot have been an error on the part of the Respondent, which both prepared the Agreement and each Term Sheet delivered to the Petitioner pursuant to the Agreement.

There is no evidence that the Dominion Transmission Pipeline TL-263 at Chelyan in Kanawha County, West Virginia was updated or incorporated into the Appalachia Gateway.

In *New v. GameStop, Inc.* 232 W.Va. 564, 753 S.E.2d 62, 2013 W.Va. LEXIS 1230 (2013) Syl. Pt. 5, a case concerning an employment agreement and arbitration of workplace

disputes, our Supreme Court of Appeals adhered to the basic principle that "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation, but its terms will be applied and enforced according to such intent." quoting *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 262 (1962) Syl. Pt. 1; *Bennett v. Dove*, 166 W.Va. 772, 277 S.E.2d 617 (1981) Syl. Pt. 1.

The *Cotiga* Court ruled that "It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as express in unambiguous language in their written contract or to make a new or different contract for them." *Id.*, Syl. Pt. 3.

The later ruling in *Bennett* also found that if the contract language is found to be unambiguous then "it is the safest and best mode of construction to give words, free from ambiguity, their plain and ordinary meaning." *Bennett, supra*, Syl. Pt. 3.

As a result, contrary to the findings of the Court, Respondent's allegation that Petitioner cannot terminate the Agreement simply fails as being contrary to the plain language of the Agreement.

Contracts containing unambiguous language must be construed according to their plain and natural meaning. *Payne v. Weston*, 195 W.Va. 502, 466 S.E.2d 161 (1995) Syl. Pt. 4.

The "plain and natural meaning" of this Agreement is that Petitioner is entitled to terminate the Agreement, and it did so on December 7, 2015 in accordance with the provisions of paragraph numbered 3 of the Agreement. The termination was then effective on March 31, 2016, relieving Petitioner of any further liability to Respondent for any obligations under the Agreement. The Circuit Court misinterpreted the parties' Agreement and this Court must correct that error.

VI. CONCLUSION

This matter should be remanded to the Circuit Court with this Court finding that the Agreement was a sales contract and not a marketing agreement between these parties. This Court must simply apply the unambiguous terms of the Agreement to find that the Delivery Point for the natural gas sold to the Respondent was at a pre-existing pipeline connection designated by the Respondent in its documents as being in Kanawha County, West Virginia, and not into newly-constructed facilities in Western Pennsylvania, thereby relieving the Petitioner of improper transportation charges imposed upon it by the Respondent, and allowing it to terminate the Agreement when its terms became uneconomical as the Agreement gave it a right to do.

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