IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0506

WARRIOR OIL AND GAS, LLC,
and
WOG MINERALS, LLC,

Petitioners,

v.

BLUE LAND SERVICES, LLC

Respondent

BRIEF OF THE PETITIONERS

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3. The Circuit Court erred in prohibiting Defendants from offering evidence concerning the nature and quality of Blue's work.
4. The Circuit Court erred as a matter of law in awarding compound prejudgment interest calculated at the rate of 1.5% per month.

II. STATEMENT OF THE CASE

This case presents the Court with the opportunity to confirm West Virginia law regarding the appropriate measure of damages where a contractor sues to recover compensation for services rendered pursuant to a written contract and where the party contracting for the services claims the contractor's work product is deficient or substandard. This case also presents the Court with the opportunity to clarify its ruling in *Miller v. Wesbanco Bank,* 859 S.E. 2d 306 (W. Va. 2021); specifically, whether West Virginia Code §56-6-27 empowers a circuit court, sitting without a jury. to award prejudgment interest in a claim based on contract.

THE PARTIES

Petitioner, defendant below, Warrior Oil and Gas, LLC (hereafter "Warrior") is a Delaware limited liability company headquartered in Kingwood, West Virginia. Warrior is engaged in the business of buying and selling oil and gas rights primarily in north-central West Virginia. Petitioner, defendant below, WOG Minerals, LLC (hereafter "WOG") is a Delaware limited liability company likewise headquartered in Kingwood, West Virginia. Respondent Blue Land Services, LLC (hereafter "Blue Land") is a West Virginia limited liability company located in Morgantown. Blue

Land is engaged in the business of providing mineral title abstracting services.

FACTUAL BACKGROUND

On February 21, 2018, Blue Land and WOG entered into a Master Service Agreement ("MSA") whereby Blue agreed to provide certain title abstracting work at WOG's request on a per project basis and concerning oil and gas interests located in Monongalia County. Appx. 264. WOG would request that Blue perform title abstracting work by issuance of a "work order". The work order would designate the parcel to be abstracted, identified by reference to parcels on county tax maps prepared by the Monongalia County Assessor. Appx. 278-294.

The MSA identified two types of title reports WOG could request: a Title Ownership Report and a Cursory Ownership Report. Appx. 265. The MSA specified that if a Title Ownership Report was requested, WOG would pay for Blue could spend no more than seven days abstracting the designated parcel unless Blue received approval from WOG. The MSA further provided that if WOG requested a Cursory Ownership Report, Blue could not spend more than four days abstracting the designated parcel without WOG's approval. Appx. 265-66. Each work order contained a section to be completed when WOG approved additional time for a project. The MSA provided WOG would pay a flat fee of $2,800.00 for a Title Ownership Report and $1,600.00 for a Cursory Ownership Report. Appx. 265-66. Effectively, WOG would pay Blue a $400.00 "day rate" for Blue's title abstracting services.

Pursuant to the MSA, WOG issued eight work orders on February 26, 2018. Work orders 76, 77, 78, 79 and 80 issued on that date requested "Full Title" searches on five parcels located in Battelle District, Monongalia County. Appx. 278-86. Work

orders 81, 83 and 84 requested "cursory" title reports on three additional parcels located in Battelle District. Appx. 288-290. Blue Land produced undated title reports in response to these work orders, apparently delivering the same from February 28, 2018 to March 29, 2018. Appx. 319. Blue Land issued an invoice dated March 29, 2018 for the work performed on these work orders for $18,000.00. Appx. 345.

WOG claimed that Blue's work product was substandard. WOG claimed it convened a meeting at its headquarters in Kingwood attended by WOG's in-house counsel, other WOG representatives and representatives of Blue at which time WOG claims it brought the deficiencies to Blue's attention. Appx. 221-22. Blue denies that such meeting took place. Rather, Blue's claims its work was in conformity with the MSA and with industry standards and that WOG had no complaints regarding Blue's work. Appx. 193.

On April 20, 2018, WOG issued work orders 89 and 90. On April 24, 2018, WOG issued work order 91. Work orders 89, 90 and 91 requesting "cursory" title reports on three parcels located in Battelle District. Appx. 291-293.

On April 26, 2018, WOG issued work order 93 requesting an "explorative" report on the "Armstrong parcel". Appx. 294. Blue claims this project was performed pursuant to the separate oral agreement between Blue Land and WOG entered into around April 26, 2018. Appx. 201. Work order 93 authorized Blue to perform four days work on the assignment absent prior authorization from WOG. Appx. 294. Blue claimed that despite this language, WOG representatives authorized weeks' worth of additional work on the Armstrong project.

Blue delivered reports concerning work orders 89, 90, 91 and 93 from May 2, 2018 to July 2018. Appx .321. Blue issued an invoice dated July 10, 2018 for work performed on work orders 89, 90, 91 and 93 in the amount of $34,400.00. This invoice indicates that Blue claimed to have performed 58 days of work on work order 93 (the Armstrong parcel) and billed WOG $23,200.00 for that work alone. Appx. 341. Appx. 341. WOG refused to pay the invoice.

PROCEDURAL HISTORY

On June 5, 2019, Blue filed a complaint in the Circuit Court of Monongalia County naming Warrior Oil and Gas, LLC and Jonathan D. Mann, Jr. as defendants. Appx. 003. Mann is a member of Warrior Oil and Gas, LLC. Count One of the complaint alleged that on February 23, 2018, Blue Land entered into a written Master Services Agreement with Warrior to perform certain mineral title examinations concerning properties located in Monongalia County. Count Three of the complaint alleged that on April 20, 2018, Blue Land entered into a separate agreement with Warrior, apparently verbal, whereby Blue Land would perform additional title examinations on realty located in Monongalia County. Count Two asserted an unjust enrichment claim against Warrior regarding work performed by Blue pursuant to the February 23, 2018 MSA while Count Four asserted an unjust enrichment claim regarding work performed by Blue pursuant to the April 20, 2018 oral agreement. Appx. 004-007. The complaint contained a single allegation against Defendant Mann, stating "Mann...is included as a Defendant individually to the extent that Warrior Oil and Gas, LLC is, or turns out to be, underinsured, undercapitalized, or otherwise unable to meet its liabilities or satisfy any judgments

resulting hereunder." Complaint, ¶3. Appx. 003.

On June 17, 2019, Blue filed a notice of dismissal concerning Defendant Mann. Appx. 013. On July 30, 2019, Blue moved for default judgment against Warrior based upon Warrior's failure to file an answer or otherwise plead to Blue's complaint. Appx 016. Blue noticed a hearing on its motion for default judgment on September 4, 2019. On August 14, 2019, Warrior served an answer and motion to dismiss Blue's complaint alleging on improper venue. Said pleading was signed by Jonathan D, Mann Jr. in his capacity as member of Defendant Warrior. Appx. 023. On August 21, 2019, Blue Land filed a motion to strike Warrior's answer and motion to dismiss, arguing that Mann was not an attorney and, therefore, could not sign pleadings on behalf of or represent Warrior in the litigation. Appx. 034.

A hearing was held on Blue Land's motion on September 4, 2019. An order entered by the Circuit Court on September 9, 2019 regarding this hearing indicated attorney Sean Logue appeared at the hearing on behalf of Warrior.[1] Appx. 038. The Court denied Blue's motions to dismiss and for default judgment but granted Plaintiff's motion to strike Warrior's answer. The Court directed Warrior to file an appropriate responsive pleading to Blue Land's complaint within 30 days of entry of the order. Appx. 039.

On September 23, 2019, Blue filed a motion to amend its complaint to add WOG Minerals, LLC as a defendant. The motion stated that on September 19, 2019,

[1]. The docket does not reflect that Logue filed and served a notice of appearance as counsel for Warrior.

Blue's counsel "received a voicemail from Joseph Fox, Warrior's new counsel indicating that WOG Minerals, LLC was to be a proper party to this action...." Appx. 041. Blue Land's proposed amended complaint retained Counts One through Four contained in Blue's complaint but substituted WOG Minerals, LLC for Warrior as the defendant against which those claims were asserted. The amended complaint retained Warrior Oil and Gas, LLC as a defendant, alleging "Warrior Oil and Gas, LLC, is included as a defendant individually to the extent that WOG Minerals, LLC is, or turns out to be, underinsured, undercapitalized, or otherwise unable to meet its liabilities or satisfy any judgments resulting hereunder." Amended complaint, ¶4. Appx. 045.[2]

On October 9, 2019, attorney Joseph Fox served and filed an Entry of Appearance on behalf of Defendant Warrior Oil and Gas, LLC. Appx. 052. On that date, Fox also served an answer and counterclaim. Said pleading stated, "AND NOW, comes the (sic) WOG Minerals, LLC, LLC (herein after (sic) "WOG") incorrectly identified as Defendant Warrior Oil and Gas, LLC, (hereinafter "Warrior") to file the within Answer and Counterclaim to Plaintiff's Complaint filed on June 5, 2019..." Appx. 025-53.

On January 29, 2020, Blue served its first set of discovery consisting of interrogatories, requests for production and requests for admissions. Appx. 070. On March 4, 2020, Warrior/WOG served answers to Blue's requests for admissions. Appx.

2. The record does not reflect that Plaintiff's motion to amend was brought on for hearing nor does the record reflect that an order was entered granting Plaintiff's motion Given that by order entered September 9, 2019, the Circuit Court struck Warrior's answer and counterclaim, Blue was likely permitted to amend its complaint as a matter of right pursuant to Rule15(a) of the West Virginia Rules of Civil Procedure.

094. On March 4, 2020, Fox also moved for leave to withdraw as Warrior's counsel. Appx. 087.

On April 20, 2020, Blue served its motion to compel discovery. Appx. 097-A. On May 11, 2020, the Court heard Fox's motion to withdraw. An order granting Fox's motion was entered on May 13, 2020.[3] Appx. 098. The Order further directed that "Defendants shall file substantive answers to Plaintiff's interrogatories and request for production of documents on or before June 18, 2020."[4] Appx. 099.

On June 18, 2020, Warrior served and filed unsigned answers to Blue's first set of interrogatories and requests for production of documents. Appx. 102. On June 22, 2020, Blue filed a motion to strike Warrior's responses to Blue's interrogatories and requests for production and for entry of default on the issue of liability as a discovery sanction. Appx. 108. Said motion was set for hearing on July 28, 2020. Warrior's present counsel was contacted 2 to 3 days before the July 28, 2020 hearing about representing Warrior and formally appeared in this matter on July 27, 2020. Appx. 347.

By order entered July 30, 2020, the Circuit Court granted Blue's motion to strike Defendants' unsigned discovery responses but held in abeyance Blue's motion for default. The Court ordered that the parties participate in mediation within 21

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[3]. The order indicates that attorney Sean Logue also appeared at the May 11, 2020 hearing. Despite Logue not having filed a motion seeking leave to withdraw as Defendants' counsel, the Court, in granting Attorney Fox's motion, ruled that Fox and Logue "are permitted to withdraw their appearance as counsel of record for Defendant (sic)."Appx. 098.

[4]. While this order references "the Court's Order with respect to Plaintiff's Motion to Compel Answers to Discovery entered contemporaneously herewith..." neither the docket nor the Circuit Court's file reflect the entry of such an order.

days. In the event the mediation proved unsuccessful, the Court scheduled a hearing on October 1, 2020 to consider Blue's motion for default judgment and motion to dismiss WOG's counterclaim made orally by Blue's counsel during the July 27, 2020 hearing. Appx. 113.

The parties participated in mediation on August 19, 2021, which failed to resolve the case. At the October 1, 2020 hearing, the Court granted Blue's motion for default and motion to dismiss Defendant's counterclaim and scheduled a bench trial on the issue of damages for November 6, 2020. Appx. 123. By order entered November 6, 2020, the then presiding judge, Philip Gaujot, voluntarily recused himself from the case. The case was assigned to Circuit Judge Susan B. Tucker. Appx. 348. As a result of scheduling issues, the damages trial was not held until May 19, 2021.

THE DAMAGES BENCH TRIAL

The Circuit Court, Judge Tucker presiding, convened a bench trial on May 19, 2021 on the issue of damages. Defendants' counsel there argued that the West Virginia Supreme Court's decision in *Thomas & Moran v. Kanawha Valley Traction Company,* 73 W. Va. 374, 80 S.E. 476 (1913) provided the rule of law applicable to Blue's damages claim and further that *Thomas* held that evidence demonstrating the substandard or nonconforming nature of Blue's work was admissible on the issue of damages recoverable by Blue. The Circuit Court ruled that given the Court's order granting default against Warrior and WOG and dismissing WOG's counterclaim, Defendants would not be permitted to offer evidence demonstrating that Blue's work was substandard or nonconforming. Specifically, the Circuit Court concluded that since WOG's counterclaim raising issues regarding the nature and quality of Blue's

work had been dismissed, Defendants were prohibited from offering such evidence. Appx 207.

Jeffrey Horne, an owner of Blue, testified at the damages trial. In light of the Circuit Court's ruling regarding damages, Defendants were not permitted to offer witnesses at the hearing. Appx. 207-09. The Circuit Court permitted Defendants' counsel to vouch the record regarding what Defendants' evidence would have shown regarding the nature and quality of Blue's work. Appx. 220. Defendant's counsel also lodged oil and gas ownership reports prepared by Blue that evidenced the shortcomings of Blue's work in the record. Appx. 225.

By order entered May 25, 2021, the Circuit Court found for Blue awarding damages of $87,377.15 against both Warrior and WOG. Of that amount, $32,302.65 consisted of compound, prejudgment interest calculated at the rate of 1.5% per month. Appx. 261.

III. SUMMARY OF ARGUMENT

1. The Circuit Court erred in awarding damages against Warrior Oil and Gas LLC. Blue's amended complaint contains no cognizable cause of action against Warrior upon which the Circuit Court could have awarded a default judgment. Warrior was not a party to the Master Service Agreement. The Circuit Court's order granting Blue damages contains no findings of fact or conclusions of law explaining on what basis the Circuit Court concluded that Warrior was liable for damages for the work performed by Blue pursuant to the MSA.

2. The Circuit Court erred as a matter of law regarding the measure of damages applicable in this action. The West Virginia Supreme Court's decision in

Thomas & Moran v. Kanawha Valley Traction Company, 73 W. Va. 374, 80 S.E. 476 (1913) defines the standard applied to determine damages recoverable by a contractor where the contracting party claims the contractor's work was defective or substandard. This standard requires consideration of evidence concerning the nature and quality of the contractor's work.

3. Given the damages rule articulated in *Thomas & Moran v. Kanawha Valley Traction Company,* 73 W. Va. 374, 80 S.E. 476 (1913), the Circuit Court erred in prohibiting Defendants from offering evidence concerning the nature and quality of Blue's work.

4. The Circuit Court erred in awarding compound, prejudgment interest calculated at the rate of 1.5% per month damages claimed by Blue. The MSA did not provide for interest on unpaid invoices. Under West Virginia law, prejudgment interest on a breach of contract claim is governed by West Virginia Code §56-6-27. Finally, absent express agreement of the parties, West Virginia law prohibits compound, prejudgment interest.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal involves assignments of error in the application of settled law; insufficient evidence or a result against the weight of the evidence; and narrow issues of law making oral argument appropriate pursuant to Rule 19(1), (3) and (4) of the Rules of Appellate Procedure.

V. ARGUMENT

A. STANDARD OF REVIEW

Rule 52 of the West Virginia Rules of Civil Procedure requires that a circuit court, sitting as the finder of fact, make findings of fact and conclusions of law in support of its ruling. Rule 52(a) states, in relevant part:

> In all actions tried upon the facts without a jury ..., the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58;...Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

In *Public Citizen, Inc. v. First National Bank in Fairmont,* 198 W.Va. 329, 480 S.E.2d 538 (1996), this Court summarized the standard of review applied when reviewing circuit court findings and conclusions made concerning bench trials. In *Public Citizen, supra,* this Court held:

> 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.

Id, syl .pt 1. In *Brown v. Gobble,* 196 W.Va. 559, 474 S.E.2d 489 (1996), this Court cautioned that the deference to trial court findings provided for in Rule 52(a) and in *Public Citizen, supra,* is not without limits, holding:

> The deference accorded to a circuit court sitting as factfinder may evaporate if upon review of its findings the appellate court determines that: (1) a relevant factor that should have been given significant weight is not considered; (2) all proper factors, and no improper factors, are considered, but the circuit court in weighing those factors commits an error of judgment; or (3) the circuit court failed to exercise any discretion at all in issuing its decision.

Brown, supra, syl. pt. 1. *See also Ark Land Company v. Harper,* 215 W.Va. 331, 599 S.E. 2d 754 (2004).

If the trial court makes no findings or applies the incorrect legal standard in reaching its decision, such decision is entitled to no deference on appeal. *Phillips v. Fox,* 193 W. Va. 657, 458 S.E. 2d 327 (1995). On appeal, where a trial court fails to make findings of fact and conclusions of law as required by Rule 52, remand may be ordered. *Id.* However, if there is sufficient information in the record regarding the controlling facts, the case may be disposed of on appeal despite the trial court's failure to make the required findings. *Commonwealth Tire Co. v. Tri-State Tire Company,* 156 W. Va. 351, 193 S.E. 2d 544 (1972); *Tomkies v. Tomkies*, 158 W. Va. 872, 215 S.E. 2d 652 (1975).

B. WEST VIRGINIA LAW APPLICABLE TO ENTRY OF DEFAULT AND DEFAULT JUDGMENT

By order entered November 5, 2020, the Circuit Court granted Blue's motion seeking entry of default as a discovery sanction pursuant to Rule 37(b) of the West Virginia Rules of Civil Procedure. In this regard Rule 37(b)(2)(C) provides:

> If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to supplement as provided for under Rule 26(e), or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> > (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

The Circuit Court ruled "Plaintiff's motion for default judgment as to the Defendant's (sic) liability is GRANTED." Appx. 123. The Order also dismissed WOG's counterclaim for failure to prosecute. *Id.*

West Virginia law recognizes a distinction between default and a default judgment. In *Cales v. Willis,* 212 W. Va. 232, 569 S.E. 2d 479 (2002), this Court held "a default relates to the issue of liability and a default judgment occurs after damages have been ascertained." 212 W. Va. at ___, 569 S.E. 2d at 484. While default was granted against Defendants as a Rule 37(b) sanction, Rule 55(b)(2) of the West Virginia Rules of Civil Procedure provides the procedure whereby a judgment by default may be entered. *Chandos, Inc. v. Samson,* 150 W. Va. 428, 146 S.E. 2d 837 (1966).

An entry of default against a defendant has the effect of precluding the defendant from challenging the facts alleged in the complaint. Robin J. Davis and Louis J. Palmer, Jr. *Litigation Handbook on West Virginia Rules of Civil Procedure,* 1277 (2017). While no West Virginia authority was found explicitly discussing the effect of an entry of default, numerous federal appellate and district court decisions recognize this rule. *See, e.g. Comdyne I, Inc. v. Corbin,* 908 F. 2d 1142 (3rd Cir. 1990); *DirecTV Inc. v. Pepe,* 431 F. 3d 162 (3rd Cir. 2005); *United States v. DiMucci,* 879 F. 2d 1488 (7th Cir. 1989); *Family Resorts of America, Inc. v. Zimmerman*, 972 F. 2d 347 (6th Cir. 1992) (unpublished). This Court has often stated that given the similarity between the West Virginia Rules of Civil Procedure and the Federal Rules of Civil Procedure, this Court gives substantial weight to federal cases when determining the meaning and scope of West Virginia's Rules of Civil Procedure. *State ex rel. Ball v. Cummings,* 208 W. Va. 393, 540 S.E.2d 917 (1999).

Courts in other jurisdictions also recognize that a defendant in default may

nevertheless challenge a complaint on grounds that it fails to state a claim upon which relief may be granted. "Courts have held that a defendant in default may challenge the complaint on the grounds that it fails to state a cause of action." Robin J. Davis and Louis J. Palmer, Jr. *Litigation Handbook on West Virginia Rules of Civil Procedure,* 1277 (2017). *See, Old Salem Foreign Car Service Inc. v. Webb,* 159 NC App 93, 582 S.E. 2d 673 (2003) (defendant in default may demonstrate complaint is insufficient to warrant plaintiff's recovery); *Alan Neuman Productions, Inc. v. Albright,* 862 F. 2d 1388 (9th Cir. 1989) (despite entry of default, claims which are not well pleaded cannot support a default judgment).

Where default has been granted against a defendant and the complaint seeks other than a sum certain or a sum which may be by computation made certain, Rule 55(b)(2) controls the procedure whereby a judgment by default may be granted. Rule 55(b)(2) provides:

> In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant, incompetent person, or convict unless represented in the action by a guardian, guardian ad litem, committee, conservator, curator, or other representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary.

A grant of default against a defendant does not relieve plaintiff of the obligation of providing competent evidence to prove up its damages and establishing a relationship between the default liability and the damages sought.

> Nonetheless, it is still incumbent upon the party moving for a default judgment to establish by competent evidence the amount of recoverable damages and costs to which he is entitled...The moving party must also show a nexus between the default liability and the damages.... (citations omitted)

Farm Family Mutual Insurance V. Thorn Lumber, 202 W.Va. 69, ___, 501 S.E. Sd. 786, 792. (1998)

While the Circuit Court convened a hearing to determine whether a judgment by default was to be awarded Blue in light of the default granted against Warrior and WOG Minerals, as discussed herein, the Circuit Court made no findings of fact or conclusions of law explaining how, in light of grants of default, it concluded that Blue was entitled to judgment by default against Warrior.

1. THE CIRCUIT COURT ERRED IN AWARDING A DEFAULT JUDGMENT AGAINST WARRIOR OIL AND GAS, LLC

Petitioners do not seek reversal of the Circuit Court's order granting default against Warrior or WOG. Rather, as to Warrior, Petitioners assert that the Circuit Court erred as a matter of law when it entered default judgment against Warrior in the amount of $87,377.15.

Counts One and Three of the Amended Complaint assert breach of contract causes of action **against WOG Minerals**. Counts Two and Four of the Amended Complaint assert unjust enrichment claims **against WOG Minerals**. Warrior is not mentioned in those counts. Rather, Blue's amended complaint contains a single averment related to Warrior. Specifically, Paragraph 4 of the amended complaint states:

> Warrior Oil & Gas, LLC, is included as a Defendant individually to the extent that WOG Minerals, LLC is, or turns out to be, underinsured,

> undercapitalized, or otherwise unable to meet its liabilities or satisfy any judgments resulting hereunder.

Appx. 045. While the Circuit Court's grant of default against Warrior prohibits Warrior from challenging the truthfulness of this statement, it does not prohibit Warrior from challenging whether that statement states a claim against Warrior on which damages may be awarded. *See, e.g., Old Salem Foreign Car Service Inc. v. Webb,* and *Alan Neuman Productions, Inc. v. Albright, supra.*

Plainly, Counts One, Two, Three and Four of the amended complaint assert no claims against Warrior. Paragraph 4 of the amended complaint, which contains the only allegation directed at Warrior, states no cognizable claim or theory of liability under West Virginia law upon which Warrior can be held liable for the damages sought by Blue for WOG's failure to pay pursuant to the MSA.

The Circuit Court's May 25, 2021 order granting Blue damages contains no meaningful finding of facts and no conclusions of law, let alone any findings or conclusions explaining how the Circuit Court arrived at the conclusion that Warrior was co-equally liable in damages with WOG Minerals regarding Blue's claims. Rather, the order recites the exhibits admitted into evidence at the damages hearing and awards judgment in the amount of Blue's invoices for work performed pursuant to contracts between Blue and WOG Minerals plus Blue's prejudgment interest calculation. There is no indication the Circuit Court considered the effect of an entry of default against Warrior and whether, given that default, the amended complaint provided a basis upon which the Court could award damages in favor of Blue against Warrior. Again, given the single averment contained in Blue's amended complaint

directed to Warrior, there is no basis upon which Blue can recover from Warrior for damages.

Given the Circuit Court's failure to make findings of fact and conclusions of law regarding the basis upon which it awarded damages against Warrior, remand of this action with directions that the Circuit Court make the required findings and conclusions would be an appropriate remedy. However, since the record on appeal is sufficient to establish that no judgment by default for damages may be awarded against Warrior, this matter should be remanded with directions that the Circuit Court dismiss Plaintiff's claim against Warrior. *Commonwealth Tire Co. v. Tri-State Tire Company,* 156 W. Va. 351, 193 S.E. 2d 544 (W. Va. 1972).

2. THE CIRCUIT COURT ERRED AS A MATTER OF LAW REGARDING THE MEASURE OF DAMAGES APPLICABLE TO BLUE'S CLAIM AGAINST WOG MINERALS

Regarding the Circuit Court's award of damages against WOG Minerals, since the Circuit Court's damages order contains no findings of fact or conclusions of law, the order does not indicate whether the Circuit Court awarded a default judgment against WOG Minerals based on the breach of contract counts and/or on the enrichment counts contained in Blue's amended complaint. West Virginia law holds that where the relationship between the parties is controlled by express contract, a damages award based wholly or partially on unjust enrichment is impermissible. In this regard, in *Gulfport Energy Corporation v. Harbert Private Equity Partners,* 851 S.E. Sd. 817 (W.Va. 2020). this Court recently held:

> We have held that "an unjust enrichment claim is inconsistent with a contractual dispute." ...
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> In light of this clear authority, we now hold that the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. (Internal citations omitted)

851 S.E.2d at 822-23. The Circuit Court's failure to make findings of fact and conclusions of law regarding whether and to what extent damages were awarded against WOG Minerals on breach of contract or unjust enrichment theories is alone sufficient to require reversal and remand.[5]

Respondent will likely argue that despite the lack of findings of fact and conclusions of law on the issue, the record supports the conclusion that the Circuit Court awarded damages against WOG Minerals based on breach of contract Counts One and Three of the amended complaint. Assuming this Court agrees, Petitioners assert the Circuit Court's conclusion that the grant of default against WOG Minerals precluded WOG from offering evidence concerning the nature and quality of Blue's work when determining damages recoverable by Blue constitutes an error of law requiring reversal and remand.

Before taking of evidence at the damages hearing, Petitioners' counsel argued that the West Virginia Supreme Court's decision in *Thomas & Moran v. Kanawha Valley Traction Company,* 73 W. Va. 374, 80 S.E. 476 (1913) provides the rule of law

[5]. For example, during the damages trial, Blue introduced the Master Services Agreement between Blue and WOG Minerals, LLC upon which Blue sought recovery. Appx 264. Horne's testimony made one reference to WOG Minerals (Appx. 151) whereas "Warrior" was referenced no less than 25 times during Horne's direct testimony. Appx. 148-91.

applicable to Blue's damages claim. Petitioner further argued per *Thomas,* evidence concerning the nature and quality of Blue's work was relevant to the issue of damages recoverable by Blue. The Circuit Court disagreed, ruling given the Court's order granting of default against both Defendants and dismissing WOG's counterclaim, Petitioners were not permitted to offer evidence demonstrating that Blue's work was substandard. Appx. 147.

Thomas arose out of a set of facts comparable to those presented in this case. Thomas & Moran entered into a contract with Kanawha Valley dated June 2, 1906 whereby Thomas & Moran agreed to drill a water well for Kanawha Valley to a depth of 365 feet. When quantities of water sufficient for Kanawha Valley's purposes were not obtained at that depth, Thomas & Moran alleged that the parties entered into a second written contract dated June 22, 1907 wherein Thomas & Moran agreed to continue drilling the well to a depth that would generate a flow of at least 20 gallons of water per minute. 73 W. Va. at 375-76, 80 S.E. at ____. Thomas and Moran further alleged that in exchange for their agreement to drill the well beyond the depth 365 feet, Kanawha Valley agreed to pay $234.00 and an additional $1.50 for each foot drilled beyond 365 feet until the well reached a depth that would produce 20 gallons of water per minute. Thomas & Moran further alleged that the June 22, 1907 contract provided after the well had been drilled to the necessary depth, Kanawha Valley would have two weeks to pump water from the well to confirm that it produced the required volume of water. Upon successful completion of this test, Kanawha Valley was to pay Thomas and Moran the agreed-upon $234.00 plus the additional $1.50 per

foot. 73 W. Va. at 376, 80 S.E. at ____.

Thomas & Moran alleged that as they prepared to commence work to deepen the well per the July 22, 1907 contract, Defendant's general manager, Alexander, directed that they not proceed. Instead, Thomas & Moran claimed that the parties entered into a verbal agreement whereby Thomas & Moran would drill three additional wells near the well drilled to the depth of 365 feet and "shoot" the three additional wells causing them the drain into the 365 foot well, thereby providing the required volume of water. 73 W. Va. at 377, 80 S.E. at ____.While Alexander testified that he discussed the plan to drill three additional wells with Thomas and Moran, Alexander said he told them he had no authority to modify the July 22, 1907 contract and that, therefore such additional wells would be governed by that contract. Thomas and Moran drilled the additional three wells. The record suggested that the combined wells still did not produce the 20 gallons per minute provided for in the June 6, 1906 contract.

Thomas and Moran demanded payment after the completion of the three additional wells. Kanawha Valley refused payment, saying the wells were not satisfactory for its purposes. The case was tried to a jury which found for Kanawha Valley. 73 W. Va. at 378-79, 80 S.E. at ____. On appeal, Thomas and Moran argued that the Circuit Court erred in instructing the jury on their theory of the case and on the appropriate measure of damages. Regarding damages, the Supreme Court held:

> When a contract has been only partially performed, or performed in an incomplete or inferior manner, if the contract is apportionable, and the labor done and material furnished is appropriated by the other party to the contract, he is liable to the contractor for what such labor and material are reasonably worth, to be determined by the contract price,

> less payments, damages sustained, and what it would cost to complete the contract. (citations omitted,)

Id, Syl. pt. 3. In *Dillon & Harrison v. Suburban Land Company,* 73 W. Va. 363, 80 S.E. 471 (1913) decided the same day as *Thomas, supra,* the Supreme Court reiterated its holding regarding the appropriate measure of damages in cases involving partially performed contracts. In this regard, *Dillon* held:

> Right of recovery for work done and material furnished under such a broken contract is dependable, however, on whether the contract is apportionable; if not, the rule is that no part of the consideration can be recovered.
>
> The general rule for measuring the damages in cases of broken and partially performed contracts, is the stipulated price less payments and the sum which it will take to complete the job according to the contract.

Id., syl. Pts. 3,5.

The principal facts and procedural posture of *Thomas* are almost identical to those in the case at bar. As in *Thomas*, Blue Land entered into a written contract to provide services to WOG Minerals. Upon completion of work on the contract, WOG refused to pay, claiming the work was substandard and incomplete. As in *Thomas*, the contractor Blue brought suit against the contract counterparty seeking to recover the amounts the Blue claimed were due it under the contract. Given a comparable set of facts, the Supreme Court in *Thomas* held that where there was evidence that the contract at issue was performed partially or incompletely; that the contract was apportionable; and that the contractor's work was appropriated by the contract counterparty, the appropriate measure of damages is the contract price for the contractor's services less damages sustained by the counterparty to complete the contract.

As indicated in *Cales v. Willis, supra,* a default relates to the issue of liability while a default judgment requires evidence sufficient to prove recoverable damages. The holdings in *Thomas* and *Dillon* relating to damages recoverable by contractors for partially performed contracts do not concern liability but rather are rules of law to be applied to determine recoverable damages. The Circuit Court's refusal to apply those rules constitutes reversible error.

3. The Circuit Court erred in prohibiting Defendants from offering evidence concerning the nature and quality of Blue's work

As indicated in the preceding section, Petitioners assert that the Circuit Court failed to apply the correct rule of law to determine what damages, if any, were recoverable by Blue against WOG Minerals. Such evidence, if allowed, would have demonstrated that Blue's work product was incomplete for WOG Minerals purposes.

Horne acknowledged that WOG Minerals intended to use information generated by Blue's title abstracting work to identify owners of mineral estates to permit WOG to attempt to purchase or lease the interests of those owners. Appx. 202-03. Petitioners' counsel vouched the record at the close of the damages hearing and explained that Petitioners would have offered testimony that Blue's work was incomplete in that in numerous cases, Blue failed to identify all the owners of the mineral tracts Blue was hired to abstract, thereby requiring WOG to perform remedial title work to identify the mineral owners. Appx. 221. Oil and Gas Ownership Reports prepared by Blue concerning the abstracting work performed at WOG's request were also lodged with the Court by Defendants' counsel. Those reports confirmed that in numerous instances, Blue failed to identify the owners of the oil

and gas estates, or, when identified, failed to provide addresses for those owners. For example, see Blue's Oil and Gas Owner Reports at Appx. 225-28, 233, 234-35, 237, 242, 242-48, 250, 254-56,and 258-59.

Such evidence, coupled with evidence regarding the cost incurred by WOG to remediate Blue's work product is precisely the type of evidence *Thomas* and *Dillon* held was relevant to determine damages recoverable in the context of partially performed contracts. The Circuit Court's refusal to allow such evidence constitutes reversible error requiring remand.

4. THE CIRCUIT COURT ERRED IN AWARDING COMPOUND PREJUDGMENT INTEREST CALCULATED AT THE RATE OF 1.5% PER MONTH

The Master Service Agreement entered into by Blue and WOG does not provide for the assessment of late fees or interest on unpaid amounts due Blue under the contract. During the damages trial, Horne admitted as much. Appx. 188. Regardless, Blue assessed "late fees" of $556.12 and $290.25 on the two invoices Blue issued regarding work it performed for WOG. Appx. 341,343.

At trial, Blue offered Exhibit 12, which contained a spreadsheet prepared by Blue and containing prejudgment interest calculations concerning its two invoices for the period from November 1, 2018 through May 1, 2021. Appx. 345. Horne testified that the interest amounts in Exhibit 12 were calculated at the rate of 1.5% per month. The total amount of interest calculated by Blue equaled $32,302.65. Appx. 185. Horne further indicated that he chose 1.5% interest per month as "collection tactic". Appx. 188.

Petitioners' counsel objected to the offering of such evidence, noting that

interest was not permitted by the MSA. Appx. 187. In closing arguments, Petitioners' counsel further noted that absent contract language, under West Virginia law, prejudgment interest in cases involving contracts is controlled by statute. Appx. 213. Despite the foregoing, the Circuit Court damages order stated that all of Blue's exhibits, including Exhibit 12, were introduced "with no objection from the Defendants." Appx. 261.

In *Miller v. Wesbanco Bank,* 859 S.E. 2d 306 (W. Va. 2021), this Court held that West Virginia Code §56-6-27 provides the exclusive means by which prejudgment interest may be awarded in an action founded on contract. *Id.* syl. pt. 1. Section 56-6-27 provides:

> **The jury,** in any action founded on contract, may allow interest on the principal due, or any part thereof, and in all cases they shall find the aggregate of principal and interest due at the time of the trial, after allowing all proper credits, payments and sets-off; and judgment shall be entered for such aggregate with interest from the date of the verdict.(emphasis added)

When called upon to interpret statutes, a cardinal rule of construction provides where the language of a statute is unambiguous, courts are required to apply and enforce the statute as written. *Davis Memorial Hospital v. West Virginia State Tax Commissioner,* 222 W. Va. 677, 671 S.E. 2d 682 (2008) Section 56-6-27 unambiguously states that in cases founded on contract and tried **to a jury,** the jury may award prejudgment interest.[6] Here, there was no jury trial on the issue of damages. Therefore, given the plain meaning of Section 56-6-27 and given the

[6]. In *Valasquez v. Roohollohi,* No. 13-1245, (W.Va. Nov. 3, 2014) this Court, in a memorandum decision, indicated in *dicta,* that a circuit court, sitting as factfinder in a contract dispute, could consider awarding prejudgment interest pursuant to §56-6-27.

Supreme Court's ruling in the *Miller, supra,* the Circuit Court could not award prejudgment interest on Blue's breach of contract claims. Had Blue wished to recover prejudgment interest, it should have requested a jury trial to consider its damages claim. *See, Drumheller v. Gillinger*, 230 W. Va. 26, 736 S.E. 2d 26 (2012).

Finally, absent a contract authorizing payment of compound interest on amounts due on a contract, West Virginia law does not permit recovery of compound, prejudgment interest. *Hensley v. West Virginia Department of Health and Human Resources,* 203 W. Va. 456, 508 S.E. 2d 616 (1998). Blue's Exhibit 12 calculated prejudgment interest at the rate of 1.5% compounded monthly.[7]

Given the foregoing, the Circuit Court erred as a matter of law in awarding Blue prejudgment interest, requiring reversal in remand.

VI. CONCLUSION

Petitioners respectfully request that the Circuit Court's order entered May 25, 2021 awarding damages against Warrior Oil and Gas, LLC and WOG Minerals, LLC be reversed and remanded to the Circuit Court of Monongalia County with the following instructions and directions:

1. That the Circuit Court enter an order providing that Blue Land Services, LLC receives no judgment by default against Warrior Oil and Gas, LLC;
2. That the Circuit Court convene a hearing on the issue of what damages, if

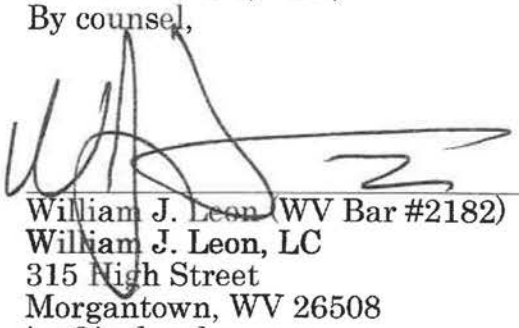
7. For example, in the left-hand column of Exhibit 12, on November 1, 2018, $18,270.00 is claimed owed on Blue's March 29, 2018 invoice. 1.5% of $18,270.00 is $274.05. When added together, this totals $18,544.05 as reflected as the amount owed on December 1, 2018. 1.5% of $18,544.05 equals $278.16. $18,544.05 plus $278.16 equals $18,822.21 as claimed is owed on January 1, 2019. The calculations for both invoices proceed in this fashion each month until May 1, 2021.

any, Blue Land Services, LLC may recover against WOG Minerals, LLC, applying the rule of damages set forth in *Thomas & Moran v. Kanawha Valley Traction Company,* 73 W. Va. 374, 80 S.E. 476 (1913); and

3. That in awarding prejudgment interest, if any, the Circuit Court comply with this Court's opinion in *Miller v. Wesbanco Bank,* 859 S.E. 2d 306 (W. Va. 2021).

Petitioners also request that this Court grant such other and further relief as it deems appropriate.

Respectfully submitted.
Warrior Oil and Gas, LLC and
WOG Minerals, LLC,
By counsel,



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CERTIFICATE OF SERVICE

I certify that I served the attached Petitioners' Brief by placing the same in the United States Mail, first class and postage prepaid, upon counsel at the addresses listed below this 15th of November 2021

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