IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-789

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DANNY WEBB CONSTRUCTION CO. INC.
and DANNY WEBB

Petitioners, Defendants below,

v.

NORTH HILLS GROUP, INC.

Respondent, Plaintiff below.

PETITIONERS' OPENING BRIEF

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INTRODUCTION

Because Plaintiff's claims are barred by res judicata and the statute of limitations, this case should never have made it to a jury. But it did, and the jury found for the Defendants on every claim. Dismayed by this result, Plaintiff requested—and Judge Blake awarded—another bite at the apple. Without the slightest bit of explanation or substantive analysis, the Circuit Court summarily concluded that the verdict was contrary to the clear weight of the evidence, vacated the jury verdict, and granted a new trial. This was a patent abuse of discretion. The Circuit Court's order must be reversed for two principal reasons. First, the jury's verdict is plainly supported by the record evidence. And second, a new trial is inappropriate given that each of the claims are barred as a matter of law in any event.

At the center of this long running dispute is an oil and gas lease between Plaintiff-Respondent North Hills Group, Inc. ("North Hills") and Defendant-Petitioner Danny Webb Construction Co., Inc. ("Webb Construction"). Because Webb Construction breached the terms of that lease, North Hills filed an earlier lawsuit for declaratory judgment in the Circuit Court of Fayette County (the "First Lawsuit"). After a two-day evidentiary hearing, Judge Blake entered a final order terminating the lease and ejecting Webb Construction from the property. On appeal of that order, this Court affirmed without remand.[1] The First Lawsuit was over.

[1] This Court also reversed on a narrow issue not relevant here.

Fast forward to present. North Hills is now attempting to resurrect old claims under new names. It filed a new lawsuit—this one—in the Circuit Court of Fayette County, seeking compensatory damages arising from the same breaches that were the subject of the prior lawsuit (the "Second Lawsuit"). Though North Hills' latest claims are barred by res judicata and the statute of limitations, Judge Blake ignored these clear legal barriers and submitted the claims to a jury. And even though North Hills was given every practical advantage at trial, the jury nonetheless found for Defendants on each claim. But that verdict was short lived.

The Circuit Court's decision to disturb the jury's verdict was badly mistaken. North Hills failed to present—and the trial court failed to identify—any specific evidence that compelled a verdict in favor of North Hills so as to satisfy the demanding standard for rejecting the jury's decision. Though the Circuit Court recited North Hills' list of witnesses and exhibits, it failed to actually explain the import, if any, of that evidence. The Circuit Court's order is wholly devoid of any substantive analysis and completely overlooks evidence *supporting* the jury's verdict. Only by ignoring the evidence supporting the jury's verdict could the Circuit Court conclude that the jury's verdict was contrary to the clear weight of the evidence. The Circuit Court's order represents clear abuse of discretion, which this Court must correct.

For these reasons, this Court should reverse the Circuit Court's order and reinstate the jury's verdict.

ASSIGNMENTS OF ERROR

1. A jury found for Defendants on each of Plaintiff's claims. But the Circuit Court vacated the jury's verdict, concluding that the verdict was contrary to the clear weight of the evidence. Did the Circuit Court abuse its discretion in vacating the jury's verdict and granting a new trial?

2. The doctrine of res judicata precludes the relitigation of claims that were raised or could have been raised in a prior case. In the current case, Plaintiff seeks claims and remedies that could have been requested in the prior case. Did the Circuit Court err by granting a new trial on such claims?

3. Each of Plaintiff's tort claims—negligence, trespass, nuisance, and breach of fiduciary duty—are subject to a two-year limitations period. Though Plaintiff's claims accrued in Spring 2015 and were the subject of a separate lawsuit filed in January 2016, it did not file the present lawsuit until January 2019. Did the Circuit Court err by granting a new trial on such time-barred claims?

4. The "gist of the action" doctrine bars plaintiffs from pursuing tort claims for what are, in reality, disguised breach of contract claims. Each of Plaintiff's tort claims squarely arise from the contractual relationship between the parties. Did the Circuit Court err by granting a new trial on these claims?

5. Quasi-contract claims—like unjust enrichment—are unavailable when an express agreement exists because such claims only exist in absence of an agreement. Plaintiff and Defendant are parties to an oil and gas lease, from which Plaintiff's unjust enrichment claim arises. Did the Circuit Court err granting a new trial on the legally infirm claim for unjust enrichment?

6. The fiduciary duty is a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law. Plaintiff and Defendant are counterparties to an oil and gas lease, from which Plaintiff's claimed breach of fiduciary duty claim supposedly arises. Did the Circuit Court err by granting a new trial on this claim where there was no basis to find the existence of a fiduciary duty?

STATEMENT OF THE CASE

The Parties

Plaintiff North Hills Group, Inc. is a corporation with property holdings in Fayette County, West Virginia. App. 17. Defendant Danny Webb was, at all relevant times,[2] the sole owner of Defendant Danny Webb Construction Co., Inc., which operated underground injection control wells for the safe storage and disposal of wastewater generated from oil and gas development. *Id*.

The Deeded Property (Well 406)

At one point in time, North Hills owned two adjacent pieces of property: a 5-acre parcel and a 3,624-acre parcel, both located in Fayette County. App. 18. In November 2001, North Hills sold the 5-acre parcel to Webb Construction. *Id*. at 651-55. Among other things, the deed conveyed all the right, title, and interest to an unplugged and unproductive gas well that was located on the deeded property and identified as "Well 460." *Id*. Sometime thereafter, Webb Construction obtained the

[2] In May 2018, Mr. Webb sold his ownership interest in Webb Construction. Though Mr. Webb is no longer associated with Webb Construction, he continues to defend the company pursuant to an indemnity agreement.

necessary permit from the West Virginia Department of Environmental Protection ("DEP") and converted Well 460 into an underground injection control well for the storage and disposal of wastewater. *Id*. at 1171-1387.

The Leased Property (Well 508)

In April 2008, North Hills and Webb Construction executed an oil and gas lease (the "Lease"), granting Webb Construction the right to conduct defined oil and gas operations on North Hills' adjacent 3,624-acre parcel. App. 656-68. Relevant here, in the event any oil and gas well on the property was proven unproductive, Webb Construction was granted the right to inject salt water, or brine, into the depleted formations. *Id*. at 666. In such instances, Webb Construction was required to pay North Hills an annual injection fee of $3,624. *Id*.

The Injection Well and Pipeline

Though North Hills disputed efforts of Webb Construction to rehabilitate the legacy well, Webb Construction deemed Well 508 unproductive. In September 2008, Webb Construction obtained the appropriate DEP permit and converted Well 508 into an underground injection control well for the storage and disposal of wastewater. App. 20. Sometime thereafter, Webb Construction laid a 2-inch diameter steel surface pipeline, connecting Well 508 (on the leased property) to Well 460 (on the deeded property). *Id*. This pipeline allowed Webb Construction to apportion wastewater, as necessary, between the two wells.

The County Commission Meetings

In November 2014, Ms. Hamilton, President of North Hills, attended a Fayette County Commission meeting where she learned that an injection control

well was operating in Fayette County. App. 328-29. Ms. Hamilton had been a vocal opponent of wastewater injection and so, in April 2015, Ms. Hamilton planned to attend and speak at a subsequent Fayette County Commission meeting.[3] *Id*. at 328-30. Just a few days before this April 2015 meeting, however, Ms. Hamilton learned that Webb Construction was operating the injection control well on North Hills' property. *Id*. at 328-29; *see Webb v. N. Hills Grp., Inc*., No. 16-0640, 2017 WL 2493768, at *3 (W. Va. June 9, 2017).

The Lease Termination

In July 2015, North Hills terminated the Lease, claiming that Webb Construction breached the Lease by injecting off-site wastewater into Well 508. App. 670-71. North Hills demanded that Webb Construction (i) cease all injection operations, (ii) remove the pipeline connecting Well 508 and Well 460, and (iii) remediate any contamination resulting from Webb Construction's injection operations. *Id*. Although North Hills had accepted and cashed annual injection payments in years prior, North Hills refunded the annual injection payment for 2015. *Id*.

The First Lawsuit (Civil Action No. 16-C-9)

In January 2016, North Hills filed a complaint in the Circuit Court of Fayette County, requesting that the Lease be terminated and that Defendants be enjoined

[3] The Lease was negotiated by North Hills' former president, Philip Mooney. App. 1704-05. Over the years, management and control of the family-owned company was passed down to heirs who shared different values and environmental concerns.

from further operations on the leased property. *See North Hills Group, Inc. v. Danny Webb and Danny Webb Construction, Inc.*, No. 16-C-9 (Cir. Ct. Fayette Cnty.) (Blake, J.) (the "First Lawsuit"). Notably, North Hills' lawsuit did not request compensatory damages for remediation or request that the pipeline be removed from the property. App. 1712-21.

After a two-day evidentiary hearing, by order dated June 7, 2016, Judge Blake declared the Lease terminated and enjoined any further operations by Defendants on the property—granting all the relief requested by North Hills in that action. App. 1722-35. Specifically, the Circuit Court found that Webb Construction breached the Lease by injecting fluids other than salt water and brine. *See id.* And though not pertinent to the breach of contract claim, the Circuit Court made several notable findings that would later bear on the statute of limitations analysis for future claims:

- "In 2015, Mr. Mooney [North Hills' former-president] learned for the first time that [Webb Construction] had injected frack fluid waste into the wells described in both the deed and lease." App. 1726.
- "Mr. Mooney's understanding came from conversations with current [North Hills] President Patricia Hamilton who learned of the frack fluid waste injection on the North Hills property after following-up on testimony she heard at a [April 2015] Fayette County Commission meeting." App. 1726.
- "Testing by researchers from Duke University clearly demonstrates that the chemical composition of the surface water directly downstream from [Webb Construction] operations is typical of oil and gas wastewater," observing elevated levels of "chloride, bromide, sodium, manganese, strontium and barium" downstream from the property. App. 1727. "Ms. Hamilton, as President of [North Hills], utilized this information to formulate her belief about what was being injected into [Well 508]." *Id.* at 1728.
- "The creation of a hydraulic fracturing waste site is a nuisance and interrupts the quiet and useful enjoyment of [North Hills'] property." App. 1733.

- "[Webb Construction's] creation of a hydraulic fracturing waste dump has the potential to create a liability situation for [North Hills] through potential contamination migration onto the properties of nearby landowners and adjacent streams of water." App. 1733.

Judge Blake repeatedly alluded to contamination of North Hills' property, but there was no evidence presented that Webb Construction actually contaminated the property or violated its DEP permit. *See Webb*, 2017 WL 2493768, at *7 ("There is no claim and no evidence that Webb Construction injected substances other than what the permit allowed.").

The Appeal of the First Lawsuit (Appeal No. 16-0640)

Defendants appealed the Circuit Court's final order and, in June 2017, this Court issued a memorandum decision affirming, in part, and reversing, in part. *See Webb*, 2017 WL 2493768. Albeit based on different reasoning, this Court affirmed the Circuit Court's order insofar as it deemed the Lease terminated. *Id*. The Circuit Court terminated the Lease based on Webb Construction's supposed breach, but this Court found that the Lease expired by its own terms. *Id*. at *6. Otherwise, this Court found that the Circuit Court committed clear error in piercing the corporate veil and holding Mr. Webb and Webb Construction jointly and severally liable to North Hills. *Id*. at *8 ("The circuit court's ruling appears to be perfunctory as no facts were referenced and there was no analysis pursuant to a fact-specific totality of the circumstances test" and "the record is essentially void of evidence supporting the piercing of the corporate veil."). The Court did not remand for further proceedings, and the First Lawsuit was over. *See id*.

The Second, and Current, Lawsuit (Civil Action No. 19-C-2)

Years later, on January 7, 2019, North Hills again filed suit against Webb Construction and Mr. Webb in the Circuit Court of Fayette County. App. 17-27. In this current lawsuit, North Hills rehashes the same allegations that Webb Construction exceeded the scope of the Lease by injecting fluids other than salt water and brine. *See id*. Rather than stating another claim for breach of contract, however, North Hills recasts its old claims, this time in tort and quasi-contract, alleging (i) negligence, (ii) trespass, (iii) nuisance, (iv) unjust enrichment, and (v) breach of fiduciary duty. *See id*. Because it did not seek such relief in the First Lawsuit, North Hills now seeks compensatory damages to remediate the property. *See id.*

The Trial

This case was tried to a jury on May 17 and 18, 2022. App. 2. At the close of North Hills' case-in-chief, Defendants moved for judgment as a matter of law. App. 526-32. Defendants argued that North Hills' claims were barred, for among other reasons, by res judicata and the statute of limitations. *See id*. Judge Blake summarily dispensed with Defendants' motion, offering a meandering and unreasoned explanation as to why res judicata and the statute of limitations did not apply. *Id*. at 538-42.[4] But the Circuit Court went further. As far as liability was

[4] For example, the Circuit Court seemed to agree that North Hills' claims first accrued in April 2015 when Mr. Hamilton learned of Webb Construction's injection operations and the supposed contamination resulting from same. App. 538. Yet, the court concluded that this lawsuit, which was filed nearly 4 years later, was

concerned, Judge Blake inexplicably granted judgment as a matter of law to *North Hills* on each of its claims. *Id.* at 542. Though he concluded that the claims were so different as to render res judicata inapplicable, the court reasoned that the First Lawsuit (which concerned a single breach of contract claim) was somehow legally dispositive of liability here (which concerns tort and quasi-contract claims). *Id*. All that was left, the Circuit Court decided, was for a jury to assess damages. *Id.*[5]

After the jury was instructed, it returned a verdict finding for Defendants on each of North Hills' five claims. App. 634-35.[6] Thereafter, North Hills moved to set aside the verdict and for a new trial, arguing *only* that the verdict was contrary to the clear weight of the evidence. *Id*. at 29-35. In its motion, North Hills made no

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not barred by the statute of limitations. *See id*. Also raising questions, the court concluded that res judicata was inapplicable because North Hills alleged "a separate claim" and this was "not the same case that was earlier decided." *Id*. at 539. Yet, in granting North Hills judgment as a matter of law, the court concluded that liability had been established in the First Lawsuit. *Id*. at 542. These rulings cannot possibly be reconciled.

[5] At times, Judge Blake seemed to be acting under the badly mistaken impression that he was still presiding over the First Lawsuit—not a second, separate lawsuit. *See* App. 528 ("You know, all along you and Mr. Barney, I think, and Mr. Shepherd have talked about -- we got two lawsuits here. I don't think that's correct. I think we got one lawsuit. We've got 19C2 that's the lawsuit [referring to the First Lawsuit]. And then you gentlemen seem to be thinking that once the Supreme Court issued its opinion in this matter and remanded it back on this issue that they say that I didn't get right -- it still remains 19C2. I mean, it's an issue of damages now. I think liability has pretty much been established by the Supreme Court in this matter."); *see also id*. at 539 (Circuit Court again mistakenly claiming that he was presiding over the First Lawsuit, which this Court had remanded for further proceedings).

[6] North Hills did not object to the jury instructions or verdict form. App. 567-69, 625 (noting agreement by both parties to the proposed jury instructions and verdict form.

complaints of any prejudicial error, misconduct, improper instructions, or improper jury verdict form. *See id*.

On September 16, 2022, the Circuit Court granted North Hills' motion, setting aside the verdict and ordering a new trial. The order contained no meaningful analysis of the record in light of the legal standard. App. 2-10. For example, the Circuit Court recited that "[North Hills] adduced substantial evidence including, but not limited to: deeds, the 2008 lease, a Notice of Violation, the West Virginia Department of Environmental Protection ("WVDEP") Consent Agreement between the WVDEP and the Defendants, injection gas well testing data indicative of a productive well, injection permit information and analytical data which all indicated that the Defendants caused contamination on Plaintiffs real estate." *Id*. at 4. But at no point did the Circuit Court actually discuss the import or this evidence or explain how any of this evidence "indicated that the Defendants caused contamination on Plaintiffs real estate." *Id*.

Similarly, the Circuit Court found that "[North Hills] also called numerous witnesses, including, but not limited to: Danny Webb, WVDEP Inspector Terry Wayne Urban, attorney Philip Douglas Mooney, corporate representative Patricia Hamilton, former Plaintiff Vice-President Charles Flint, real estate appraiser J.D. Koontz, mineral estate appraiser Rachael Vass and remediation specialist Marc Glass." *Id*. But again, the Circuit Court did not actually discuss the substance of those witnesses' testimony or how that testimony tended to prove North Hills'

claims, much less explain how it satisfied the rigorous standard for tossing the jury verdict and obtaining a new trial. *See id*.

This appeal followed.

SUMMARY OF ARGUMENT

The Circuit Court's summary conclusion that the jury verdict was contrary to the clear weight of the evidence was an abuse of discretion and must be reversed.

First, the jury's verdict was plainly reasonable in light of the record evidence. The most straightforward way to see the Circuit Court's error is to consider the showing of damages, as each of North Hills' tort claims share a common element: injury to property. If North Hills failed to prove the fact of property damage by a preponderance of evidence, then each of its tort claims necessarily fail. The principal injury alleged by North Hills is the cost of remediating the property. But a representative from the DEP—the agency entrusted with enforcing federal and state environmental laws—stated that the abandoned well and pipeline posed no risk to the environment or human health. Indeed, North Hills' expert in environmental sciences and remediation conceded that *none* of the constituents emanating from the pipeline or wellhead exceeded health-based standards. As such, neither DEP nor North Hills' remediation expert could say that remediation was actually necessary. As such, the jury could have reasonably concluded that North Hills suffered no injury to property—a required element of each its tort claims. That alone is sufficient to sustain the jury's verdict for Defendants and reverse the judgment below. This Court need not address the further assignments of error.

Second, even if the weight of the evidence overwhelmingly favored North Hills, the Circuit Court still erred by granting the motion for new trial because each of North Hills' claims fail as a matter of law. For one thing, res judicata precludes the relitigation of claims that were raised or could have been raised in a prior action. In the present action, North Hills seeks claims and remedies that absolutely could have been asserted in the prior action. Its claims are thus plainly precluded by res judicata. For another, North Hills' claims are barred by a two-year limitations period. The claims undisputedly accrued in April 2015 and were the subject of a First Lawsuit filed in January 2016, yet it did not file the present, Second Lawsuit until January 2019. Because North Hills' claims are barred as a matter of law, the Circuit Court was wrong to grant a new trial upon them.

Accordingly, this Court should reverse the Circuit Court's order and reinstate the jury's verdict.

STATEMENT REGARDING ORAL ARGUMENT

This appeal is suitable for Rule 19 argument because this case involves assignments of error regarding the application of settled law and arguments of insufficient evidence or a result against the weight of the evidence.

ARGUMENT

I. This Court has appellate jurisdiction.

An order vacating a jury verdict and setting a new trial is immediately appealable to this Court. *See* Syl. Pt. 4, *Smith v. Andreini*, 223 W. Va. 605, 607, 678 S.E.2d 858, 860 (2009) ("One may appeal to this Court a circuit court's order granting a new trial and one may appeal such an order without waiting for the new

trial to be had."). On the other hand, the Intermediate Court of Appeals ("ICA") expressly lacks appellate jurisdiction over such orders because they are interlocutory and not final. *See* Syl. Pt. 6, in part, *Foster v. Sakhai*, 210 W.Va. 716, 559 S.E.2d 53 (2001) (providing that a circuit court order granting a new trial is interlocutory but also immediately appealable); W. Va. Code § 51–11–4(d)(8) (excluding appeals of "interlocutory" orders from the subject matter jurisdiction of the ICA); *see also id.* § 51–11–4(b)(1) (granting appellate jurisdiction to the ICA over only "final" judgments or orders from circuit courts in civil cases).

II. The standard of review

"The action of the trial court in setting aside a verdict and awarding a new trial will be reversed by this Court where it appears that the case, as a whole, was fairly tried and no error prejudicial to the losing party was committed during the trial." Syl. Pt. 3, *Neely v. Belk Inc.*, 222 W. Va. 560, 562–63, 668 S.E.2d 189, 191–92 (2008). "In other words, when a trial court abuses its discretion and grants a new trial on an erroneous view of the law, a clearly erroneous assessment of the evidence, or on error that has no appreciable effect on the outcome, it is this Court's duty to reverse." *Id*. at 567, 668 S.E.2d at 196 (quoting *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 106, 459 S.E.2d 374, 383 (1995)); *accord* Syl. Pt. 4, in part, *Sanders v. Georgia-Pac. Corp.*, 159 W. Va. 621, 621, 225 S.E.2d 218, 219 (1976) (a new trial order "will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence").

Although a lower court's factual findings are reviewed under clear error, "findings made on the basis of the application of incorrect legal standards or made

in disregard of applicable legal standards" are subject to de novo review. *State v. Lilly*, 194 W. Va. 595, 600 n.5, 461 S.E.2d 101, 106 n5. (1995) (citing *State v. Farley*, 192 W. Va. 247, 253, 452 S.E.2d 50, 56 (1994)); a*ccord In re K & L Lakeland, Inc.*, 128 F.3d 203, 206 (4th Cir. 1997) ("The clearly erroneous standard will not insulate findings made on the basis of the application of incorrect legal standards.") (cleaned up). Indeed, "a circuit court by definition abuses its discretion when it makes an error of law." *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Finally, "[w]here the trial court improperly sets aside a verdict of a jury, such verdict will be reinstated by this Court and judgment rendered thereon." Syl. Pt. 2, *Neely*, 222 W. Va. at 562, 668 S.E.2d at 191 (quoting Syl. Pt. 4, *Bronson v. Riffe*, 148 W. Va. 362, 135 S.E.2d 244 (1964)).

III. The Circuit Court's order must be reversed because sufficient evidence supported the jury's verdict.

The only reason given by the Circuit Court for throwing out the jury verdict and ordering a new trial was an asserted insufficiency of the evidence to support a verdict for Defendants. Although the Circuit Court's "assessment of the evidence" is subject to a clear error standard, *Neely*, 222 W. Va. at 567, 668 S.E.2d at 196, here, the Circuit Court made no actual "assessment" of the evidence. Instead, it simply recited the losing party's witnesses and exhibits, and summarily concluded that a new trial was warranted. In short, the Circuit Court made no actual findings to which this Court could review for clear error. Instead, it provided only summary conclusions, to which this Court owes no deference, as the Circuit Court's error turns on its legal interpretation of the new trial standard. Regardless, the Circuit

Court's conclusion was error, clear or otherwise, as a straightforward view of the law and record confirm.

In determining whether there is sufficient evidence to support a jury's verdict, "it is not the role of the Circuit Court to substitute its credibility determinations for those of the jury." *Fredeking v. Tyler*, 224 W. Va. 1, 6, 680 S.E.2d 16, 21 (2009); *accord* W. Va. Const., art. III, § 13 (providing a constitutional right to trial by jury in civil cases). Rather, in determining whether there is sufficient evidence to support a jury's verdict, courts *must*: "(1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." *Fredeking*, 224 W. Va. at 6, 680 S.E.2d at 21 (cleaned up).[7]

It is not surprising, then, that "[a] new trial should rarely be granted and then granted only where it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." *Smith v. Cross*, 223 W. Va. 422, 427, 675 S.E.2d 898, 903 (2009) (cleaned up); *accord* W. Va. Const., art. III, § 13.

[7] *See also* Syl. Pt. 3, *Walker v. Monongahela Power Co.*, 147 W. Va. 825, 131 S.E.2d 736 (1963) ("In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true.").

The most straightforward reason for sustaining the jury verdict comes from looking to the lack of proof presented by North Hills for the element common to its claims: injury to property. The principal injury alleged by North Hills is contamination emanating from the injection well site and the abandoned pipeline. If North Hills failed to prove the fact of property damage by a preponderance of evidence, then each of its tort claims necessarily fail. Even before affording Defendants the benefit of inference—which the Circuit Court should have but wholly failed to do—the jury's verdict for Defendants is plainly supported by the evidentiary record. The following evidence shows why.

Testimony of Terry Urban

North Hills called Terry Urban, an inspector for DEP, the state agency entrusted with enforcing federal and state environmental laws. App. 243-90. Urban was the inspector chiefly responsible for monitoring Webb Construction's injection operations. App. 265. As a general matter, Urban testified that Defendant Danny Webb was a "good operator" and quick to address any problems that might arise. *Id.* at 265-66. Although Urban had cited Webb Construction in the past—demonstrating a watchful eye on its operations—none of those citations *ever* concerned threats to safety or public health. *Id.* at 266.

As for North Hills' claims that Webb Construction contaminated the property, Urban testified that DEP would have intervened if the pipeline actually posed any risk to the environment or public health. App. 266. That said, Urban was not aware of any investigations into the supposed contamination on North Hills' property. *Id.* at 266-67. Ultimately, Urban expressed no concerns about the

integrity of Well 508 or the pipeline, stating that "it's good pipe." *Id*. at 266-67, 275. When asked if DEP had any issues with the property, Urban stated, "I don't think they have any issues" or "none that I'm aware of." *Id*. at 268. In the absence of DEP scrutiny and based on this testimony, the jury could reasonably conclude that North Hills suffered no injury to property—a required element of each its tort claims. The Circuit Court ignored this.

But Urban's testimony went further. In fact, his testimony would allow a jury to reasonably conclude that North Hills' contamination claims as a whole were simply *manufactured*. In particular, North Hills alleges that, in January 2018, guests hiking on North Hills' property noticed a "strong smell of hydrocarbons" and, upon closer inspection, found that an "oily substance" was "spewing from a hole in the pipeline and contaminating the soil beneath and around the pipeline." App. 22. Urban, however, shed light on this alleged discovery, vividly recounting the scene from the supposed leak.

First, Urban testified that the leak was reported to DEP by a suspicious caller. App. 269-70. The complaint states that the leak was reported by "[North Hills] representatives," *id*. at 22, but neither the representatives nor the hikers were identified at trial. *Second*, when Urban arrived at the scene of the supposed leak, the media and members of the public were already there—they had been tipped off. *Id*. at 270-71. *Third*, upon close inspection, Urban could not actually identify any fractures or holes in the steel pipe. *Id*. at 272-73. *Fourth*, the substance on the ground directly below the supposed leak was consistent with motor oil, which

would not have come from the pipe, which years ago transported exclusively wastewater. *Id*. at 274. *Fifth*, the pipeline was unhooked from the well site, making a leak even less probable. *Id*. *And sixth*, Webb Construction had been ejected from North Hills' property back in June 2016, so no fluids had been pumped through the pipeline since then. *Id*.

These observations led Urban to conclude that there was *never a leak* and that the substance on the ground was put there by *someone else*. *Id*. A jury could reasonably assume—as Defendants argued—that the leak was staged and that North Hills suffered no actual injury to property, dooming all of its claims. The Circuit Court ignored this, too.

Testimony of Marc Glass

North Hills also called Marc Glass, an expert in environmental sciences and remediation. App. 447-518. Glass testified that the pipe is a source of contamination and that certain contaminants were present in the soil around the pipe. *Id*. at 493. But, as Glass also testified, the mere presence of "contaminants" does not, in itself, equate to harm. *Id*. at 507-08.[8] "Contaminants" are ubiquitous in daily life so, as

[8] Illustratively, the EPA has explained that, in the context of drinking water, the term "contaminant" is defined as "meaning any physical, chemical, biological, or radiological substance or matter in water." The EPA defines the term "very broadly as being anything other than water molecules. Drinking water may reasonably be expected to contain at least small amounts of some contaminants. Some drinking water contaminants may be harmful if consumed at certain levels in drinking water while others may be harmless. The presence of contaminants does not necessarily indicate that the water poses a health risk." https://www.epa.gov/ccl/types-drinking-water-contaminants. All that to say, the mere presence of "contaminates" does not reasonably (much less, automatically) imply ecological harm.

Glass acknowledged, harm is generally dictated by the type, amount, and level of exposure. *Id.* at 507. Though he found "elevated" levels of certain contaminants (primarily, heavy metals) along the pipeline—in itself an unremarkable finding—he conceded that "[t]here are no constituents that exceed health-based standards." *Id.* at 511-12. Thus, Glass *could not say* that the contaminates posed any risk to the environment or human health. *Id.* The jury could also have reasonably relied upon this critical testimony to conclude that North Hills suffered no injury to property, such that, once again, it failed to prove a required element of each of its claims. The Circuit Court ignored this.

Glass also prepared a proposed remediation plan.[9] App. 681-702. This remediation plan contemplates, among other things, the removal of the 2-inch steel pipeline across the surface of the property. *Id.* Once the pipeline is removed, the remediation plan calls for "confirmatory soil sampling" and, depending on the results of this soil sampling, the excavation and removal of some or all of the soil along the pipeline's path. *Id.* at 700-02. In particular, Glass proposed excavating and removing sections of soil that exceed "WV De Minimis standards for the COPCs [contaminants of potential concern]." *Id.* at 702. But he did not yet know the results of this soil sampling, so he provided a menu of possible mitigation "estimates"

[9] Over Defendants' objections, App. 370-71, the Circuit Court wrongly admitted into evidence each of Plaintiff's expert reports and CVs wholesale. *See Bianco v. Globus Med., Inc.*, 30 F. Supp. 3d 565, 570 (E.D. Tex. 2014) (providing that expert reports are hearsay and inadmissible); *Mahnke v. Washington Metro. Area Transit Auth.*, 821 F. Supp. 2d 125, 154 (D.D.C. 2011) (same); *Rawers v. United States*, 488 F. Supp. 3d 1059, 1104 (D.N.M. 2020) (same).

ranging from $65,000 (assuming 5% of the pipeline route exceeds de minimis levels) to $1,300,000 (assuming 100% of the pipeline route exceeds de minimis levels). *Id.* at 514-16, 700-02. Thus, even accepting the propriety of Glass's mitigation plan, these costs are incredibly uncertain and require a wild degree of speculation. Given that Glass could not say how much, if any, soil would have to be removed, the jury could reasonably conclude that such mitigation efforts were unnecessary. The Circuit Court ignored this.

Given Glass's concession that the "contaminants" along the pipeline do not exceed any health-based standards, App. 511-12, the jury could reasonably conclude that North Hills suffered no injury to property. Likewise, given that "WV De Minimis standards" were used as the benchmark for Glass's remediation plan, *id.* at 701-02, the jury could reasonably conclude that remediation was neither reasonable nor necessary. In the end, North Hills failed to present any evidence that removal of the pipeline was indeed necessary. The Circuit Court ignored this, too.

Testimony of J.D. Koontz

North Hills called a residential appraiser, J.D. Koontz, to opine on the residential value of the property, which, in his estimation, had decreased as a result of the well and pipeline. App. 842-66. But notably, Koontz did not opine on whether there was any property damage or whether the remediation plan was even necessary. *Id.* at 389-90. He simply appraised the as-is value of the property, then subtracted the cost of Glass's proposed remediation plan to arrive at the impaired property value. *Id.* at 390-91. Put another way, the impairment, if any, is exactly equal to Glass's estimated cost of cleanup.

So, if the jury found that Glass's remediation plan was neither reasonable nor necessary, then it logically follows that, under Koontz's analysis, the residential value of the property had *not* been impaired. Given Glass's concession that the "contaminants" along the pipeline do not exceed any health-based standards, the jury could, accordingly, have reasonably concluded that the value of North Hills property had not been impaired. The Circuit Court ignored this.

What is more, there is another reason a jury could doubt Koontz's opinions: he only appraised the *residential* value, a purpose for which the property had never been used. App. 842-66. Koontz did this because, in his opinion, residential use is the property's highest and best use. *Id*. As Defendants argued below, this conclusion is unsupported and should not be credited for at least two reasons.

First, the property had never been used for residential purposes. Rather, the property has historically been used for timbering, oil and gas extraction, and, most recently, wastewater injection. App. 384, 393. *Second*, Koontz conceded that he had not valued these other income-generating uses. *Id*. at 385. Without valuing the property based on these other income-generating uses, there was no basis to compare and conclude that residential use is the property's highest and best use. Without a complete picture of the property's value, the jury could have reasonably concluded that North Hills simply failed to prove that its property value was actually diminished at all. The Circuit Court ignored this, too.

The Lease

North Hills failed to present *any* evidence that Webb Construction was obliged to remove the pipe from the property. The Lease provides that "Lessee shall

have the right at any time either before or within one year after the termination of this lease to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing." App. 665. Notably, Webb Construction was given the *right* to remove fixtures, demonstrating that there is no *affirmative obligation* to remove fixtures once operations cease. That the pipeline was intended to be a permanent fixture on the property is further evidenced by the fact that the pipeline could, at North Hills' request, be buried "below plow depth." *Id*. at 666. If the abandoned pipeline is now a possible source of contamination, as North Hills claims, the jury could have reasonably concluded that it was *North Hills'* property to maintain and *North Hills'* duty to remediate. This issue of contract interpretation should have been resolved by the Circuit Court as a matter of law, but Judge Blake summarily dispensed with this argument and left it to the jury to sort out. (It did—in Defendants' ultimate favor, and quite reasonably so).

In sum, North Hills demanded that Webb Construction remove the pipeline and remediate the property, claiming that the well and pipeline are sources of potential contamination. Yet, North Hills failed to present any credible evidence that either the well or pipeline was leaking; DEP had taken no issue with the well or pipeline or raised concern that either pose risk to the environment or human health; North Hills' own expert could not say that remediation was necessary or required; North Hills' own expert conceded that the "contaminants" emanating from the pipeline and wellhead do not exceed any health-based standards; North Hills' own expert appraiser could not actually say whether North Hills' property value

had been impaired; and the Lease contemplates that the pipeline remain a permanent fixture. The jury's verdict is not only reasonable in light of the record evidence—but demonstrably correct.

Along similar lines, in order to prevail on its unjust enrichment claim, North Hills was required to prove that Webb Construction received and retained benefits "under such circumstance that it would be inequitable and unconscionable" to permit Webb Construction to avoid payment therefor. *Realmark Devs., Inc. v. Ranson*, 208 W. Va. 717, 721, 542 S.E.2d 880, 884 (2000). But, as the jury learned, Webb Construction had *already compensated North Hills* for the benefit of operating on its property. At the time the Lease was executed, Webb Construction made an initial payment to North Hills in the amount of $72,480. App. 225, 659. Thereafter, for the years 2012 through 2015, Webb paid North Hills an annual injection payment of $3,624. *Id.* at 226-27, 666. In total, Webb Construction paid North Hills $86,976 for the privilege of operating on its property. Until Ms. Hamilton succeeded to President of North Hills, the company's former management gladly cashed each of these checks. *Id.* at 225-27. Only once Hamilton took control of North Hills did the company move to terminate the Lease and refund the 2015 annual injection payment. *Id.* at 671. Based on this evidence, a jury could have reasonably concluded that North Hills had already been compensated for the benefits received and retained by Webb Construction when it found for Defendants on the unjust enrichment claim.

The Circuit Court's unreasoned decision to throw out the jury's verdict is a patent violation of Defendants' constitutional right to a jury trial and the longstanding precedents of this Court governing new trials, *see Neely*, 222 W. Va. at 566–67, 668 S.E.2d at 195–96, which gives that right real value. The order below must be reversed, and the jury verdict reinstated. This Court need not address any further assignments of error in order to do so.

IV. Alternatively, even if this Court agrees that the jury's verdict was plainly contrary to the weight of the evidence, the Circuit Court still erred in granting a new trial because each of North Hills' claims fail as a matter of law.

This Court can and should reverse the Circuit Court's order and reinstate the jury verdict for the simple reason that the Circuit Court wholly mistook its role when it sidelined the jury as factfinder and gave North Hills a mulligan.

However, even if this Court finds that no reasonable jury could have found in Defendants' favor based on the record, the Circuit Court was *still* wrong to grant a new trial. Why? Because North Hills' claims are hopelessly infirm as a matter of law for several reasons, which the Circuit Court was unfortunately content to ignore in favor of sending it all to the jury.

A. Plaintiff's claims are barred by res judicata.

"Under West Virginia law, the doctrine of res judicata or claim preclusion assures that judgments are conclusive, thus avoiding relitigation of issues that were or could have been raised in the original action." *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 559, 803 S.E.2d 519, 529 (2017). "Res judicata prohibits not only the re-litigation of claims that were actually asserted in the prior

action, but also precludes every other matter which the parties might have litigated as incident thereto." *Id.* at 561 (cleaned up). "Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." *Id.* But that is precisely what happened below, and the Circuit Court did nothing about it.

A three-part test controls the preclusive effect of a prior judgment. "First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

The first two elements are uncontroverted. *First*, the prior action—the First Lawsuit—was fully adjudicated on its merits. The Circuit Court of Fayette County terminated the Lease in the prior action in a final order, and that decision was affirmed by this Court on appeal. *See Webb v. N. Hills Grp., Inc.*, No. 16-0640, 2017 WL 2493768 (W. Va. June 9, 2017). Because all the matters in controversy had been resolved, this Court did not remand the prior action for any further proceedings. *Second*, there is perfect parity between the parties in both the prior action and the current action. In both, North Hills Group is the plaintiff and Danny Webb and Danny Webb Construction Co., Inc. are the defendants.

On the third element, North Hills' current claims unquestionably could have been resolved, had it presented them, in the First Lawsuit. In the First Lawsuit, North Hills claimed that Webb Construction breached the Lease by injecting fluids other than saltwater and brine. App. 1712-21. North Hills sought a single remedy in the prior action: termination of the lease, which the trial court granted. *Compare id. at* 1712-21 *with id*. at 1722-35. It could have requested compensatory damages resulting from Webb Construction's actions for that breach but, for whatever reason, tactically decided not to do so. North Hills cannot now request relief that could have been awarded in the prior action—in particular, remediation of the property. Indeed, North Hills had contemplated and demanded remediation before filing the First Lawsuit. For instance, in its lease termination letter, dated July 2015, North Hills accused Webb Construction of contaminating the property and demanded that the pipeline be removed and that the property remediated. *Id*. at 670-71. That North Hills already litigated this dispute to final judgment squarely bars it from *reopening* this matter for the purpose of seeking additional relief that was clearly available in the First Lawsuit.

Because North Hills' present claims are barred as a matter of law, the Circuit Court erred by permitting a new trial on them. Even if the weight of the evidence militates in North Hills' favor, a new trial is error as a matter of law.

B. Plaintiff's claims are barred by the statute of limitations.

North Hills' negligence, trespass, nuisance, and breach of fiduciary duty claims—each of which are premised on supposed injury to property—are clearly barred by the two-year statute of limitations. *See* W. Va. Code § 55-2-12.

At the earliest, North Hills' claims accrued in April 2015 when its president, Patti Hamilton, learned from a series of public meetings that Webb Construction was injecting wastewater into Well 508. App. 328-30, 340 (testimony of Ms. Hamilton confirming that she first learned of Webb Construction's injection operations in April 2015). And, as this Court previously noted in the First Lawsuit, "the record is also abundantly clear that North Hills Group had no knowledge that anything other than salt water or brine was being injected into the 508/1A well until learning information at a Fayette County Commission meeting in November 2014, which prompted an inquiry into the nature of Webb Construction operations on the premises." *Webb,* 2017 WL 2493768, at *3. Because North Hills' claims accrued in April 2015 and the current lawsuit wasn't filed until January 2019, the claims are plainly barred by the two-year limitations period. A new trial on them would be patent legal error.

By letter dated July 24, 2015, North Hills informed Webb Construction that the Lease was terminated due, in part, to the injection of off-site waste material other than salt water, brine, or natural gas. App. 670-71. North Hills "requested that injection activity cease and that, within a reasonable time, equipment be removed, the premises reclaimed, and the well shut down in accordance with regulatory requirements." *Id.* At that time, North Hills "further indicated that remediation of ground and surface waters may be required." *Id.* This letter—demonstrating that North Hills fully appreciated the supposed harm to its property—predates the current lawsuit by nearly 3.5 years.

By letter dated September 1, 2015, Ms. Hamilton advised DEP that the Lease had been terminated. App. 669. Notably, Hamilton referenced Webb Construction's "wastewater operation," claiming that Webb Construction was then trespassing and obliged to clean up the site and remove the pipeline—the very claims North Hills is now prosecuting. *Id*. This letter—again, demonstrating that North Hills fully appreciated the supposed harm to its property—predates the current lawsuit by more than 3 years.

If that weren't enough, North Hills *certainly* appreciated the supposed harm to its property when it filed the First Lawsuit on January 15, 2016—nearly three years before the present lawsuit was filed—alleging, among other things, that Webb Construction contaminated the property with "elevated levels of several dissolved constituents including chloride, bromide, sodium, manganese, strontium and barium." App. 1715.

At the absolute latest, North Hills' claims accrued on June 7, 2016, when Judge Blake first terminated the Lease and enjoined Webb Construction's operations on North Hills' property. In terminating the Lease, the Circuit Court found that Webb Construction used the property as a "hydraulic fracturing waste dump" which resulted in "potential contamination migration onto the properties of nearby landowners and adjacent streams of water." App. 1733. Echoing the claims in the present lawsuit, the Circuit Court reasoned that the supposed "waste site is a nuisance and interrupts the quiet and useful enjoyment of [Plaintiff's] property." *Id*. Webb Construction was ejected from the property in June 2016, yet North Hills

waited another 2.5 years to file the present lawsuit. *Compare id*. at 17-27 *with id*. at 1722-35. North Hills clearly had the opportunity to litigate these claims in the First Lawsuit but, for whatever reason, decided not to do so.

Because North Hills' present claims are barred as a matter of law, the Circuit Court erred by permitting a new trial on them. Even if the weight of the evidence militates in North Hills' favor, a new trial is error as a matter of law.

C. Plaintiff's tort claims are barred by the gist of the action doctrine.

In addition to res judicata, the Circuit Court erred ordering a new trial on claims that fail as a matter of law under the "gist of the action" doctrine. In the case below, North Hills simply reclothed its prior breach of contract claim in tort attire. *Compare* App. 17-27 *with* App. 1712-21. Applying the "gist of the action" doctrine, this Court has refused similar attempts to recast a contract claim as a tort claim. *See Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 586, 746 S.E. 2d 568, 577 (2013) (barring recovery in tort "(1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim"). The doctrine is satisfied here.

First, North Hills' trespass and nuisance claims as pleaded and argued depended on proof of breach of contract—here, the Lease. Consent is a valid defense to nuisance and trespass. *See Bd. of Trustees of Leland Stanford Junior Univ. v.*

Agilent Techs., Inc., 573 F. Supp. 3d 1371, 1377 (N.D. Cal. 2021). As such, in order to prevail on its trespass and nuisance claims, North Hills must first prove that Webb Construction breached the Lease by operating outside the scope of the Lease.

Second, North Hills' breach of fiduciary duty claim arises *solely* from the parties' contractual relationship. Because there is no evidence (much less, allegations) of a fiduciary duty that transcends or exists outside of the parties' lease agreement, North Hills' breach of fiduciary duty claim is barred by the gist of the action doctrine. *See Hirtle Callaghan Holdings, Inc. v. Thompson*, 2022 WL 2048656, at *4 (E.D. Pa. June 7, 2022) (dismissing breach of fiduciary duty claims based on the gist of the action doctrine where the duties outlined in the contract are "inextricably intertwined" with the alleged breaches of fiduciary duties).

Third, in order to prevail on its negligence claim, North Hills must prove that Webb Construction breached a duty of care. "The gist-of-the-action doctrine is triggered when the asserted duty of care derives, in fact, from a contract." *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 556, 803 S.E.2d 519, 526 (2017). Here, North Hills alleges that (i) "Defendants owed a duty to Plaintiff to use reasonable care not to contaminate Plaintiff's property," (ii) "Defendants owed a duty to Plaintiff to remediate any contamination related to Defendants' operations," and (iii) "Defendants owed a duty to make full disclosures to Plaintiff during [lease] negotiations." App. 23. Even on Plaintiff's own telling, each supposed legal duty allegedly breached derives *solely* from the parties' contractual relationship.

Because North Hills' tort claims are barred as a matter of law based on the "gist of the action" doctrine, the Circuit Court erred for this additional reason when granting a new trial on them.

D. A new trial on the unjust enrichment claim is precluded by a written agreement.

The new trial order was error as to the unjust enrichment claim in particular, for an additional reason. Because it already prosecuted its claim for breach of contract, North Hills hopes to repeat that claim under the guise of unjust enrichment. In particular, North Hills argues that Webb Construction has been enriched as a result of its improper use of North Hills' property for the purpose of injecting wastewater. App. 25-26. But it is well-established that quasi-contract claims, like unjust enrichment, are legally unavailable when an express agreement exists because such claims only exist in absence of an agreement. *See Gulfport Energy Corp. v. Harbert Priv. Equity Partners, LP*, 244 W. Va. 154, 159–60, 851 S.E.2d 817, 822–23 (2020). Simply put, an express contract and an implied contract relating to the same subject matter cannot co-exist. Yet the Circuit Court allowed it below. Here, the parties' relationship was governed by the Lease, the existence of which eclipses any right to recover for unjust enrichment as a matter of law. Because North Hills' unjust enrichment claim fails as a matter of law, the Circuit Court erred by ordering a new trial on the claim.

E. The Lease did not create a fiduciary relationship.

The new trial order was error as to the breach of fiduciary duty claim for yet another reason: North Hills is wrong that the Lease created a fiduciary duty. A

fiduciary duty is "a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law." *Napier v. Compton*, 210 W. Va. 594, 598, 558 S.E.2d 593, 597 (2001) (cleaned up). Here, North Hills and Webb Construction were counterparties to an oil and gas lease, meaning there was no expectation that either party would subordinate their interests to that of the other party. And nothing in the text of the Lease imposes a fiduciary duty on Webb Construction in favor of North Hills. App. 656-68. Plaintiff's claim therefore fails for lack of a fiduciary duty. Because North Hills' breach of fiduciary duty claim fails as a matter of law, the Circuit Court erred by ordering a new trial on that claim as well.

CONCLUSION

For these reasons, this Court should reverse the Circuit Court's order and reinstate the jury verdict. *See* Syl. Pt. 2, *Neely*, 222 W. Va. at 562, 668 S.E.2d at 191 (quoting Syl. Pt. 4, *Bronson v. Riffe*, 148 W. Va. 362, 135 S.E.2d 244 (1964)) (holding that when reversing a new trial order the Supreme Court of Appeals must itself reinstate the jury verdict and judgment rendered thereon).

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2023, **Petitioners' Opening Brief** and **Appendix** were filed and served via File&ServeXpress on all counsel of record.

/s/ J. Zak Ritchie
J. Zak Ritchie (WVSB #11705)