INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-154

CARBON ENERGY CORPORATION, CARBON WEST VIRIGINIA COMPANY, LLC., n/k/a DP BLUEGRASS, LLC, AND DIVERSIFIED GAS AND OIL CORPORATION,
Defendants Below, Petitioners,

v.

SHONK LAND COMPANY, LLC,
Plaintiff Below, Respondent.

Honorable Jennifer Bailey, Judge
Circuit Court of Kanawha County
Civil Action No. 20-C-613

BRIEF OF THE PETITIONERS

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I. INTRODUCTION

This is an appeal by the Petitioners, Carbon West Virginia Company LLC (n/k/a DP Bluegrass LLC) ["Carbon West Virginia" or "DP Bluegrass"], Carbon Energy Corporation ["Carbon Energy"], and Diversified Gas & Oil Corporation ["Diversified"], from a judgment of over $4 million for claims of tortious interference, willful trespass, and unjust enrichment by the Respondent, Shonk Land Company LLC ["Shonk" or "Respondent"], arising from what should have been nothing more than a suit for breach of a right of first refusal with no or minimal damages. Instead, Shonk was permitted to prosecute non-contract claims and argue to the jury that it had been the victim of fraud when the Petitioners bent over backward to accommodate Shonk's unreasonable demands when exercising its right of first refusal. The outrageous outcome here is analogous to similar situations, such as the sale of farmland, involving contractual rights of first refusal where one party agrees that before selling property to a buyer, the holder of the right of first refusal could match the price offered. Applying that analogy here, the farmer (Shonk) with a right of first refusal on an acre of farmland (the Leases) made outrageous extracontractual demands of, first, the contracting party (Carbon Energy) and, then, the farmer who has offered to buy the acre (Diversified) while exercising his option and later filed suit against the other farmers (Carbon Energy and Diversified) and was awarded the acre as well as the value of the acre, while avoiding his obligation to pay for the acre, resulting in a triple recovery. This should send chills down the spine of all parties, both individual and corporate, subject to rights of first refusal.

II. ASSIGNMENTS OF ERROR

1. The Circuit Court erred by failing to enter judgment for the Petitioners on the Respondent's breach of contract and implied covenant claims where there was no evidence from which a jury could reasonably find a material breach of the Respondent's right of first refusal.

2. The Circuit Court erred by failing to enter judgment for the Petitioners on the Respondent's slander of title claim where (a) the subject assignment did not refer to the Respondent's leases; (b) if the leases were forfeited, the assignment could not have slandered its title; (c) if the leases were not forfeited, the assignment did not slander its title; and (d) no evidence was presented of any special damages or diminished value in the eyes of third parties.

3. The Circuit Court erred by failing to enter judgment for the Petitioners on the Respondents' willful trespass claim as (a) in the absence of forfeiture, the Petitioners had the right to operate the wells and (b) even if there were a forfeiture, the Respondent allowed continued operation of the wells while the parties negotiated over the terms of a proposed transfer and thereafter.

4. The Circuit Court erred by (a) failing to enter judgment for the Petitioners on the Respondent's unjust enrichment claim, which was (i) premised on a forfeiture that did not occur; (ii) failed for the same reason as the willful trespass claim, and (iii) resulted in a double recovery, and (b) awarding prejudgment interest on the claim.

5. The Circuit Court erred by failing to enter judgment for the Petitioners on the Respondent's tortious interference claim because (a) it was duplicative; (b) the damages awarded for this claim, $1,280,504, was the value of sixty (60) different wells governed by an unrelated lease having nothing to do with this case; (c) the damages awarded would represent the amount the Respondent would owe, not any amount that would be owed to the Respondent; and (d) the conduct involved – contract negotiations that may impact a third party - cannot constitute tortious interference as a matter of law.

6. The Circuit Court erred by permitting the post-trial pursuit of slander of title special damages in the form of attorney fees.

7. The Circuit Court erred by not awarding a new trial where (a) the damages awarded are duplicative and unsupported by competent evidence and (b) counsel made improper closing arguments that the Respondent had been "cheated" and was the victim of "fraud" when nothing more than a contractual dispute over a right of first refusal was involved.

III. STATEMENT OF THE CASE

This case is about leveraging a simple contract dispute into slander of title, willful trespass, tortious interference, and unjust enrichment claims. This resulted in not only the forfeiture of wells worth millions but also a verdict of $1,280,504 for tortious interference, $1,596,847 for willful trespass, and $1,302,803 for unjust enrichment.[1]

The claims between the parties, with Shonk as Lessor and DP Bluegrass as Lessee, arise from two oil and gas leases, the Larner Lease[2] and the Williams Lease.[3] Approximately 57 natural gas wells and associated infrastructure are on the leased premises. Under its former name of Carbon West Virginia, DP Bluegrass and Shonk executed a Second Lease Amendment and Ratification for each lease dated May 6, 2019.[4] Among other provisions, the Second Lease Amendment grants Shonk a "right of first refusal" to purchase the lessee's interests if the lessee proposes to sell the lease interests to a third party.[5] Once the lessee receives such an offer, the Second Lease Amendment requires that written notice be provided to Shonk that sets forth "information concerning the purported transferee of the Transferred Interest[6] and the value Lessee

[1] App. 3655-3660.

[2] App. 4384.

[3] App. 4399.

[4] App. 3880.

[5] App. 3880-3881.

[6] The term "Transferred Interest" is defined as all or any portion of the lessee's interest in the Lease that the lessee seeks to transfer to an unaffiliated third party. App. 3880.

expects to receive in exchange for transferring the Transferred Interest."[7] Shonk then had thirty days to decide whether to "elect to purchase the Transferred Interest for the value and upon the terms set out in the Notice of Intent to Transfer and shall give written notice of such election to Lessee."[8] In other words, if Shonk decided to purchase the lease interests on the same terms offered by a third party, it could do so upon written notice to the Lessee within thirty days of receiving the Notice of Intent to Transfer. The Second Lease Amendment further stated that a "material breach" by Carbon West Virginia of the right of first refusal provision would result in forfeiture.

On April 7, 2020, Carbon Energy agreed to effectively sell ownership of the Larner and Williams lease interests, among other unrelated leases, to Diversified.[9] Notably, the sale to Diversified was part of a larger transaction in which Diversified proposed to purchase 100% of Carbon Energy's equity interests in several affiliated companies, including Carbon West Virginia (which owned the Larner and Williams lease interests), for a base purchase price of $110 million, subject to various adjustments.[10] Through this transaction, ownership of the Leases would not change. Instead, ownership of Carbon West Virginia would change, which triggered Shonk's right of first refusal.[11] Diversified and Carbon Energy agreed on an allocated value for the Larner Lease of $2,605,607,[12] roughly double 60% of the PV10 value[13] for the Larner wells. Diversified did not increase the allocated value of the Williams Lease above the value used for the other wells.[14]

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[7] *Id*.

[8] App. 3881.

[9] App. 3678.

[10] App. 3690.

[11] App. 3685.

[12] App. 3960.

[13] "PV10 is a calculation of the present value of estimated future oil and gas revenues, net of forecasted direct expenses, and discounted at an annual rate of 10%. The resulting figure is used in the energy industry to estimate the value of a corporation's proven oil and gas reserves." A. Hayes, *PV10: Definition, Use to Energy Investors, Calculation, Example*, Investopedia, https://www.investopedia.com/terms/p/pv10.asp.

[14] App. 3961.

By letters dated April 8, 2020, Shonk received notice of the proposed transaction with Diversified.[15] Following the requirements of the Second Lease Amendments, the notices set forth "information concerning the purported transferee of the Transferred Interest" by identifying Diversified. The notices also described "the value Lessee expects to receive in exchange for transferring the Transferred Interest," which was the agreed-upon allocated values for the Larner Lease ($2,605,607) and the Williams Lease ($60,022). At that point, Shonk's thirty-day clock began to tick, but rather than offering "to purchase the Transferred Interest for the value and upon the terms set out in the Notice of Intent to Transfer," it requested a copy of the agreement between Carbon Energy and Diversified, to which it was not a party, to "evaluate the fairness or accuracy of the computation of the $2,605,707 purchase price allocated to" the leases.[16] This established a pattern that would continue throughout the parties' disputes, i.e., Shonk making unreasonable demands in negotiating the terms of exercising its right of first refusal to generate non-contractual claims against the Petitioners, which responded with good faith offers to resolve Shonk's demands, but limited to the scope of the contractual right of first refusal.

For example, the "fairness or accuracy" of what Diversified was willing to pay Carbon Energy for the leases was irrelevant. Shonk had the right to meet the price offered by Diversified, and *whether that price was above or below the market was irrelevant*. Indeed, a "right of first refusal" is defined in BLACK'S LAW DICTIONARY as "[a] potential buyer's contractual right to meet the terms of a third party's higher offer."[17] Moreover, "market price" is that reached "by a willing buyer and a willing seller, each acting with complete freedom and knowledge of the property."[18]

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[15] App. 4078.

[16] App. 4246.

[17] *Right of First Refusal*, BLACK'S LAW DICTIONARY (10th Ed. 2014).

[18] *West Virginia Department of Transportation, Division of Highways v. Western Pocahontas Properties, L.P.*, 236 W. Va. 50, 62, 777 S.E.2d 619, 631 (2015) (citations, internal quotation marks, and alterations omitted).

Nevertheless, Carbon Energy representative Mike Potter sent Shonk the allocated value table for the wells governed by the Larner and Williams leases, which listed the agreed-upon price for the leases.[19] A week later, on April 21, 2020, Potter advised Shonk that the schedules and exhibits to the sales agreement between Carbon Energy and Diversified could not be provided to Shonk as it was designated as confidential.[20] At that point, Shonk had a choice – (1) not exercise its right of first refusal or (2) demand information to which it was not entitled.

On May 5, 2020, Shonk sent a letter to Carbon Energy exercising its right of first refusal to purchase both leases for the allocated value amounts stated in the April 8, 2020, notices of intent to transfer.[21] *Over the next several weeks*, counsel for Shonk and counsel for Carbon Energy/Carbon West Virginia exchanged drafts of various closing documents that, once executed, would accomplish a conveyance of the Leases to Shonk.[22] Consistent with the applicable agreements, the proposed closing documents stated that Shonk's purchase price for the Leases would be reduced by the value of oil and gas produced from those Leases as of January 1, 2020.[23]

Simultaneously, representatives of Carbon Energy were diligently working toward closing the much larger transaction with Diversified, which was scheduled to occur on May 26, 2020, by agreement between Carbon Energy and Diversified.[24] However, as of May 21, 2020, *forty-three days* after the tender, Shonk failed to close and instead continued to dicker over the terms of the closing documents, *including insisting on onerous terms beneficial to Shonk well beyond those agreed upon between Carbon Energy and Diversified*.[25] Rather than continuing to negotiate with

[19] App. 3958.
[20] App. 3819-3820.
[21] App. 4267. This was the effective date of the Carbon Energy/Diversified transaction.
[22] App. 4276-4382.
[23] App. 4234, 4264, 4265
[24] App. 3728, 3964.
[25] App. 3962-3963.

Shonk over the Memorial Day weekend, Carbon Energy allocated its resources toward closing the transaction with Diversified by May 26, 2020, and allowed Diversified (as the new owner of Carbon West Virginia) to finalize the negotiations with Shonk to transfer the leases.[26]

As scheduled, Carbon Energy and Diversified closed their transaction on May 26, 2020.[27] Initially, a mortgage/trust deed was executed that mistakenly included the Shonk leases,[28] but a release was quickly recorded to correct that error.[29] On the same day as the closing, Carbon Energy notified Shonk that Diversified representatives would continue discussing the terms and conditions of the proposed lease transfer with Shonk.[30] In response, on May 29, 2020, Shonk declared a default and forfeiture of the leases but agreed to forbear on its claimed right of forfeiture to proceed with a transaction with Diversified.[31] By letter agreement dated June 10, 2020, Shonk and Diversified documented their agreement to work together toward closing the lease transaction while reserving any claims or defenses any of those companies may have.[32]

So, at this point, (1) Carbon Energy had notified Shonk of Diversified's offer; (2) Shonk demanded more information than that to which it was entitled; (3) Carbon Energy rejected Shonk's demands for sales terms benefitting only Shonk well outside the terms of the right of first refusal; and (4) Carbon Energy closed its transaction with Diversified, with the latter agreeing to honor Carbon West Virginia's obligations under the right of first refusal. Unfortunately, Shonk thereafter continued demanding sales terms benefitting Shonk well outside the Lease provisions.

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[26] App. 3965 ("Shonk and Carbon West Virginia can continue discussions regarding the form of purchase agreement and assignment to be executed between the parties.").

[27] App. 3832-3876.

[28] App. 3836 (June 23, 2020).

[29] App. 4429 (July 27, 2020).

[30] App. 3965.

[31] App. 3970.

[32] App. 4034.

Even though Diversified was not obligated to do so as the successor to the right of first refusal, it diligently and earnestly prepared and provided Shonk with a detailed PowerPoint presentation that measured the price Shonk agreed to pay against several metrics commonly used to value oil and gas assets.[33] Diversified did so to develop a positive and communicative relationship with Shonk. Diversified noted that gas production from the wells is directly connected to an interstate transmission pipeline operated by Dominion Energy, thus avoiding the additional fees associated with transporting gas through smaller pipeline systems.[34] Diversified also pointed out that the compressor station and other associated infrastructure serving the Larner Lease wells would be included in the transaction even though that equipment was not separately assigned value as part of the Carbon Energy-Diversified transaction.[35]

By letter emailed on July 10, 2020, Shonk notified Diversified that it was dissatisfied with the information provided and of Shonk's position that it "be immediately provided with the full disclosure it has long been requested."[36] When Diversified (which had already gone out of its way to provide information it was not required to provide) did not provide the extra-contractual requested information, Shonk commenced this civil action on July 23, 2020. In line with Shonk's pattern of adding items well beyond what was contemplated by the parties, Shonk filed a lawsuit for breach of the implied covenant of good faith and fair dealing, slander of title, unjust enrichment, trespass, and tortious interference[37] instead of a simple lawsuit for breach of contract.

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[33] App. 4063. For example, Shonk's cash flow projections for the next 50 years, when corrected to include revenue for 2020 and gas production in 2019, resulted in a net present value of the Larner lease wells of $2,707,725, which is over $102,000 more than Shonk agreed to pay ($2,605,707). App. 4064.

[34] App. 4065.

[35] App. 4067.

[36] App. 3829, 3830.

[37] App. 0013.

After filing its lawsuit, Shonk never requested Carbon West Virginia to cease producing oil and gas. Contrary to Shonk's theories of intentional trespass, unjust enrichment, and tortious interference, Diversified continued to produce oil and gas and send royalty payments to Shonk.[38] It was not until five months after Shonk filed suit that Shonk notified Diversified that "Shonk is not accepting any royalty payments from DGO, and it is reserving all rights under the Leases and the law, including its right to terminate the Leases."[39] Notwithstanding Shonk's position, a royalty check of $94,426.06 was tendered, in good faith, to Shonk by letter dated August 27, 2021. This check represented royalties payable since the transaction between Carbon Energy and Diversified closed on May 26, 2020.[40] The check tendered to Shonk included advance royalty payments for June and July 2021 for $8,785.56 per month. This amount represented the highest monthly royalty paid during the previous six-month period. The letter further noted that royalty payments for the production month of August 2021 forward would be paid per Diversified's royalty payment cycle.

The conduct of Carbon and Diversified was not the behavior of parties motivated to slander Shonk's title, unjustly enrich themselves at Shonk's expense, willfully trespass on Shonk's leasehold interests, or tortiously interfere with Shonk's contractual rights. It was the behavior of parties striving in good faith to comply with their contractual obligations under the right of first refusal, including providing information beyond that to which Shonk was entitled, only to be blocked by Shonk. Ultimately, a verdict was returned finding (1) Carbon West Virginia materially breached the Leases by (a) closing the deal with Diversified; (b) not sharing its confidential and proprietary information with Shonk; (c) committing a scrivener's error in failing to initially exclude the Shonk leases from a mortgage/trust deed, which was quickly corrected; and (d)

[38] App. 4447.

[39] App. 4438-4439.

[40] App. 4447.

recording an intra-company assignment of assets that does not mention the Leases; (2) Diversified somehow tortiously interfered in Shonk's contract with Carbon West Virginia by agreeing on prices for the Leases; (3) Carbon West Virginia slandered Shonk's title by recording the intra-company assignment; (4) Carbon willfully trespassed on Shonk's leases by continuing to operate the wells and pay royalties after Shonk reneged on its obligation to purchase the Leases; and (5) Carbon West Virginia was unjustly enriched by conducting gas operations after May 26, 2020, because the parties never reached an agreement relative to the cost of Shonk's exercise of its right of first refusal. Based on these findings, the jury awarded (1) $1,280,504 on Shonk's tortious interference claim, (2) $1,596,847 on Shonk's trespass claim, and (3) $1,302,803 on Shonk's unjust enrichment claim.[41] Although instructions and arguments were given, the jury awarded no punitive damages to Shonk.[42] Timely post-trial motions were filed following the entry of judgment on the jury's verdict.[43] Those motions were denied[44] and this appeal has been taken.

IV. SUMMARY OF ARGUMENT

The Circuit Court erred by failing to enter judgment as a matter of law on claims of breach of contract, breach of good faith and fair dealing, slander of title, willful trespass, and unjust enrichment; by failing to strike duplicative damage awards unsupported by the evidence; by permitting the post-trial pursuit of slander of title special damages; by awarding prejudgment interest on the unjust enrichment claim; and by failing to award a new trial where the damages award bore no rational relationship to the evidence and the verdict was the product of impermissible argument that the Respondent had been "cheated" and was the victim of "fraud."

[41] App. 3655-3659.

[42] App. 3660.

[43] App. 4676, 4694, 4712, 4823, 4834, 4874.

[44] App. 5061.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners request oral argument because the dispositive issues have yet to be authoritatively decided, and it will significantly aid the decisional process.[45] Rule 20 argument is warranted where this appeal involves issues of first impression and public importance.[46] If allowed to stand, this case establishes a blueprint by which a party to a contract, whether a right of first refusal or other, can attempt to extort from the other party certain extra-contractual concessions, and when the party's unreasonable demands are rejected, sue the other party or those doing business with the contracting party not only for breach of contract, but for such causes of action such as slander of title, tortious interference, unjust enrichment, and the like, and then argue to a jury, despite every good faith effort by the party and those doing business with the party, that they were the victims of "fraud" because their demands were rejected in settlement negotiations.

VI. ARGUMENT

A. STANDARD OF REVIEW

"The standard of review applicable to an appeal from a motion to alter or amend a judgment … is the same standard that would apply to the underlying judgment … from which the appeal to this Court is filed."[47] The standard of review on a motion for judgment as a matter of law is *de novo*.[48] The "standard of review for … a motion for a new trial is abuse of discretion."[49]

B. THE CIRCUIT COURT ERRED BY FAILING TO ENTER JUDGMENT ON THE BREACH OF CONTRACT AND IMPLIED COVENANT CLAIMS WHERE THERE WAS NO EVIDENCE FROM WHICH A JURY COULD REASONABLY FIND A BREACH OF THE RIGHT OF FIRST REFUSAL.

The Leases define a material breach of the "right of first refusal" ["ROFR"] as a breach

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[45] R. App. P. 18(a).

[46] R. App. 20(a).

[47] Syl. pt. 1*, Wickland v. American Travelers Life Ins.* Co., 204 W. Va. 430, 513 S.E.2d 657 (1998).

[48] Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

[49] *Marsch v. American Elec. Power Co*., 207 W. Va. 174, 180, 530 S.E.2d 173, 179 (1999).

"that deprives the other party of a substantial benefit that the other party reasonably expected to receive under the terms of the contract."[50] Well outside the "terms of the contract," Shonk argued that a breach occurred by (1) closing the Diversified transaction before transferring the Leases to Shonk;[51] (2) not providing Shonk with schedules and exhibits to the Membership Interest Purchase Agreement ["MIPA"] between Carbon Energy and Diversified and other information about the values allocated to all the assets involved in that transaction;[52] (3) recording a mortgage that temporarily created a lien against the lease interests until a release was recorded;[53] and (4) recording an assignment that does not mention Shonk or the leases that conveyed ownership of midstream infrastructure owned by Carbon West Virginia to another Diversified affiliate, Diversified Midstream, LLC.[54] For the reasons explained below, Shonk failed to present evidence from which a reasonable jury could conclude that any of these events amounts to a material breach.

1. Closing of Carbon Energy to Diversified Transaction.

Shonk alleged that closing the transaction to convey the ownership interests in Carbon West Virginia to Diversified before conveying the subject leases to Shonk constituted a material breach of the ROFR provision.[55] However, it is undisputed that Carbon West Virginia's obligation to honor Shonk's exercise of its ROFR was wholly unaffected by the closing of the Diversified transaction. The MIPA expressly required Diversified to ensure Carbon West Virginia completed that transaction.[56] It is also undisputed that the ROFR provisions of the leases do not expressly require the conveyance of the Leases to Shonk before a change in ownership of Carbon West

[50] App. 3882.
[51] App. 0092-0094.
[52] App. 0094-0095.
[53] App. 0100-0101.
[54] App. 0101-0102.
[55] App. 0092-0094.
[56] App. 3678.

Virginia.[57] This makes sense because Carbon West Virginia is the company that holds the Leases and is obligated to convey them to Shonk upon exercise of the ROFR. A change in ownership of Carbon West Virginia would have no impact on the ROFR nor other detrimental impact on Shonk.

Following the closing between Carbon Energy and Diversified, Shonk told Carbon West Virginia that Shonk would allow Carbon West Virginia to "do the right thing" and close the transaction to transfer the leases to Shonk.[58] Despite Diversified's best efforts, Shonk never honored that commitment or its original contractual obligation to purchase the Leases. Notwithstanding Shonk's decision to walk away from the transaction, Shonk's witness, Lon Shannon, testified that he believed Shonk was denied six substantial benefits – *none of which appear in the ROFR* -- it expected to receive under the ROFR because of closing the Carbon Energy to Diversified transaction.[59] Each of those alleged benefits is discussed below. No reasonable jury could determine that the absence of those purported benefits would constitute a "material breach" of the Leases *as that term is defined therein*. That is because *it is uncontested* none of those purported benefits appear in the ROFR provision of the Leases.

First, Shannon testified that Shonk expected to receive a plethora of information about the Diversified transaction, such as all the MIPA schedules and exhibits, information about values allocated to other leases in which Shonk had no interest, and information on how the value allocated to the Shonk leases was ascertained.[60] *The ROFR provision does not entitle Shonk to receive any of this information*. The ROFR plainly and clearly states that Shonk is only entitled to receive "information about the purported transferee of the Transferred Interest and the value

[57] App. 4384 and 4399.

[58] App. 3971.

[59] App. 2763-2766.

[60] App. 2763.

Lessee expects to receive in exchange for transferring the Transferred Interest."[61] In other words, the ROFR entitles Shonk to receive two pieces of information: (1) the identity of the proposed transferee and (2) the value Carbon West Virginia expects to receive. Carbon West Virginia's representative, Mike Potter, testified that when negotiating this language, he never fathomed that Carbon West Virginia obliged itself to provide Shonk with information about values associated with other assets or how they were ascertained.[62] Even Shannon acknowledged that the parties did not define the scope of information to be provided to include information beyond the subject leases.[63] Since the ROFR does not entitle Shonk to receive any of the additional information identified by Shannon, and no witness testified that the parties reached a "meeting of the minds" on what Shonk claimed to be the scope of information required by the ROFR, a reasonable jury could not find that the decision to decline disclosure of that information constitutes a material breach of the ROFR. "It is elemental that all contracts must be made by a mutual agreement or a meeting of the minds of the parties involved."[64]

Second, Shannon stated that Shonk was denied the benefit of completing the transaction with the same attorneys, i.e., Carbon's, instead of Diversified's attorneys.[65] Nothing in the ROFR provision gives Shonk such a right.

Third, Shannon testified that Shonk expected to have ownership of the leases and thus be able to shut in the wells as of May 26, 2020, and to replace or upgrade one of the compressor units.[66] The Circuit Court ruled that Shonk had no expectation of a May 26, 2020, closing date,[67]

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[61] App. 4384.

[62] App. 3296-3297.

[63] App. 2786.

[64] *Wheeling Downs Racing Ass'n v. W. Va. Sportservice*, 157 W. Va. 93, 98, 199 S.E.2d 308, 311 (1973).

[65] App. 2763-2764.

[66] App. 2764-2765.

[67] App. 1710.

and no witness testified otherwise at trial. Shonk would have received ownership of the wells had Shonk honored its commitment to pay the agreed-upon price to purchase them. Since Shonk voluntarily walked away from its obligation to purchase the leases, no reasonable jury could find that Carbon West Virginia's conduct denied Shonk this benefit or that a material breach occurred.

Fourth, Shonk complained that it was denied the ability to acquire the leases on the same terms, conditions, and value agreed upon between Carbon Energy and Diversified.[68] Shonk's witnesses were asked to identify the specific value that Shonk claims should have been offered in an ROFR notice – *not a single witness could identify such a value*.[69] Similarly, none of Shonk's witnesses identified any other applicable term that Carbon West Virginia refused to provide to Shonk. Thus, the jury lacked any evidentiary basis to find that a material breach occurred.

Fifth, Shonk argued that Diversified "changed the terms of the deal" by "tack[ing] on a firm transportation contract that would have caused Shonk to incur a liability estimated at over $1 million"[70] but an email from Diversified to Shonk addressed the firm transportation contract:

Also, on another note, it has come to our attention that some of the DTI Firm obligation should probably transfer with this asset as a material contract. I am attaching a copy of this agreement, where you will see the firm volumes associated with the Hamon site. We will have to think through how to

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transfer this over to SLC given FERC and other issues at play. The amount of FT associated with the Hamon Compressor site is 2,000 dth/d and the Gateway rate is $.58/dth through August 31, 2022. SLC should begin thinking of how they will satisfy the credit requirements for this contract, as that process can take quite some time to get set up with DTI if they are not already a shipper on that system. Generally speaking they will require a bond or letter of credit for some amount of future demand rate.

Thanks,

-Alex Shain [71]

[68] App. 2766.

[69] App. 2808, 2898, 2938.

[70] App. 5127-5128.

[71] App. 3829.

Mr. Shain testified that he raised the firm transportation contract as something for discussion with Shonk – not as a demanded term of the transaction:

> Q. Then we had some testimony earlier about that firm transportation contract.
>
> A. Correct.
>
> Q. I forgot to ask you about that, that you sent over, and in your email you noted that it should probably transfer, right? What did you mean by that?
>
> A. So initially we didn't realize that the Gateway firm, which is what that is called, had the Hamon site as one of its receipt points on the interstate pipeline. Well, to determine that, you know, I thought it probably should, but you know, one demand.
>
> Q. So it was something you were raising for further discussion with Shonk?
>
> A. Correct, and you know, those kind of issues always come up in the late stages of negotiation, bartering an oil and gas asset transfer.[72]

There is simply no record evidence reflecting Diversified's demand that Shonk accept the assignment of the firm transportation agreement, which did not constitute a material breach. Shonk likewise proposed terms beyond those in the MIPA, including requests for indemnity, representations and warranties, and insurance.[73] Diversified did not respond to those requests by suing Shonk for tortious interference with the MIPA, and it was preposterous for Shonk to do so.

Finally, Shannon claimed that Shonk lost the expected benefit of having Carbon Energy's guaranty of performance continue.[74] The very terms of that guaranty defy Shannon's position:[75]

> **7. TERMINATION; ASSIGNMENT.** This Guaranty shall terminate upon the full, final, irrevocable and nonpreferential payment and performance of the Obligations, the proper assignment of the Leases by Shonk or Carbon West Virginia to an unaffiliated third party or termination of the Leases. This Guaranty is for the benefit of Shonk and may not be assigned by Shonk, unless assigned to a wholly-owned affiliate or subsidiary of Shonk Land Company, LLC, or Shonk Del, LLC.

In short, the guaranty terminates upon assignment of the Leases to an unaffiliated third party or

[72] App. 3186-3187.

[73] App. 3066, 3067-3070, 4303.

[74] App. 2778.

[75] App. 4074.

termination of the Leases. Had Shonk honored its obligation to purchase the Leases, they would have been transferred to Shonk. If Shonk did not exercise or honor the ROFR, the Leases would be effectively "transferred" to Diversified within the meaning of the ROFR provision through a change in Carbon West Virginia Company ownership. Under either scenario, the guaranty would end, so a reasonable jury could not conclude that Shonk reasonably expected it to continue or constituted a material breach. For all these reasons, Shonk failed to present evidence at trial to support the jury's finding that closing the Diversified transaction constituted a material breach.

2. Non-Disclosure of Exhibits and Schedules to MIPA.

Shonk alleged that Carbon West Virginia materially breached the ROFR provisions "by failing to provide information necessary to evaluate the fairness and accuracy of the computation of the purchase price allocated to the Shonk Transferred Interest."[76] During the trial, Shonk argued that this included the exhibits and schedules to the MIPA.[77] As discussed above, the ROFR does not entitle Shonk to this information, nor did it have any bearing on the transaction, and no witness testified that both Shonk and Carbon West Virginia contemplated, much less agreed, that the scope of information to be provided included assets other than the Leases. Shonk also argued to the jury that it was entitled to the exhibits and schedules because the ROFR notice stated that Shonk could purchase the leases "on and subject to the same terms and conditions set forth in the agreement with DGO [Diversified], which requires cash at closing."[78] This is a red herring. All the exhibits and schedules are described explicitly in the MIPA provided to Shonk,[79] and Shonk never identified any specific exhibit or schedule that it believed could be germane to the leases. Instead,

[76] App. 0094.
[77] App. 2590-2592, 3513.
[78] App. 4078.
[79] App. 3678.

Shonk just made a blanket demand without considering what relevance, if any, those materials could have. Moreover, after the Diversified transaction closed, Diversified, in good faith and to develop a positive relationship with its new lessor, sent Shonk the schedule setting forth the values allocated to all the assets involved in the transaction, the very documents it had requested, even though doing so was not required or useful.[80] Shonk did not present evidence that it later requested additional schedules or exhibits. In short, the jury had no evidence to conclude that Shonk reasonably expected to receive the exhibits and schedules nor that it remained unsatisfied.

3. Recording of Mortgage and Assignment of Midstream Infrastructure.

In connection with the transaction, Diversified recorded on June 23, 2020, a mortgage/deed of trust executed on May 26, 2020, that created a lien against various oil and gas leases to secure a loan from lender Munich RE.[81] At the time, Diversified assumed Shonk would be acquiring the Leases.[82] Undisputed trial testimony reflects that references to the Shonk Leases were supposed to have been omitted from the instrument[83] and that a release to correct this mistake was executed a month later, on June 30, 2020, and was recorded on July 27, 2022,[84] only two months later. Also, in connection with the Carbon Energy and Diversified transaction, Carbon West Virginia recorded on June 23, 2020, an instrument dated May 26, 2020, in which it and four other affiliated companies conveyed several specifically identified surface property agreements (rights of way, easements, surface leases, etc.) to another Diversified affiliate, Diversified Midstream, LLC.[85] This Midstream Assignment instrument does not mention Shonk or the subject Leases by name. The

[80] App. 2732.
[81] App. 3832.
[82] App. 4428.
[83] App. 2606-2610.
[84] App. 4429.
[85] App. 3910. ["Midstream Assignment"]

Midstream Assignment also conveys to Diversified Midstream all the "midstream infrastructure" (pipelines and equipment to transport gas from the wells) the assignors owned. Thus, if Carbon West Virginia owned the Shonk Leases as of June 23, 2020, the midstream infrastructure associated with those leases would be assigned to Diversified Midstream, LLC. If Carbon West Virginia did not own the Shonk Leases as of June 23, 2020, the assignment would not affect the ownership of their midstream infrastructure.

Shonk alleged that recording these instruments constituted a material breach of the ROFR provisions because Carbon West Virginia did not first send Shonk a notice of its right to match the terms of the instruments.[86] As a matter of law, a reasonable jury could not have concluded that Carbon West Virginia was obligated to send another ROFR notice to Shonk before executing or recording these instruments. That is because Shonk had already contractually bound itself to purchase the entirety of the lease interests by exercising the ROFR. There was nothing left to offer to Shonk to purchase. Having formed a binding contract to purchase the entirety of the Leases, Shonk could not later change its mind to purchase less than the entirety without committing a breach of contract. Thus, Shonk could have no reasonable expectation of being able to purchase only the interests that were identified in the recorded instruments. That is because Shonk was already contractually bound to purchase the entirety of the lease interests, including those identified in the recorded instruments. In short, Shonk failed to present evidence from which a reasonable jury could find a breach of the ROFR by recording the mortgage or assignment.

4. Breach of Carbon Energy Guaranty.

There is no dispute that this claim is premised on the existence of an underlying purported material breach of the Leases that Carbon Energy failed to cure upon receiving notice from Shonk.

[86] App. 0100-0101.

Since no material breach of the Leases occurred, as discussed earlier, no breach of the guaranty agreement for failing to cure a material breach could have occurred. Petitioners are thus entitled to judgment on this theory.

C. THE CIRCUIT COURT ERRED BY FAILING TO ENTER JUDGMENT ON THE SLANDER OF TITLE CLAIM WHERE (1) THE ASSIGNMENT MADE NO REFERENCE TO THE RESPONDENT'S LEASES; (2) THE ASSIGNMENT COULD NOT HAVE SLANDERED ITS TITLE; AND (3) NO EVIDENCE WAS PRESENTED OF ANY THIRD-PARTY'S INFERENCE OF ANY NEGATIVE IMPUTATION ON SHONK'S TITLE OR THE SPECIAL DAMAGES REQUIRED.

Shonk alleged that recording the Midstream Assignment on June 23, 2020, slandered Shonk's title to the oil and gas rights governed by the Leases because the Leases were forfeited as of the closing of the Diversified transaction on May 26, 2020.[87] According to Shonk, Carbon West Virginia thus lacked any valid claim or interests in the Leases that could be assigned.[88] Shonk's allegations, as well as the jury's finding in Shonk's favor on this claim, are unsupported by at least five key undisputed facts:

1. The Midstream Assignment does not mention Shonk or the Leases, so it could not constitute a "false statement" about the leases or be "derogatory" to Shonk's title in any way.
2. The language conveying all midstream infrastructure owned by Carbon West could not be "derogatory" to Shonk's title in any way, regardless of whether the Leases were forfeited.
3. Shonk did not present evidence that the jury could have determined that Carbon West Virginia recorded the instrument with "malice."
4. Shonk introduced no evidence of an amount of "special damages" because of the Midstream Assignment.
5. Shonk presented no evidence that Midstream Assignment diminished the value of the Leases in the eyes of third parties.

The elements of slander of title are (1) publication of (2) a false statement, (3) derogatory to the plaintiff's title, (4) with malice, (5) causing special damages, (6) because of diminished

[87] App. 0103-0104.

[88] *Id*.

value in the eyes of third parties.[89] Here, the facts prevent a finding for Shonk on each element.

1. The Midstream Assignment Does Not Mention Shonk or the Leases.

Two essential elements of a slander of title claim are that a publication (1) reflects a false statement and (2) the statement is derogatory to the claimant's title. Neither occurred here. The Midstream Assignment reflects no statement about Shonk or the Leases. Shonk's name does not appear *anywhere* in the instrument, nor do the names of the Leases or any specific reference whatsoever to the Leases. Hundreds of other instruments are specifically identified by name, date, and recording information, but no reference to Shonk or the Leases appears.[90] Without language identifying Shonk or the Leases, the Midstream Assignment cannot, as a matter of law, be said to reflect a false statement about Shonk or the Leases derogatory to Shonk's title.

2. An Assignment of Whatever Carbon West Virginia Owns at a Certain Time Cannot be Derogatory to Shonk's Title.

Like many of Shonk's claims, it is illogical for Shonk to claim that recording the assignment slandered its title to the Leases. *First*, the assignment did not reference Shonk or the Leases. *Second*, regardless of whether the Leases were forfeited, the Midstream Assignment cannot, as a matter of law, be derogatory to Shonk's title. If the Leases were forfeited on May 26, 2020, as Shonk claimed and the jury concluded, Carbon West Virginia would not have owned the Leases when the assignment was recorded on June 23, 2020. Thus, language conveying all the midstream infrastructure owned by Carbon West Virginia would not apply to the Shonk Leases since Carbon West Virginia would not have owned them on June 23, 2020. Conversely, if the Leases were not forfeited as the Petitioners contend, Carbon West Virginia still held title to the leases on June 23, 2020. In that scenario, the conveyance of the midstream infrastructure associated

[89] Syl. pt. 2, *TXO Prod. Corp. v. All. Res. Corp*., 187 W. Va. 457, 419 S.E.2d 870 (1992).

[90] App. 3910.

with the Leases could not be derogatory to Shonk's title as the lessor because, as a lessor, Shonk had no ownership claim to that equipment. Under either scenario (forfeiture or non-forfeiture), a purported conveyance of midstream infrastructure owned by Carbon West Virginia Company cannot, as a matter of law, be derogatory to Shonk's title.

3. Shonk Presented No Evidence that the Midstream Assignment was Recorded with Malice Toward Shonk.

For essentially the same reasons, the jury had no evidentiary basis to conclude that Carbon West Virginia recorded the Midstream Assignment, knowing that a statement concerning Shonk or Leases was false or in reckless disregard of the truth or falsity of such a statement when this instrument made no claims about Shonk or the Leases – *neither is mentioned anywhere*.

4. Shonk Presented No Evidence of Special Damages.

Shonk presented no evidence of special damages due to the recording of the Midstream Assignment; consequently, it cannot recover attorney fees. Shonk has argued that attorney fees are special damages but that is true only to the extent the fees were incurred in "removing spurious clouds from a title."[91] As explained above, the Midstream Assignment created no cloud on the title. More importantly, Shonk did not introduce evidence during the trial of attorney fees. In *TXO*, the jury awarded $19,000 in attorney fees that the plaintiff incurred in defending its title against TXO's claims. Here, no one ever challenged Shonk's title to the Lease, necessitating its retention of counsel, the jury awarded no such damages, and Shonk introduced no evidence of such damages.

5. Shonk Presented No Evidence of Diminished Value.

Not only did Shonk fail to present any evidence of an amount of attorney fees, but it presented no evidence that the Midstream Assignment caused any third parties to view the Leases

[91] *TXO Prod. Corp.*, 187 W. Va. at 469, 419 S.E.2d at 882.

as having a diminished value. Shonk's representative was squarely asked about any third parties that valued the leases less due to the Midstream Assignment.[92] *He identified none*. No other witness testified that the value of the leases had been diminished because of the Midstream Assignment. Multiple courts have recognized that such a failure of evidence warrants judgment as a matter of law on a slander of title claim.[93] For all these reasons, the slander of title claim failed.

D. THE CIRCUIT COURT ERRED BY FAILING TO ENTER JUDGMENT ON THE WILLFUL TRESPASS CLAIM AS (1) IN THE ABSENCE OF A FORFEITURE, THE PETITIONERS HAD THE RIGHT TO OPERATE THE WELLS AND (2) EVEN IF THERE WERE A FORFEITURE, THE RESPONDENT DECIDED NOT TO ACT WHILE THE PARTIES NEGOTIATED SALES TERMS.

Shonk alleged that operating wells governed by the Leases constituted a trespass once Shonk provided notice that the Leases were forfeited as of May 26, 2020.[94] However, the undisputed evidence of Carbon's and Diversified's good faith negates this allocation. The jury concluded that Carbon West Virginia intentionally trespassed on the leased property by continuing to operate the leases after May 26, 2020,[95] and awarded Shonk $1,596,847 in trespass damages.[96] This specific amount represents Shonk's expert's calculation of 100% of the gross revenue from the natural gas produced from the wells from June 2020 through April 2022 *without any deduction for the operating expenses incurred in producing that gas*.[97]

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[92] App. 2805.

[93] *See Lemartec Corp. v. Berkeley County Solid Waste Authority*, 2020 U.S. Dist. LEXIS 106336, *14 – 15 (N.D. W. Va. June 17, 2020) (granting summary judgment on slander of title claim for failure "to put forth evidence to establish diminished value of the subject property in the eyes of third parties."); *Sapphire Development, LC v. Span USA Inc*., 120 Fed. Appx. 466, 474 (4th Cir. Feb. 1, 2005) (affirming trial court's order granting judgment as a matter of law following trial on slander of title claim because claimant "failed to produce evidence at trial that the value of the property at issue was in any way diminished."); *Killette v. Pittman*, 1997 U.S. App. LEXIS 28909, *20 (4th Cir. May 5, 1997) (reversing trial court's denial of a motion for judgment as a matter of law on slander of title claim because claimant "failed to show that any damages were as a result of the diminished value of the property in the eyes of third parties.") (cleaned up).

[94] App. 0104-0105.

[95] App. 3657.

[96] App. 3658.

[97] App. 4414.

Under West Virginia law, an intentional trespass is done "intentionally or recklessly with intent to 'take an unconscientious advantage of his victim[.]'"[98] By contrast, an innocent trespass is done "through inadvertence or mistake, or in good faith, under an honest belief that the trespasser was acting within his legal rights."[99] If a trespass was intentional, the measure of damages is the value of the gas extracted without any deduction for operating expenses. Damages for an innocent trespass are measured by the value of the extracted gas after deducting operating expenses.[100]

The jury lacked any evidentiary basis to conclude that the continued operation of the wells after May 26, 2020, was done "intentionally or recklessly with intent to 'take an unconscientious advantage of'" Shonk. The uncontroverted evidence of Carbon's and Diversified's good faith precludes a rational basis for such a finding.

Shannon testified that after the Diversified closing on May 26, 2020, Shonk made the conscious decision *not* to take action to force Carbon West Virginia to discontinue operating the wells.[101] Instead, Mr. Shannon's May 29, 2020, letter to Carbon West Virginia specifically stated that Shonk would give Carbon West Virginia "a second opportunity to do the right thing" by honoring Shonk's exercise of its ROFR.[102] So, as of May 2020, Shonk had not requested the cessation of production. The parties then entered into a "Standstill Agreement" in which they agreed to work together "to effect the transfer and assignment of the interests in the oil and gas wells subject to the Leases" to Shonk.[103] The parties continued discussions for over another month until Shonk's counsel, Kent George, transmitted a letter dated July 17, 2020, advising the

[98] App. 3650.
[99] *Id.*
[100] *Id*.
[101] App. 2696-2698.
[102] App. 3970.
[103] App. 4034.

Petitioners that Shonk would not honor its commitment to purchase the Leases.[104] George's July 2020 letter did not demand that Carbon West Virginia cease operating the wells. Shonk filed suit a week later, on July 23, 2020. At no time during the next twenty-two months after filing its complaint did Shonk ever request Carbon West Virginia to cease operating the wells or turn the wells over to Shonk. Moreover, Shonk never sought a preliminary injunction pending the resolution of the merits of its claims. In short, Shonk never acted to prevent Carbon West Virginia from continuing to operate the wells until this suit was resolved or requested the same.

In addition to Shonk's decision not to even ask that the wells be shut in after backing out of its commitment to purchase the Leases, Carbon West Virginia certainly had a good faith basis to believe the Leases had not been forfeited for all the reasons discussed above concerning the absence of a material breach. Carbon West Virginia did not attempt to hide that the wells continued to be operated. Even after Shonk gave notice that it would not accept royalties for the produced gas, Carbon West Virginia tried to pay those royalties to Shonk, which were returned.[105] Even viewed in the light most favorable to Shonk, there is simply no evidentiary basis for a rational jury to have concluded that, from June 2020 forward, Carbon West Virginia operated the wells "intentionally or recklessly with intent to 'take an unconscientious advantage of'" Shonk.

E. THE CIRCUIT COURT ERRED BY FAILING TO ENTER JUDGMENT ON THE UNJUST ENRICHMENT CLAIM (1) WHICH WAS PREMISED ON A FORFEITURE THAT DID NOT OCCUR; (2) FAILED FOR THE SAME REASON AS THE WILLFUL TRESPASS CLAIM; (3) CONSTITUTED A DOUBLE RECOVERY; AND (4) BY AWARDING PREJUDGMENT INTEREST.

The infirmity of the jury verdict is further exemplified concerning the unjust enrichment and tortious interference claims, which can accurately be described as double recoveries on steroids. As explained below, the jury awarded $1,302,803 in unjust enrichment damages that do

[104] App. 4069.

[105] App. 4438-4439.

not represent the value of any benefit retained by Carbon West Virginia that belonged to Shonk. Shonk alleged that continued operation of the wells after Shonk declared a forfeiture resulted in Carbon West Virginia "accepting and retaining benefits . . . under circumstances that it would be inequitable and unconscionable to permit Carbon West Virginia to retain those benefits."[106] Those benefits, i.e., continued well production and the receipt of royalties, are the same that Shonk did not request and from which it was sent royalties that it rejected in favor of a lawsuit in which it has been awarded massive extra-contractual damages. The Court instructed the jury that if it determined a material breach occurred that triggered forfeiture, the jury "may consider whether Shonk has proven that Carbon West Virginia company has unfairly kept some benefit that actually belonged to Shonk and that there was no legal justification for keeping it."[107] The verdict form reminded the jury that any damages they may award for unjust enrichment "should not duplicate any damages you have awarded, if any, for Trespass[.]"[108]

The jury answered "yes" to the following verdict form question: "Do you find that Defendant Carbon West Virginia Company was unjustly enriched by conducting oil and gas operations on Shonk's land after May 26, 2020?"[109] The jury then awarded Shonk $1,302,803 in unjust enrichment damages and $1,596,847 in trespass damages. The unjust enrichment damages figure is a very specific number that only appears in one piece of evidence: a spreadsheet in which Shonk's expert, Stevens Gillespie, purported to calculate how *Diversified* ascertained the value allocated to the Larner Lease.[110] Gillespie testified that $1,302,803 represents the value generated

[106] App. 0105.
[107] App. 3651.
[108] App. 3658.
[109] *Id*.
[110] App. 4418.

by multiplying the PV10 values for all the Larner Lease wells by 61.07452%.[111]

No evidence was presented that Carbon West Virginia retained a benefit worth $1,302,803 that Shonk was entitled to receive. At best, $1,302,803 represents an allocated value ascertained *by Diversified* using a method used to value all the developed leases other than the Larner Lease – the total PV10 values of the existing wells multiplied by approximately 60%.[112] Carbon West Virginia was not involved in generating this figure, which Shonk's witness said would have been generated using the methodology *described by Diversified* to allocate value to the leases involved in the transaction with Carbon Energy (except the Larner Lease).[113] Yet, in the absence of any evidence regarding any actual "unjust enrichment," the jury irrationally decided to use this figure for the damages on Shonk's claim for damages from the operation of the leased property after May 26, 2020 – the date Shonk claims the Leases were forfeited.

In theory, the jury could have determined that Shonk should have been offered $1,302,803 to purchase the Larner Lease, although no witness testified. In that scenario, this figure would represent the value that *Shonk would have paid to Carbon West Virginia* to acquire the Larner Lease. It would certainly not represent the amount Carbon West Virginia was obligated to pay Shonk. The following facts are critical to what has been erroneously permitted to occur.

The jury determined that the Leases were forfeited, so to the extent the jury valued the Larner Lease at $1,302,803, *Shonk received the value of that benefit in the form of forfeiture*. To use the analogous acre of farmland example illustrative of the gross inequity which has occurred here – a farmer who holds the right of first refusal has not only been awarded the acre but has been awarded the value of the acre – a textbook definition of a double recovery. Moreover, not only has

[111] *Id.*

[112] *Id.*

[113] *Id.*

the farmer been awarded the acre and the value of the but he has escaped having to pay for executing his right of first refusal – *an incredible triple recovery*!

Indeed, the farmer could present evidence in his breach of contract action seeking damages for the delay in securing the benefit of his bargain, e.g., the value of hay harvested, but that claim would be one of breach of contract, entitling him to be placed in the same position in the absence of a breach, not one for unjust enrichment. Likewise, Shonk is not entitled to receive the Leases plus $1,302,803 in damages in this case. That represents an impermissible double recovery because Shonk never incurred $1,302,803 in losses.

During the hearing on post-trial motions, Shonk argued that the Circuit Court should not disturb this damages award because the evidence contains a source for the figure the jury used to calculate damages – Mr. Gillespie's spreadsheet.[114] Under no conceivable circumstances could the jury have rationally concluded that Shonk was entitled to $1,302,803 in damages *and* $1,596,847 in trespass damages. At best, the jury could have determined that Carbon West Virginia should have offered Shonk a price of $1,302,803 to purchase the Larner Lease. That would represent a value Shonk would have *paid Carbon West Virginia* to acquire the Larner Lease. It would certainly not represent the amount Carbon West Virginia was obligated *to pay Shonk*. The jury determined that the leases were forfeited and awarded $1,596,847 in damages for the value of oil and gas produced. Shonk is certainly not entitled to receive the Lease, plus trespass damages, plus an additional $1,302,803 in damages. That clearly represents an impermissible double recovery because the jury received no evidence that Shonk incurred $1,302,803 in losses.

"It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double

[114] App. 4422.

satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories."[115] "If the circuit court determines that an impermissible double recovery has been awarded, it shall be the court's responsibility to correct the verdict."[116] Yet, in this case, the Circuit Court wrongly permitted the jury's verdict to stand – essentially taking the family farm from Diversified while giving it to Shonk and requiring Diversified, not Shonk, to pay for it.[117]

F. THE CIRCUIT COURT ERRED BY FAILING TO ENTER JUDGMENT ON THE TORTIOUS INTERFERENCE CLAIM (1) WHICH WAS DUPLICATIVE; (2) WHICH BASED ON AN UNRELATED LEASE HAVING NOTHING TO DO WITH THIS CASE; (3) WHERE THE DAMAGES AWARDED WOULD REPRESENT THE AMOUNT THE RESPONDENT WOULD OWE, NOT ANY AMOUNT THAT WOULD BE OWED TO THE RESPONDENT; AND (4) WHERE THE COMPLAINED CONDUCT CANNOT CONSTITUTE TORTIOUS INTERFERENCE UNLESS ALL CONTRACT NEGOTIATIONS BETWEEN PARTIES THAT MAY IMPACT THIRD-PARTIES CONSTITUTE TORTIOUS INTERFERENCE.

The jury committed a similarly grievous error in awarding damages on the tortious interference claim. Shonk alleged that Diversified wrongly interfered with Shonk's ROFR by (1) "inflating and assigning an allocated value" to the Larner Lease that was "double the value relative to all the other wells" involved in the Carbon Energy to Diversified transaction and (2) "intentionally misleading Shonk about how it calculated and assigned the allocated values for the wells . . . to obfuscate the inequitable and inflated allocated value it assigned" to the Larner Lease wells.[118] Shonk described its injury from this alleged interference as being "prevented from purchasing" the Larner Lease "for a fair, equitable purchase price."[119] The Circuit Court instructed

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[115] Syl. pt. 7, *Harless v. First Nat'l Bank*, 169 W. Va. 673, 289 S.E.2d 692 (1982).

[116] Syl. pt. 15, in part, *Tudor v. Charleston Area Med. Ctr., Inc*., 203 W. Va. 111, 506 S.E.2d 554 (1997).

[117] The Circuit Court also erred in awarding prejudgment interest on the unjust enrichment claim. *See, e.g., Ringer v. John*, 230 W. Va. 687, 742 S.E.2d 103 (2013) (the award of prejudgment interest on claims grounded in contract rather than unjust enrichment is for the jury, not for the court).

[118] App. 0091.

[119] *Id.*

the jury that damages for tortious interference with contract "are calculated to place the injured party in the position he or she would have been in had the contract been performed."[120]

On the verdict form, the jury answered "yes" to whether Diversified "intentionally and improperly interfered with Shonk's Right of First Refusal in the Larner Lease" and awarded $1,280,504 in damages to Shonk.[121] Like the other damages figures, *this is a very specific number*. This figure represents the exact allocated value assigned to a set of 60 wells governed by a *completely different lease*, known as the Little Coal Land lease, which was part of the assets involved in the Carbon Energy to Diversified transaction. The number can be found in three locations: (1) the spreadsheet of all allocated values for the Carbon Energy to Diversified transaction, which was provided to Shonk;[122] (2) the "Side Letter Agreement" between Carbon Energy and Diversified specifying the allocated values for all the assets owned by the companies being sold;[123] and (3) in the Shonk expert's spreadsheet, comparing the value allocated to the Shonk wells to those allocated to wells governed by the unrelated leases.[124]

Shonk never claimed any ownership interest in the land governed by the Little Coal Land lease, much less an ROFR to purchase that lease. Shonk certainly did not present any evidence to that effect. Yet the jury awarded Shonk $1,280,504 in damages purportedly to place Shonk in the position that Shonk would have been in had the ROFR been performed. There is no evidence to support a finding that Shonk would have received this amount of money from Petitioners under any circumstance, much less through the performance of the ROFR. Again, Shonk alleged in its complaint that Diversified prevented Shonk from acquiring the Larner Lease for a "fair, equitable

[120] App. 3648.
[121] App. 3656.
[122] App. 3811 at rows 4288-4347.
[123] App. 4510, 4587-1588.
[124] App. 4422, 4425-4426.

purchase price."[125] If the jury somehow concluded that $1,280,504 was a "fair, equitable purchase price" for the Larner Lease, Shonk would have been entitled to *pay* that amount to Carbon West Virginia to acquire the lease. Under no circumstance would Shonk have the right to acquire the Lease for free *plus be paid $1,280,504 to boot*. That, however, is the incongruous result of the jury verdict for which the Circuit Court did nothing to address. In addition to the absence of any evidentiary basis for this damages award, the jury likewise lacked any basis to conclude that Shonk satisfied all the required elements to prevail on a tortious interference claim.

The Circuit Court's charge described the tortious interference claim as follows:

> Shonk alleges that Diversified prevented Shonk from purchasing the leases for a fair, equitable price by (1) inflating the value of the Larner lease for purposes of the price offered to Shonk to purchase that lease; and (2) misleading Shonk about how Diversified came up with the price offered to Shonk to purchase the Larner lease.[126]

The Circuit Court further instructed the jury on the following elements of a tortious interference claim: (1) the existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages.[127] Even assuming the jury found Shonk's two allegations true as outlined in the Circuit Court's charge, that would not satisfy the required elements of a tortious interference claim.

First, concerning Shonk's claim that the price was "inflated," the Circuit Court correctly ruled before trial in its summary judgment order addressing Shonk's claim for breach of the duty of good faith and fair dealing that Shonk had no contractual right to purchase the leases for a value

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[125] App. 0106.

[126] App. 3648.

[127] *Id.* The Circuit Court declined to include in the jury instructions the Petitioners' requested language that would have advised the jury that they should "identify the contractual right that Shonk claims Diversified intentionally and improperly interfered with, determine whether Diversified intentionally and improperly interfered with that right, and if so, whether Shonk suffered any damages as a result of that intentional and improper interference."

derived using any particular methodology:

> Shonk claims that the $2,605,707 value "does not reflect the accurate purchase price allocation of the Shonk Transferred Interest in proportion with the overall price paid by DGO for the membership interests in Carbon West Virginia." There is no dispute, however, that the prices offered to Shonk to purchase the leases are the prices agreed upon between Diversified and Carbon Energy in the MIPA. To the extent Shonk claims that the same formula must be used to value the Lamer Lease as the other leases, nothing in the leases or the MIPA creates such a requirement. In fact, nothing in the leases or the MIPA requires a value to be determined using any particular methodology, much less the methodology Shonk claims should be used.[128]

Second, concerning Shonk's claim that Diversified misled Shonk about how Diversified came up with the price offered to Shonk to purchase the Larner Lease, Shonk never identified a contractual right to receive information about how Diversified came up with the offer price. *That is because no such right exists in the leases*. The Circuit Court observed in its summary judgment order: "The right of first refusal simply calls for DP Bluegrass to give Shonk the opportunity to purchase the leases on the same terms offered by a third-party. The leases do not specify how those terms — particularly the price — are determined."[129]

The jury's verdict on tortious interference amounted to an end-run around the Circuit Court's award of summary judgment on the breach of the duty of good faith and fair dealing claim. The Circuit Court specifically ruled that Diversified did not owe any duty to Shonk concerning the price offered to purchase the Leases or any obligation to take Shonk's interests into account:

> To the extent Shonk argues that the duty of good faith and fair dealing obligated Diversified to offer a "fair" or "equitable" price for the leases, and to take Shonk's interests into account when offering a price, the Court rejects that position. The duty of good faith and fair dealing governs the conduct of parties to a contract. Shonk has not identified the existence of any contract between Shonk and Diversified, much less a contract that would impose a duty of good faith and fair

[128] App. 1714. This holding also eviscerates Shonk's complaints that it was not provided sufficient information regarding the valuation methodologies for the Leases – a logical inconsistency that the Circuit Court never acted to resolve.

[129] *Id.*

dealing on Diversified vis-à-vis the prices offered by Diversified to Carbon Energy to acquire the equity interests in DP Bluegrass.[130]

Yet, Shonk argued to the jury, using the jury charge, that Diversified had a duty to refrain from "(1) inflating the value of the Larner lease for purposes of the price offered to Shonk to purchase that lease and (2) misleading Shonk about how Diversified came up with the price offered to Shonk to purchase the Larner lease."[131] By doing so, according to Shonk, Diversified tortiously interfered with Shonk's contractual rights under the Leases.

However, if Diversified owed no duty of good faith to Shonk, as the Circuit Court correctly ruled, and Shonk had no contractual rights to an "uninflated" price or information on how the price was ascertained, then how can Diversified have breached a duty to Shonk under Shonk's theory of the case? The answer is Diversified cannot have done so.

The jury cannot have found in Shonk's favor on the tortious interference claim without concluding that Diversified breached a legal duty to Shonk. In other words, the jury's verdict is premised on a legal duty that the Circuit Court properly recognized does not exist. Shonk effectively circumvented the Circuit Court's summary judgment order by dressing up the duty of good faith and fair dealing claim[132] in the parlance of a tortious interference claim. The problem is the absence of a legal duty that could support a tortious interference claim for all the above reasons. The jury verdict yields the absurd result that a person can commit tortious interference

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[130] *Id.*

[131] App. 3502.

[132] Critically, our Supreme Court has held that the implied covenant of good faith and fair dealing "does not provide a cause of action apart from a breach of contract claim." *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 587, 746 S.E.2d 568, 578 (2013) (internal citation omitted) (affirming summary judgment on good faith and fair dealing claim where the trial court had "proper[ly] grant[ed] . . . summary judgment to the contract-based claims"); *Highmark West Virginia, Inc. v. Jamie*, 221 W. Va. 487, 492, 655 S.E.2d 509, 514 (2007); *see also Clendenin v. Wells Fargo Bank*, N.A., No. 2:09-00557, 2009 WL 4263506, at *5 (S.D. W. Va. Nov. 24, 2009) ("this claim will live or die by the [express breach of contract] claim in [the same complaint]).") (holding that the claim for breach of the covenant of good faith and fair dealing must be dismissed because the breach of contract claim was dismissed).

with a contract by simply agreeing on a price to purchase an asset from a seller and declining to reveal how that price was ascertained to a third party with no right to learn this information. This is not, and cannot be, the law. Yet, the Circuit Court allowed it to suffice.

The jury's verdict also improperly punished Diversified for doing nothing but looking out for its financial interests. As its witness explained, Diversified had a proper financial interest in ensuring that it received fair compensation for the Larner Lease if the Shonk exercised its ROFR to purchase it.[133] So, Diversified priced the Larner Lease to be more consistent with fair market value.[134] That price *was over $500,000 less than the $3,200,000 value assigned to the Larner Lease by Carbon Energy's consultant, Copper Run*.[135] Our Supreme Court has recognized that such conduct does not constitute tortious interference:

> Defendants are not liable for interference that is negligent rather than intentional, or if they show defenses of *legitimate competition between plaintiff and themselves*, their financial interest in the induced party's business, their responsibility for another's welfare, *their intention to influence another's business policies in which they have an interest*, their giving of honest, truthful requested advice, or other factors that show the interference was proper.[136]

Other courts have also recognized that a party's actions to protect its legitimate business interests cannot qualify as "interference" for purposes of a tortious interference claim. "Our cases accord substantial deference to defendants whose conduct, despite its conflict with plaintiff's interest, protects an existing legitimate business concern."[137]

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[133] App. 2585.

[134] *Id.*

[135] App. 2595-2597.

[136] Syl. pt. 2, *Torbett v. Wheeling Dollar Sav. & Tr. Co*., 173 W. Va. 210, 211, 314 S.E.2d 166, 167 (1983) (emphasis added).

[137] *Windsor Secur., Inc. v. Hartford Life Ins. Co*., 986 F.2d 655, 665 (3d Cir. 1993) (vacating judgment in favor of plaintiff because defendants' conduct in protecting its business interests was not improper); *Knight Enters. v. RPF Oil Co*., 299 Mich. App. 275, 282, 829 N.W.2d 345, 349 (2013) ("It generally does not constitute improper interference with a contract if a defendant simply takes the initiative to gain an advantage over the competition[.]") (cleaned up).

Diversified was in "legitimate competition" with Shonk to acquire the Larner Lease, which is the very definition of the triggering of a right of first refusal. As the Circuit Court recognized, Diversified owed no duty to Shonk to assign any particular value to the Larner Lease, much less one that would be significantly below market value, which, as noted above, was $3,200,000, according to Carbon Energy's consultant.[138] Diversified also had a legitimate interest in influencing Carbon West Virginia's business policies since Diversified was in the process of acquiring it. Finally, it was undoubtedly in Diversified's interest for Carbon West Virginia to either retain the Larner Lease or ensure a fair market value price was assigned.

Carbon West Virginia's interests were assignable to Diversified. Shonk had the right to match Diversified's offer for the Leases – whether above or below their market value. Shonk never reserved the right to challenge an offer, arbitrate disputes over the bona fides of an offer, or otherwise do anything but match or not match an offer. It could have matched the offer, tendered the sales price, and owned the Leases. Instead, it made extra-contractual demands outside the scope of Diversified's offer that were properly rejected first by Carbon Energy and then by Diversified. Under no reasonable interpretation of the law does that give rise to a cause of action against Diversified for tortious interference. Thus, the verdict on this claim should be vacated.

G. THE CIRCUIT COURT ERRED BY PERMITTING THE POST-TRIAL PURSUIT OF SLANDER OF TITLE SPECIAL DAMAGES IN THE FORM OF AN AWARD OF ATTORNEY FEES.

As noted, the Circuit Court erred by permitting a slander of title claim to proceed without evidence of the requisite special damages. The Circuit Court compounded this error by ruling that Shonk may present post-trial evidence of special damages in the form of attorney fees, which is wrong for three reasons. *First*, "[a]ttorney fees incurred in removing spurious clouds from a title

[138] App. 2595-2597.

qualify as special damages for an action for slander of title"[139] and no attorney fees were required to remove a scrivener's error that was promptly rectified. *Second*, because attorney fees are special damages in slander of title cases, evidence of those fees and the issue of whether they were narrowly tailored only to removing a spurious cloud from a title are for the jury.[140] *Finally*, the decision in *Aetna Cas. & Sur. Co. v. Pitrolo*,[141] was limited to fee-shifting cases where litigation expenses may be awarded, not as special damages, but for a party who substantially prevailed. Accordingly, the Circuit Court erred relative to a contemplated award of attorney fees.[142]

H. THE CIRCUIT COURT ERRED BY NOT AWARDING A NEW TRIAL WHERE (1) THE DAMAGES AWARDED ARE DUPLICATIVE AND UNSUPPORTED BY COMPETENT EVIDENCE AND (2) COUNSEL MADE IMPROPER ARGUMENTS THAT THE RESPONDENT HAD BEEN "CHEATED" AND THE VICTIM OF "FRAUD" WHEN NOTHING MORE THAN A CONTRACTUAL DISPUTE OVER A RIGHT OF FIRST REFUSAL WAS INVOLVED.

Alternatively, the Circuit Court erred by not granting a new trial because (1) the damages awarded are duplicative and unsupported by evidence, and (2) Shonk's counsel made improper arguments that it had been "cheated" and was the victim of "fraud."

1. The Award of a New Trial is Warranted Where the Damages Awarded are Duplicative and Unsupported by the Evidence.

The jury's damages award is unsupported by evidence, resulting in a miscarriage of justice. The jury awarded Shonk $2,583,307 in phantom damages consisting of two parts: (1) $1,302,803 against Carbon West Virginia on the unjust enrichment claim, which is a figure representing the

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[139] Syl. pt. 6, *TXO, supra*.

[140] *See, e.g., Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC*, 205 Cal. App. 4th 999, 1035, 141 Cal. Rptr. 3d 109, 139–40 (2012), *as modified on denial of reh'g* (May 30, 2012) ("At the time the case was tried, plaintiffs as well as defendants had pending causes of action for slander of title. The trial court instructed the jury on the law as it applied to both sides' claims for attorney fees as damages for slander of title. Specifically, the trial court informed the jury that attorney fees and litigation costs necessary to clear a slandered title were recoverable as to the slander of title cause of action, but added that attorney fees and costs were not recoverable regarding other causes of action.").

[141] 176 W. Va. 190, 342 S.E.2d 156 (1986).

[142] It is noteworthy that in *Quarrier St. LLC v. Hull Property Group, LLC*, Kanawha Co. Civ. Action No. 22-C-128 (W. Va., Dec. 11, 2023), another circuit court ruled contrary to the ruling in this case.

price that Shonk claims it should have been offered to purchase the Leases and (2) $1,280,504 against Diversified on the tortious interference claim, which is a figure representing the value allocated to an entirely different lease (Little Coal Land) that was not in any way related to Shonk. There was no evidentiary basis for a jury to conclude Shonk suffered these damages, let alone award Shonk the Leases without paying anything for them!

Concerning the unjust enrichment damages, the Circuit Court instructed the jury that such damages must represent the value of a benefit *unfairly kept by one party that belonged to another party*.[143] To the extent the jury concluded that $1,302,803 was the price Carbon Energy and Diversified should have agreed upon to value the Lease, Shonk would have *paid* to purchase the Lease. Obviously, Shonk had no right to benefit from obtaining the Lease for free because of the forfeiture plus $1,302,803 that *it would have paid to purchase the same Lease* as damages.

The tortious interference damages are likewise contrary to the law. The Circuit Court instructed the jury that such damages "are calculated to place the injured party in the position he or she would have been in had the contract been performed."[144] The $1,280,504 value allocated to the Little Coal Land lease has *no relationship* to any rights under the Leases with which Shonk claims that Diversified interfered. Had Shonk received an offer to purchase the Larner Lease at a price Shonk claimed was proper ($1,302,803), Shonk would have *paid* that money to purchase the Larner Lease. There is no scenario under which Shonk would have *received* a payment of $1,280,504 had the parties performed precisely according to Shonk's view of the lease obligations. Yet, the jury inexplicably awarded this amount to Shonk. Recently, the Supreme Court vacated a jury verdict that reflected similar "phantom damages" awarded by a jury.

[143] App. 3505.

[144] App. 3506.

In *Miller v. WesBanco Bank, Inc.*,[145] the Supreme Court was presented with a dispute between borrowers and their lender concerning a construction loan. The jury returned a verdict in favor of the borrowers. It awarded damages that included purported expenses they never incurred and the cost of materials delivered by a contractor for which the borrowers never asked the lender to authorize payment.[146] The Supreme Court observed that "to the extent these damages may have been included, the award is against the evidence. For these reasons, we find the circuit court abused its discretion in denying [the lender's] motion for a new trial with respect to damages."[147]

The damages awarded to Shonk suffer from the same infirmity that justified the award of a new trial in *Miller*. There was no evidentiary basis in the record to support a finding that Shonk suffered compensable harm in the amounts of $1,302,803 for unjust enrichment and $1,280,504 for tortious interference. As explained above, the evidence reflecting these amounts has nothing to do with Shonk's compensable harm. Shonk did not even claim to incur these damages, much less present evidence to support them. Allowing these damages to stand constitutes a gross miscarriage of justice and an extraordinary windfall unsupported by any legal precedent. At a bare minimum, the damages awarded compel the award of a new trial.

2. Shonk's Courtroom Conduct Warrants the Award of a New Trial.

This case should have been limited to determining whether Shonk's demands first of Carbon West Virginia and then of Diversified were within or outside the scope of its right of first refusal. The core of the dispute was contractual, not tortious interference, slander of title, unjust enrichment, willful trespass, or any other non-contractual claim that the creative minds of Shonk's lawyers could concoct. However, one does not recover non-contractual damages in a breach of

[145] 245 W. Va. 363, 859 S.E.2d 306 (2021).

[146] *Id.* at 393, 859 S.E.2d at 336.

[147] *Id.*

contract action, and it is more difficult to inflame the passions of a jury in a breach of contract case. So, Shonk's contract claim against Carbon West Virginia became one of unjust enrichment and willful trespass, and even though there was transparency relative to Diversified's involvement, it became claims of slander of title and tortious interference.

Consistent with escalating a difference of opinion over the interpretation and application of contract rights, Shonk's counsel made unwarranted accusations in front of the jury about Shonk being "cheated" out of its rights even though Shonk failed to identify any specific contractual right to which it was denied.[148] During closing arguments, Shonk even went so far as to accuse the Petitioners of offering Shonk a fraudulent price to purchase the leases[149] despite the absence of any fraud claim. The Petitioners submit that these arguments were beyond the pale and warrant the award of a new trial.[150]

VII. CONCLUSION

WHEREFORE, the Petitioners, Carbon West Virginia Company LLC (n/k/a DP Bluegrass LLC), Carbon Energy Corporation, and Diversified Gas & Oil Corporation, respectfully request that the judgment of the Circuit Court of Kanawha County be set aside and this case be remanded with instructions to enter judgment against the Respondent, Shonk Land Company, LLC; to amend

[148] App. 2582 ("Carbon and DGO were two corporations who essentially cheated us out of our contractual right of first refusal to buy back our land.").

[149] App. 3524 ("Well, isn't that exactly what you do with a fraudulent valuation?"); 3569 ("Did they explain that Mr. Shain did when he hid that fraudulent number from us?"); 3570-3571 ("Well, they gave us a fraudulent price. It is a straight-up crooked fraudulent number and now they are blaming us for not going through with the deal based on a fraudulent price"); 3572 ("Listen, all they had to do is carve it out, get a sign-off from DGO, and it would be no problem except for the fraudulent price").

[150] "Though wide latitude is accorded counsel in arguments before a jury, such arguments may not be founded on facts not before the jury, or inferences which must arise from facts not before the jury." *Crum v. Ward*, 146 W. Va. 421, 122 S.E.2d 18 (1961).

the judgment following this Court's directives; or in the alternative, that it be set aside and this case remanded for a new trial subject to this Court's directions as to the issues raised in this appeal.

DP BLUEGRASS, LLC (F/K/A CARBON WEST VIRGINIA COMPANY, LLC) AND DIVERSIFIED GAS AND OIL CORPORATION

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-154

CARBON ENERGY CORPORATION, CARBON WEST VIRIGINIA COMPANY, LLC., n/k/a DP BLUEGRASS, LLC, AND DIVERSIFIED GAS AND OIL CORPORATION,
Defendants Below, Petitioners,

v.

SHONK LAND COMPANY, LLC,
Plaintiff Below, Respondent.

Honorable Jennifer Bailey, Judge
Circuit Court of Kanawha County
Civil Action No. 20-C-613

CERTIFICATE OF SERVICE

I certify that on July 22, 2024, I served the foregoing "BRIEF OF THE PETITIONERS" using the Court's E-Filing system on the following:

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