INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-154

ICA EFiled: Sep 25 2024
03:38PM EDT
Transaction ID 74593561

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

REPLY BRIEF OF THE PETITIONERS

Counsel for Petitioners DP Bluegrass, LLC (f/k/a Carbon West Virginia Company, LLC) and Diversified Gas and Oil Corporation

Ancil G. Ramey (WV Bar #3013)
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington WV 25722-2195
ancil.ramey@steptoe-johnson.com

Timothy M. Miller (WV Bar #2564)
Robert M. Stonestreet (WV Bar #9370)
Babst Calland Clements & Zomnir, PC
300 Summers Street, Ste. 1000
Charleston, WV 25301
tmiller@babstcalland.com
rstonestreet@babstcalland.com

Counsel for Petitioner Carbon Energy

Michael Meadows (WV Bar #10100)
Burns White, LLC
720 Fourth Avenue
Huntington, WV 25701
mameadows@burnswhite.com

Counsel for Respondents

Nicholas S. Johnson (WV Bar #10272)
Bailey & Glasser LLP
1055 Thomas Jefferson Street, NW
Suite 540
Washington, DC 20007
Nicholas S. Johnson
NJohnson@baileyglasser.com

Sallie Gilbert (WV Bar #14317)
Bailey & Glasser LLP
209 Capitol Street
Charleston, WV 25301
sgilbert@baileyglasser.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

I. INTRODUCTION

This case should have been limited to a contract dispute between the Petitioner, Carbon West Virginia, LLC k/n/a DP Bluegrass, LLC ("Carbon West Virginia"), and the Respondent, Shonk Land Company, LLC ("Shonk"), over rights of first refusal. Instead, because of legal errors, Shonk obtained an impermissible triple recovery against Carbon West Virginia and the Petitioner, Diversified Gas and Oil Corporation ("Diversified"). Thus, this Court should either direct entry of judgment for the Petitioners or remand the case solely on Shonk's breach of contract claim.

II. STATEMENT OF THE CASE

Some key, undisputed facts are lost in the flurry of obfuscation in Shonk's brief. *First*, the two Leases gave Shonk nothing more than a right of first refusal and required only the purchaser's identity and price to be provided.[1] *Second,* Shonk does not dispute that it was notified about the purchaser and the sales price: "Carbon West Virginia's Notices of Intent to Transfer included information concerning the DGO sale [and] specified that '[t]he offer for the Transferred Interest is: $2,605,707.00 [and] [t]he offer for the Transferred Interest is: $60,022.00."[2] *Finally*, the dispute between these parties turns on the following sentence in Shonk's brief: "Neither notice provided *any information concerning* these figures."[3] This Court will look in vain for anything in the Leases or law requiring Carbon West Virginia to provide information other than the purchaser and sales price. Despite that, Carbon West Virginia bent over backward, provided extensive information,[4]

---

[1] Shonk's Brief at 4 concedes "the Notice of Intent to Transfer needed to include two things: (1) 'information concerning the proposed transferee,' and (2) 'information concerning … the value [Carbon West Virginia] expects to receive in exchange for transferring the Transferred Interest.'"

[2] *Id.* at 6 (emphasis omitted).

[3] *Id.* (emphasis in original).

[4] Shonk concedes that the sales agreement between Carbon West Virginia and Diversified "was publicly available." *Id.* at 7.

and *Shonk exercised its right of first refusal*.[5]

Shonk has a history of weaponizing forfeiture,[6] and this case is no exception. The subject Leases provided that upon a breach of "any material aspect" of the "Right of First Refusal … the Lease shall be forfeited …"[7] So, Shonk demanded additional information and documentation not required by the Leases so it could manufacture a breach, cry "forfeiture," and seek extracontractual damages not only from Carbon West Virginia but also from Diversified. For example, Shonk complains in its brief that "Neither notice provided any *information concerning* these figures."[8] However, the Court will look in vain for any provision in the two Leases requiring the information Shonk demanded. So, Shonk constructs a strawman: "Shonk needed a way to ensure the figures included in the Notices of Intent to Transfer were the prices DGO had actually agreed to pay."[9] Then, after constructing this strawman, Shonk reveals its motivation: "Shonk concluded its letter with a simple warning: 'If you fail to provide the information … any transfer of the Transferred Interest would constitute a material breach of [Shonk's] Right of First Refusal and result in the immediate forfeiture of the Lease[.]'"[10] In other words, demand information not required by the Leases, declare a "forfeiture," pay nothing, and be awarded $4,180,154 in *extracontractual damages*. As in *Bethlehem Steel*, Shonk's weaponization of forfeiture here should be rejected.

---

[5] *Id.* at 10 ("On May 5, 2020, Shonk exercised its right of first refusal.").

[6] In *Bethlehem Steel Corp. v. Shonk Land Co*., 169 W. Va. 310, 313, 288 S.E.2d 139, 141 (1982), for example, as in this case, Shonk unilaterally declared a forfeiture after the parties disputed its interpretation and application: "Shonk based its forfeiture claim upon Bethlehem's alleged defaults …." The Supreme Court rejected the same Shonk playbook used in this case: "We do not agree that Bethlehem's defaults justify the wholesale forfeiture of improvements, equipment and personal property. Shonk can be made whole by monetary damages and by allowing it not to renew the lease … Forfeitures of estates are not favored in law. … Every breach of a covenant or condition does not confer it upon the injured party." *Id.* at 313-314, 288 S.E.2d at 142.

[7] *Id.* at 4.

[8] *Id.* at 6 (emphasis in original).

[9] *Id.* at 7.

[10] *Id.*

III. ARGUMENT

A. STANDARD OF REVIEW

Shonk's brief misstates the standard of review,[11] consistent with its approach to the applicable substantive law. Indeed, throughout its brief, it obsessively references the "jury" no fewer than 131 times, even though none of the seven assignments of error – all beginning with "The Circuit Court erred" – involve the jury's work. Instead, all address legal errors.

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.

Shonk's brief addresses this assignment of error on pages 24-33, citing not a single case supporting its arguments relative to a holder of a right of first refusal's purported right to the information and documentation demanded. Instead, it only argues whether a party materially breached a contract is a jury issue.[12] When no legal authority supports its assertion of rights beyond the face of the Leases, the issue of material breach was for the trial court, not the jury.

1. Closing of Carbon Energy to Diversified Transaction.

Shonk ignores the undisputed fact that it exercised its rights of first refusal before the Carbon Energy/Diversified closing, *which would have been irrelevant had Shonk not been motivated to weaponize its forfeiture clause and manufacture extracontractual claims*. Indeed, the MIPA expressly required Diversified to ensure Carbon West Virginia completed the transaction with Shonk, recognizing the exercise of its rights of first refusal.[13] Besides two procedural rules, this section of Shonk's brief contains no legal citations.[14] Ignoring Shonk's obfuscations, none of

---

[11] *Id.* at 21-23.

[12] *Id.* at 24.

[13] App. 3678. It is also undisputed that the Leases do not require the conveyance of the Leases to Shonk before a change in ownership. App. 4384 and 4399.

[14] *Id.* at 28-31.

this is complicated. Carbon West Virginia held the Leases subject to the rights of first refusal. If Carbon Energy's ownership changed, its successor would be subject to those rights.[15] The two Leases were effectively removed from the acquisition as the MIPA transferred Carbon Energy's obligation to honor the rights of first refusal to Diversified. Shonk suffered no harm. This is why, following the closing, 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.[16] Despite Diversified's best efforts, Shonk never honored that commitment or its original contractual obligation to purchase the Leases because Shonk was more interested in fabricating a justification for a forfeiture declaration and seeking extracontractual damages than paying to Diversified what it had offered to Carbon West Virginia to pay for the Leases.

In its brief, Shonk makes what are effectively extralegal arguments. For example, although the MIPA preserved all of Shonk's rights and Diversified would have gladly transferred the Leases to Shonk upon the payment price Shonk had committed to pay for them, Shonk defends itself by arguing, "The Leases do not limit their protections to specifically enumerated contractual 'benefits,' nor do they require that such 'benefits' be set out in the contract."[17] Noticeably absent

---

[15] In other words, Diversified becoming the new owner of Carbon West Virginia did not compromise Shonk's rights of first refusal.

[16] App. 3971.

[17] Shonk's Brief at 29. Shonk's contrived "benefits," allegedly deprived of speak for themselves: Shonk was "forced to deal with DGO," *id.* at 29, "DGO changed the terms of the deal by tacking on a firm transportation obligation," *id.* at 30, which, as the Petitioners noted in their brief, was false, Petitioners' Brief at 16 ("Mr. Shain testified that he raised the firm transportation contract as something for discussion with Shonk – not as a demanded term …"), "the Parent Company Guaranty terminated," *id.* at 31, which, again, as the Petitioners Brief at 14-15 noted, has no merit ("the guaranty terminates upon assignment of the Leases to an unaffiliated third party or 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 …."). There is simply nothing in either the Leases or the law that gave Shonk the right to deal solely with Carbon Energy.

from Shonk's brief is the black-letter law stating: "It is a fundamental principle of the law of contracts that a plaintiff is only entitled to such damages as would put him in the same position as if the contract had been performed. ... In other words, a plaintiff is not entitled to damages beyond his actual loss ..."[18] Here, Shonk had a right of first refusal and exercised that right. The Leases would have been transferred save for its preference for declaring forfeiture and pursuing tort claims. Shonk is not entitled to extracontractual damages, and its remedy, if any, relative to Carbon Energy's alleged breaches, are contractual, not extracontractual. Accordingly, the trial court should have entered judgment for the Petitioners relative to the closing.

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

This section of Shonk's brief contains not a single legal citation.[19] Instead, Shonk asks this Court to take its word for it and adopt its logic. Because nowhere in the Leases did it provide any right to the information and documentation demanded, it resorts – as it did in the trial court – to arguing, "As a matter of straightforward logic, Shonk was entitled to all the information"[20] that it demanded. Petitioners have been unable to find any "straightforward logic" legal doctrine applicable to contracts that trigger forfeiture and extracontractual damages.

The absurdity of Shonk's demands appears on the face of its brief. For example, under Shonk's "straightforward logic" theory, it was entitled to the entire MIPA between Carbon West Virginia and Diversified and other information about the values allocated to all the assets involved in that transaction, *including those other than the two Leases subject to the rights of first refusal*. Building on its "straightforward logic" approach, Shonk defends its demand for the MIPA,

[18] *Miller v. WesBanco Bank, Inc*., 245 W. Va. 363, 392, 859 S.E.2d 306, 335 (2021) (citations omitted).

[19] *Id.* at 24-28.

[20] *Id.* at 25.

including all its various schedules and exhibits, because declining to provide the same relative to a private, commercial transaction between Carbon West Virginia and Diversified "makes no sense."[21] The notices provided all the information to Shonk referenced in the rights of first refusal – the offeror and the offer price – and Shonk cites no legal authority for the proposition that the holder of a right of first refusal is entitled to information and documentation outside the face of the contract affording that right. Shonk complains that "it wanted to 'understand how the value [was] calculated,"[22] but (1) nothing in the Leases provides it was entitled to a detailed explanation of the offer price; (2) there is nothing in the law providing it was so entitled, which is why it does not cite any; and (3) Shonk's motivation was not to decide whether to exercise its right.[23]

Admitting that it was provided with the offeror and offer price, as required, Shonk manufactures extracontractual requirements and complains that the offer price could "be gleaned only from reviewing a broader deal that includes other assets."[24] It admits that it never requested a single exhibit or schedule but defends itself by saying that it "was not required to guess which part of 'the agreement with DGO' revealed the relevant information or which exhibit, precisely, might have contained it,"[25] which begs the question, "What 'relevant information?'" Shonk defends moving the goalposts by now arguing that even if additional information and documentation were provided – which the Petitioners gratuitously and extensively did as

[21] *Id.*

[22] *Id.* at 26.

[23] Again, as noted, Shonk exercised its right at the offered prices, and Carbon Energy immediately agreed to transfer the Leases to Shonk – *but to manufacture a predicate to declare a forfeiture*, which Shonk has accomplished and then some, by not only demanding information and documentation, constantly moving the goalposts, declaring a forfeiture, and then not effectuating ownership and control of the Leases so it could claim tortious interference, slander of title, and unjust enrichment.

[24] *Id.*

[25] *Id.*

thoroughly discussed in their opening brief[26] -- that information and documentation should have been provided with the notices and because they were not – forfeiture![27] Of course, this betrays Shonk's motivations from the outset. Accordingly, the trial court should have entered judgment on Shonk's breach of contract claim relative to the failure to disclose the schedules and exhibits as they were not required by the contracts nor by any law.

3. Recording of Mortgage and Assignment of Midstream Infrastructure.

Continuing a theme, this section of Shonk's brief contains no legal citations and ignores undisputed facts that illustrate the trial court's legal errors.[28] *First*, Shonk does not contest that the undisputed testimony that references to the Shonk Leases were supposed to have been omitted from a mortgage[29] and that a release to correct this mistake was executed a month later, on June 30, 2020, and was recorded on July 27, 2022,[30] only two months later. *Second*, Shonk does not dispute the assignment did not mention Shonk or the subject Leases by name.[31] As it did in the trial court, Shonk ignores the timeline, which eviscerates its breach of contract claim. Carbon Energy provided notices to Shonk on April 8, 2020.[32] Shonk exercised its rights of first refusal on May 5, 2020.[33] Carbon Energy honored the exercise, and the Leases were excluded under the MIPA.[34] Accordingly, the recordation of the mortgage and assignment on May 26, 2020, could

---

[26] Petitioners' Brief at 6-9.

[27] Shonk's Brief at 27 ("By contract, Carbon West Virginia was required to include this information in the Notices of Intent to Transfer. … It was certainly required to provide the information before May 8, 2020 (i.e., when Shonk needed to make its ROFR election). But it did neither. Nor did it provide the information by the time it closed the DGO Sale (i.e., May 26, 2020) or even by the time it received Shonk's Notices of Forfeiture (i.e., May 29, 2020). As a result, it materially breached and forfeited the Leases.").

[28] *Id.* at 32-33.

[29] App. 2606-2610.

[30] App. 4429.

[31] App. 3910.

[32] Shonk's Brief at 5.

[33] *Id.* at 6.

[34] App. 3678.

not have constituted a material breach of Shonk's rights of first refusal. If Carbon West Virginia owned the Shonk Leases, the midstream infrastructure associated with those leases would be assigned to Diversified Midstream, LLC. If Carbon West Virginia did not own the Shonk Leases, the assignment would not affect the ownership of their midstream infrastructure. Accordingly, the trial court should have entered judgment on Shonk's breach of contract claim as a matter of law.

4. Breach of Carbon Energy Guaranty.

Again, Shonk's brief cites no law relative to this issue, and the section addressing it is thirty-seven words long.[35] For the reasons discussed in the Petitioners' brief,[36] the trial court should have entered judgment on Shonk's breach of contract claim related to the guaranty.

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.

Instead of addressing this assignment of error as presented,[37] Shonk makes summary arguments on a single page.[38] Here, the facts fail on multiple elements of a slander of title claim.[39]

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

Essential elements of slander of title are that a publication (1) reflects a false statement and (2) the statement is derogatory to the claimant's title. The undisputed evidence was that hundreds of other instruments were explicitly identified by name, date, and recording information in the assignment, *but no reference to Shonk or the Leases appears*.[40] All Shonk can muster is that its

---

[35] Shonk's Brief at 33.

[36] Petitioners' Brief at 19-20.

[37] *Id.* at 20-23.

[38] Shonk's Brief at 34.

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

[40] App. 3910.

witness testified that "the assignment included assets covered by the leases."[41] This is insufficient.

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

In their brief, the Petitioners noted, "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."[42] Confronted with this logical problem, Shonk's brief ignores it, which warrants judgment as a matter of law on the slander of title claim.

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

Shonk's response to this argument is classic misdirection.[43] Any evidence of the required "malice" must relate to the recorded document slandering one's title as a matter of law. Here, there was 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*. So, Shonk asks this Court to look for malice

[41] Shonk's Brief at 34.
[42] Petitioners' Brief at 21.
[43] Shonk's Brief at 34.

elsewhere: "Carbon West Virginia participated in a prolonged pattern of deception—putting DGO's doubled price in the Notices of Intent to Transfer and withholding the information necessary to reveal the truth, despite being contractually obligated to provide it."[44]

The only substantive case relied on by Shonk relative to its slander of title claim is *TXO,*[45] which is easily distinguishable:

> When examined in the light most favorable to the appellees, the evidence clearly shows that TXO *intentionally and maliciously recorded a quitclaim deed that it knew to be without any basis in fac*t because Mr. Signaigo explicitly told TXO that he had not bought the oil and gas on the Blevins Tract in 1958. Furthermore, the record shows that this was not an isolated incident on TXO's part -- a mere excess of zeal by poorly supervised, low-level employees -- but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power vis-a-vis TXO's superior legal firepower.[46]

Only because there was evidence in TXO that malice existed directly related to the recordation that it knew had no basis did the *TXO* Court affirm the slander of title verdict. Here, the Court needs to look no further than Shonk's brief to confirm that there was no evidence of any malice in recording an assignment making no references to Shonk or the Leases, or it would have identified the same, which warrants judgment as a matter of law on the slander of title claim.

4. Shonk Presented No Evidence of Special Damages.

Shonk argues that attorney fees are special damages.[47] but that is true only to the extent the fees were incurred in "removing spurious clouds from a title."[48] As explained above, the subject assignment did not cloud Shonk's title, as no one examining the assignment would have seen any reference to Shonk or the subject leases. More importantly, Shonk did not introduce evidence of

---

[44] *Id.*
[45] *Id.*
[46] Shonk's Brief at 34.
[47] *Id.*
[48] *TXO Prod. Corp*., 187 W. Va. at 469, 419 S.E.2d at 882.

attorney fees. It references "App. 2763–64, 2922–24" in its brief,[49] but that testimony was "You would have to ask Mr. George [Shonk's lawyer] about that, but I believed he charged us"[50] wholly unrelated to removing any fictional cloud on Shonk's title and "you [are] picking up here to start over with different lawyers"[51] again wholly unrelated to removing any fictional cloud on Shonk's title. In *TXO*, $19,000 in attorney fees was awarded *because there was evidence such an amount was incurred*.[52] Zero proof of the amount of Shonk's attorney fees for removing any fictional cloud on its title was presented, warranting judgment as a matter of law on the slander of title claim.

5. Shonk Presented No Evidence of Diminished Value.

Shonk offered no evidence that any third parties viewed the Leases 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.[53] *He identified none*. The Petitioners' brief[54] noted that multiple courts have recognized that such a failure of evidence warrants judgment as a matter of law on a slander of title claim.[55] Confronted with this pertinent legal authority, Shonk's brief ignores it.[56]

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.

Under West Virginia law, "A trespasser who does so intentionally or recklessly with intent

---

[49] Shonk's Brief at 34.

[50] App. 2764.

[51] App. 2924.

[52] *TXO Prod. Corp*., 187 W. Va. at 468, 419 S.E.2d at 881 ("The appellees spent $ 19,000 responding to TXO's declaratory judgment action that the appellees would not have spent if TXO had not filed the false quitclaim deed and then sued the appellees in an attempt to steal their land.").

[53] App. 2805.

[54] Petitioners' Brief at 23.

[55] *See Lemartec Corp. v. Berkeley County Solid Waste Authority*, 2020 U.S. Dist. LEXIS 106336, *14 – 15 (N.D. W. Va. June 17, 2020); *Sapphire Development, LC v. Span USA Inc*., 120 Fed. Appx. 466, 474 (4th Cir. Feb. 1, 2005); *Killette v. Pittman*, 1997 U.S. App. LEXIS 28909, *20 (4th Cir. May 5, 1997).

[56] Shonk's Brief at 34.

to 'take an unconscientious advantage of his victim' commits a willful or bad faith trespass and is liable for damages in a greater amount than an innocent trespasser."[57] Conversely, "If the trespass be committed, not recklessly, but through inadvertence or mistake, or in good faith, under an honest belief that the trespasser was acting within his legal rights, it is an innocent trespass …"[58] If a trespass was intentional, the measure of damages is the value of the gas extracted without any deduction for operating expenses.[59] The value of the extracted gas measures damages for an innocent trespass after deducting operating expenses.[60] Here, there was no evidence 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. Shannon testified that after the Diversified closing on May 26, 2020, Shonk made the conscious decision *not* to demand that Carbon West Virginia discontinue operating the wells.[61] 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.[62] So, as of May 2020, Shonk had not requested the cessation of production. Instead, Shonk entered into a "Standstill Agreement" with the Petitioners 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.[63]

---

[57] *EQT Prod. Co. v. Crowder*, 241 W. Va. 738, 744, 828 S.E.2d 800, 806 (2019) (internal quotation marks and citations omitted).

[58] *Bryan v. Big Two Mile Gas Co*., 213 W. Va. 110, 114, 577 S.E.2d 258, 262 (2001) (internal quotation marks and citation omitted).

[59] Syl. pt. 4, *Petrelli v. West Virginia-Pittsburgh Coal Co*., 86 W. Va. 607, 104 S.E. 103 (1920) ("The measure of damages for a wilful subterranean trespass upon mineral lands is the value of the thing mined, after its severance, without deduction of expenses incurred in mining and removing it."

[60] *Journey Acquisition-II, L.P. v. EQT Prod. Co*., 830 F.3d 444, 458 (6th Cir. 2016) ("If the trespass was innocent, then the measure of damages is 'the value of the mineral after extraction, less the reasonable expenses incurred by the trespasser in extracting the mineral.'") (citation omitted).

[61] App. 2696-2698.

[62] App. 3970.

[63] App. 4034.

The parties continued discussions for over another month until Shonk's counsel transmitted a letter dated July 17, 2020, advising that Shonk would not honor its commitment to purchase the Leases.[64] 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 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. Moreover, even after Carbon West Virginia tried to *pay* those royalties to Shonk, they were returned.[65] In response, Shonk advances another "gotcha" argument: "The leases had been forfeited. Shonk did not need to seek a preliminary injunction."[66] In other words, a party to a right of first refusal can unilaterally declare a forfeiture, negotiate over whether its declaration is valid, enter into a standstill agreement, never request that the subject leases be surrendered, refuse to accept tendered royalties, and then claim it is the victim of intentional trespass? That is not the law, so Shonk's brief cites none.

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.

As noted in the Petitioners' brief, the award of damages for tortious interference and unjust enrichment constitutes a double recovery on steroids.[67] Shonk contends that Carbon West Virginia breached the rights of first refusal, and as noted, damages for such a breach would place Shonk in the same position it would have been in the absence of a breach. How can a party to a contract get

[64] App. 4069.
[65] App. 4438-4439.
[66] Shonk's Brief at 35.
[67] Petitioners' Brief at 25.

extracontractual damages from the other contracting party in the form of "unjust enrichment?" Shonk's argument is frivolous: "In addition to extracting and selling Shonk's gas, Carbon West Virginia also unjustly retained 16,000 acres of Shonk's land. … And Carbon West Virginia used that valuable property to obtain a loan from a bank. … Put simply, Carbon West Virginia unjustly retained Shonk's land to enrich itself at Shonk's expense."[68] Any creditor can sue for "unjust enrichment, under Shonk's novel theory,[69] because the debtor "unjustly retained" what was owed.

As with Shonk's slander of title claim, no evidence was presented to the jury establishing a causal nexus between its unjust enrichment claim and any supposed economic benefit retained by Carbon West Virginia. In its brief, as noted, it references Carbon Energy's alleged use of the property to obtain a bank loan, but no evidence was presented regarding the economic benefit of such alleged use. The jury awarded Shonk $1,302,803 in unjust enrichment damages. This figure is a precise number appearing in the record 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.[70] Gillespie testified that $1,302,803 represents the value generated by multiplying the PV10 values for all the Larner Lease wells by 61.07452%.[71]

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%.[72] Carbon West

[68] Shonk's Brief at 36.

[69] Again, the Court will notice a continuation of a theme of Shonk's inability to recite any legal precedent for its extracontractual claims.

[70] App. 4418.

[71] *Id.*

[72] *Id.*

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).[73] 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. This Court needs to look no further than Shonk's response to the farmland example to know that unjust enrichment must be set aside:

> To use Petitioners' "farmland example" … the farmer whose ROFR rights have been trampled may be awarded the acre after trial. She may also be awarded the value of accessing the acre for the earlier period her counterparty wrongfully denied it. And she may even be awarded the value of the crops grown and sold at a profit after violating her ROFR. No part of those awards would amount to double recovery. Each remedy redresses a different harm.[74]

What Shonk has just described is not what has happened in this case but is what should have happened. Shonk's remedy was a suit for breach of contract with damages that would have placed Shonk in the same position it would have been without a breach. Using the farmland example, Shonk would (1) receive the acre, (2) pay the reasonable value, and (3) receive the economic benefit of the acre between the time it should have received it and when it was tendered – none of which involve an award of damages for unjust enrichment untethered to any evidence.

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.

The sole substantive case relied upon by Shonk[75] – *Pantry v. Pride Enters., Inc. v. Stop &*

---

[73] *Id.*

[74] Shonk's Brief at 37.

[75] *Id.* at 37-38.

Shop Co., 806 F.2d 1227 (4th Cir. 1986) – is readily distinguishable. Indeed, one wonders if Shonk read the opinion outside the irrelevant dicta referenced in its brief.

Pantry involved a lawsuit between two contracting parties with no claim against a third party for tortious interference. Specifically, Stop & Shop leased a shopping center from API and subleased a portion of the shopping center to Pantry Pride, which was required to notify Stop & Shop of any proposed sublease assignment. Later, Pantry Pride agreed with a third party, Richmond, Inc., to sell twenty stores, including the store Pantry Pride subleased from Stop & Shop, but instead of notifying it of the proposed assignment, notified API. Once Stop & Shop discovered the transaction, it notified Pantry Pride that it was terminating the sublease. Pantry Pride then tried to salvage the deal by offering to sell the store to Stop & Shop for $571,000 – the price allocated to the store in its agreement with Richmond. Stop & Shop rejected that offer and countered by offering $142,750, which Pantry Pride and Richmond had assigned to the value of the lease, having allocated $428,250 to the store's equipment. Pantry Pride then filed a declaratory judgment against the other contracting party, Stop & Shop, to force it to pay $571,000 for exercising its right of first refusal. Again, there was no claim against Richmond, as there is in the present case against Diversified, for tortious interference. Additionally, the holdings in *Pantry* undercut Shonk's case.

First, the Fourth Circuit held that merely because Stop & Shop disagreed with the financial terms offered by Pantry Pride relative to Stop & Shop's exercise of its right of first refusal, Stop & Shop did not have "the unilateral power to interpret and terminate the lease."[76] Of course, Shonk's entire case is premised on asserting a unilateral power to interpret and terminate the leases.

Second, the Fourth Circuit held that the appropriate remedy for the holder of a right of first refusal on the leased property is to resolve the "conflict by enjoining the sale of any property

[76] 806 F.2d at 1229.

subject to the lessee's option."[77] The only reason the Fourth Circuit did not apply that general rule in the *Pantry* case, unlike the present case, is because a sublease of less than the entire leased premises was involved and it would be too difficult to value the disputed portion, and because "The lease itself divided the leasehold and equipment interests, putting Pantry Pride on notice that the lease and equipment were separate interest."[78] Here, neither of those concerns is present, and under *Pantry*, it is clear that the Fourth Circuit would apply the general rule to require Shonk to resolve any conflict by enjoining Carbon West Virginia's sale of the leases to Diversified.

Third, the Fourth Circuit rejected Stop & Shop's argument, like that advanced by Shonk, that it was entitled to a windfall and to exercise its right of first refusal for $142,750: "Permitting the exercise of the first refusal right at $142,750 provides Stop & Shop with a windfall for which it never bargained in the lease. *What Stop & Shop did bargain for was the right to buy the leasehold at the price offered by a third party*."[79]

Finally, the Fourth Circuit directed the appropriate *contractual* remedy: "On remand, the parties should submit to the district court evidence of the value of the entire supermarket at the time of the offer and evidence of what percentage of that value was fairly attributable to the lease. Once this percentage is determined, it should be applied to the $571,000 offering price to ascertain what percentage of the offering price was offered for the lease."[80] There were no extracontractual claims, no extracontractual damages, and no getting something for nothing; instead, contractual damages placed Stop & Shop in the same position it would have been without any breach.

Lest the Court have any concerns about the award of $1,280,504 for Diversified's alleged

---

[77] *Id.* at 1230.
[78] *Id.*
[79] *Id.* at 1231 (emphasis supplied).
[80] *Id.* at 1232.

tortious interference being duplicative, here are Shonk's arguments relative to that award and the award of $1,302,803 for slander of title:

Slander of Title	Tortious Interference
"The jury returned a verdict reflecting the fact that Shonk was deprived of possession of $1.3 million of land."[81]	"The jury awarded Shonk $1.3 million—recoverable against DGO—for the value of the deal Shonk was deprived of …"[82]

In addition to this being the same thing for which Shonk has twice been awarded damages, it is telling that it rounds up to "$1.3 million" because the actual amount awarded—$1,280,504—is a precise number. It was 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.[83] but has absolutely nothing to do with the two Leases that are the subject of this litigation. Hoping this Court would do so as well, and although raised in the Petitioner's brief,[84] Shonk has elected, in its brief, to ignore it.

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

As noted, the trial court erred by permitting a slander of title claim without evidence of special damages. Shonk's only defense – waiver[85] – is wrong. The Petitioners moved for judgment as a matter of law before,[86] during,[87] and after[88] trial on Shonk's slander of title claim precisely due to Shonk's failure to present special damages evidence to the jury. However, the trial court erred by concluding it could sit as the fact-finder on special damages post-trial.

---

[81] Shonk's Brief at 36.
[82] *Id.* at 39.
[83] App. 3811 at rows 4288-4347, App. 4510, 4587-1588, App. 4422, 4425-4426.
[84] Petitioners' Brief at 30-31.
[85] Shonk's Brief at 39.
[86] App. 232-233.
[87] App. 3049, 3054-3056.
[88] App. 4677, 4852.

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.

Regarding this issue, Shonk's brief illustrates the triple recovery described in the Petitioners' opening brief, describing the damages awarded as follows: (1) "the value of the land it wrongfully retained;" (2) "the value of the gas it impermissibly extracted;"[89] and (3) "a third injury caused by a different party."[90] Of course, (1) Shonk has been awarded the land, based on its unilateral assertion of forfeiture, without paying anything for it; (2) Shonk received separate trespass damages for the value of the gas extracted while it sat on its hands and rejected Carbon West Virginia's royalty payments; and (3) Shonk presented no evidence of some "third injury" caused by Diversified. Again, this Court should set aside all the extracontractual damages and remand this case for a new trial solely on Shonk's claim for breach of contract.

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

As noted in the Petitioners' opening brief, the trial court's legal errors made in permitting extracontractual claims to be asserted in what should have been limited, like the *Pantry* case upon which Shonk relies, to breach of contract, also allowed to make not only extracontractual claims

[89] It is helpful to note that if the operation of the wells had ceased while the parties were negotiating and then litigating, Shonk still would have sought damages for lost profits.

[90] Shonk's Brief at 39.

and arguments but arguments regarding fraudulent conduct[91] 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.[92] Shonk's only defenses are waiver and justification.[93] Regarding the first point, an objection was made immediately after closing arguments, and the trial court noted that the error was preserved.[94] As to the second point, Shonk offers no legal authority to support the proposition that a plaintiff can argue to a jury that it should return a verdict for the plaintiff because the defendant's conduct was "fraudulent" when the plaintiff has asserted no fraud claim.

Accordingly, this Court should set aside the judgment and remand the case for a new trial.

IV. 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 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

By Counsel:

---

[91] App. 3524, 3569, 3572.

[92] "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).

[93] Shonk's Brief at 40.

[94] App. 3574 ("MR. MEADOWS: Judge, I just wanted to note an objection for the record. It was never pled there are fraudulent actions. I didn't want to make an objection during Mr. Johnson's – we want to make objection now. … JUDGE: It is noted for the record.").

Ancil G. Ramey (WV Bar #3013)
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington WV 25722-2195
ancil.ramey@steptoe-johnson.com

Timothy M. Miller (WV Bar #2564)
Robert M. Stonestreet (WV Bar #9370)
Babst Calland Clements & Zomnir, PC
300 Summers Street, Ste. 1000
Charleston, WV 25301
tmiller@babstcalland.com
rstonestreet@babstcalland.com

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 September 25, 2024, I served the "REPLY BRIEF OF THE PETITIONERS" using the Court's E-Filing system on the following:

Nicholas S. Johnson
Bailey & Glasser LLP
1055 Thomas Jefferson Street, NW
Suite 540
Washington, DC 20007
Counsel for Shonk Land Company LLC

Michael Meadows
Burns White, LLC
720 Fourth Avenue
Huntington, WV 25701
Counsel for Carbon Energy Corporation

Sallie Gilbert
Bailey & Glasser LLP
209 Capitol Street
Charleston, WV 25301
Counsel for Shonk Land Company LLC

Ancil G. Ramey
WV Bar #3013