No. 21-0934

FILED
FEB 18 2022
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Redstone International, Inc., Petitioner

v.

JF Allen Company, Amec Foster Wheeler Environment & Infrastructure, Inc., & MarkWest Liberty Midstream & Resources, Inc., Respondents

On Appeal from the Circuit Court of Wetzel County, Business Court
(The Honorable H. Charles Carl, III., Civ. Act. No. 16-C-82)

Petitioner's Brief

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February 17, 2022

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ASSIGNMENTS OF ERROR

1. Whether the Circuit Court erred in dismissing Redstone's negligence claim against Amec on the basis that the special relationship duty allowed the project's owner, MarkWest, to pursue a negligence claim against Amec, but did not allow Redstone, a subcontractor, to pursue a negligence claim for the same engineering and design flaws which impacted its work?

2. Did the Circuit Court err by allowing a contractual damages limitation between JF Allen and Amec to limit damages awarded to JF Allen against Amec, but ignoring a similar contractual damage limitation as to consequential damages between Redstone and JF Allen, and awarding JF Allen $$1,458,342.35 for MarkWest's "lost profits"?

3. Did the Circuit Court err by failing to find that JFA was contractually obligated to indemnify Redstone?

4. Did the Circuit Court err by ignoring Redstone's claims against MarkWest?

5. Did the Circuit Court err by granting MarkWest's Motion to Dismiss Redstone's "Failure to Coordinate" claim?

6. Did the Circuit Court err in determining that Redstone performed defective work on the project?

7. Did the Circuit Court err by finding that JFA had overpaid the contractual money owed to Redstone?

8. Did the Circuit Court err by awarding MarkWest delay damages?

STATEMENT OF THE CASE

This litigation is the result of a multi-faceted dispute among the Owner, MarkWest Liberty Midstream & Resources, L.L.C., ("MarkWest") a general contractor, JF Allen ("JFA"), an engineering and design firm, AMEC Foster Wheeler Environment and Infrastructure, Inc. ("Amec") and a subcontractor, Redstone International, Inc., ("Redstone") who is the Petitioner. MarkWest dubbed the Project, a portion of a much larger natural gas processing operation, the Great Wall of Mobley ("Project").

To gain more flat space on its property on top of a remote hillside in Wetzel County, MarkWest hired JF Allen, who in turn hired Redstone and Amec, to construct a large retaining wall structure to hold fill material cut from steep slopes in other locations on MarkWest's property. The base value of the JFA contract was $12.3 M. JA 5563. Construction began in the fall of 2014 and primary construction completed in 2015, with additional repairs completed in 2016. Litigation began in 2015 after problems arose with the wall. A parallel federal court action, filed in 2015, has been stayed since early 2018.

The parties engaged in extensive discovery after the Circuit Court of Wetzel County referred this matter to Business Court. A seventeen-day bench trial was held in September and October of 2020, and Judge Carl, assigned through the Business Court, issued his decision on October 15, 2021, which was entered by the Circuit Clerk of Wetzel County on October 18, 2021. JA 42-194.

The Circuit Court thoroughly and accurately described the work performed by Redstone, the sequence of work, and some of the problems with the Project in the Judgment Order as factual findings. JA 48-61 ("Background," "The Design Build Contract," & "Construction of the Wall"). Those findings, for sake of brevity, are not repeated herein, and are not disputed by Petitioner.

The Circuit Court's damages awards are summarized below:

Party Awarded Damages	Reason	Amount	Party Liable for Damages
MarkWest	Repairs to Wall (in the future)	$2,605,596.00	Amec 60%/ JFA 40%
MarkWest	Instrumentation and monitoring of the wall (incurred)	$701,942.00	Amec 60%/ JFA 40%
MarkWest	Testing and Inspection	$242,152.00	Amec 60%/ JFA 40%
MarkWest	Delay – Lost Profits and impacts to other contractors	$4,750,712.59	JFA (partly indemnified)
MarkWest	Negligence – Compensatory Damages	$129,814.10	Amec
JF Allen	Unpaid Contract Balance	$1,581,405.10	MarkWest
JF Allen	Contractual Overpayment	$904,438.00	Redstone
JF Allen	Repairs	$981,673.00	Redstone
JF Allen	Indemnification for MW Lost Profits	$1,458,342.35	Redstone
JF Allen	Indemnification for MW Lost Profits	$291, 668.47	Amec
JF Allen	Repairs caused by Design errors	$695,527.99	Amec

MarkWest was awarded $8,300,402.59 against JFA, offset by the remaining contract balance of $1,581,405.10 for a total of $6,718,997.49. JA 188-194. MarkWest was awarded $129,814.10 against Amec. JFA was awarded $3,117,009.47 against Amec, but the Court found that Amec's contract limited their liability to JFA to $2 M. JFA was awarded $3,344,453.35 against Redstone. *Id.*[1]

Parties

MarkWest is the site owner, and the job site has five natural gas processing plants in Wetzel County, West Virginia. JA 287-288 (Tr. P. 93-94: L. 17-24, 1-13, Day 1.)[2]

The Project was designed to provide on-site disposal and repurposing for waste material excavated from a hill to create a flat space for a building pad for the fifth processing plant, Plant

[1] Subsequent to this Notice of Appeal being filed, the other Parties satisfied their claims by paying judgments and interest as found by the Circuit Court. JA 40-41. "Order Granting Rule 60(b)(5) Motion for Relief from Final Judgment Order Due to Satisfaction of Judgment Entered." 1-4-2022.

[2] Trial Transcript Citations will include the Joint Appendix page number as well as the trial transcript page and line number.

5, and for an electrical substation. JA 307 (113: 2-18.) At the time the Project started, in the fall of 2014, with four plants already built, MarkWest had no more available site space for Plant 5. *Id.* The Project is a large, hybrid wall, approximately 1,200 feet long and up to 100 feet high, consisting of a lower portion with a soldier pile system of precast concrete, steel, and anchor bolts (a/k/a tie-backs or anchor tendons) drilled and secured into the rock face, and an upper portion of reinforced soil slope ("RSS"). The wall was to be designed to hold more than 200,000 tons of waste material. (*See, e.g.*, JA 5553; JA 698, Tr. 8: 20-24, Day 3.)

J.F. Allen Company ("JFA") was the general contractor for the retaining wall. JFA had a direct contract with MarkWest ($12.35 million). JA 2156 (Tr. 221:11-15, Day 8) It performed the installation of all fill material behind the wall, including the soldier pile wall, and the complete construction of the upper, or RSS, portion of the retaining wall. JFA was also responsible for excavating loose material (for as-designed anchor testing and other purposes) and controlling ground water from the backside of the retaining wall, i.e. the slope or "rock face." JA 5563.

AMEC Foster Wheeler Environmental & Infrastructure, Inc. ("Amec") was the design engineer for the entire Project. JA 5287. Amec also provided daily quality assurance personnel for the project that documented work and prepared daily notes. Amec was under direct contract with JFA. *Id.*

Redstone was under direct contract ($6.58 million) with JFA. JA 5199. Redstone constructed the vast majority of the soldier pile retaining wall, drilling and installing vertical steel H-piles, the anchor bolts, concrete lagging between H-piles, and steel walers (reinforcing horizontal steel boxes between vertical H-piles). The walers provide the attachment point for nuts to the anchor bolts. Redstone also tested for conformity with Amec's design strength of the anchor bolts.

ii. Significant Non-Parties (Settled before Trial)

Civil & Environmental Consultants, Inc. ("CEC"), which settled MarkWest's claims against it, was under direct contract with MarkWest. JA 323 (Tr. 129:22-24; 130:1-24; 154:22-24, Day 1.) CEC provided engineering services to MarkWest and quality assurance personnel who monitored progress throughout the site, including quality of fill material. *Id.*

Lane Construction Corporation ("Lane"), which settled MarkWest's claims against it, was under direct contract with MarkWest. Lane performed the excavation and blasting that prepared the pad site for Plant 5, and also processed the material from the excavation into a stockpile for placement as fill in the retaining wall. JA 544 (Tr. 84:14-24; 85:1-20, Day 2.)

Coastal Drilling East, LLC ("Coastal"), which settled MarkWest's claims against it, was under direct contract with JFA. After Redstone was terminated from the project, Coastal performed Redstone's remaining scope, or approximately 5% of the total Redstone scope of work. JA 2247 (Tr. 53:5-6, Day 9.)

iii. SIGNIFICANT RULINGS BY THE CIRCUIT COURT

The Circuit Court found that Amec and JFA were liable to MarkWest for necessary repairs to the Project in the future. JA 188-189. None of those repairs were the fault of Redstone. The Circuit Court dismissed Redstone's negligence claim against Amec in two sentences without analysis and stated that Amec had no duty to Redstone. JA 188. The Circuit Court found that Amec was negligent to MarkWest and breached its contract with JFA. JA 192-193. The Circuit Court found that Amec's specific negligent acts and omissions, which were also breaches of Amec's contract with JFA, all of which directly impacted Redstone, were as follows: Changing the size of the concrete panels in the wall, which led to shifting, cracking, and necessary repairs (JA 55); failing to accurately measure or account for the unit weight (pounds per cubic foot, or PCF) of the

backfill, which led to settlement problems and anchor bolt shearing, and changed the calculated factor of safety for the Project (JA 61, 71-76, 96, 108); failing to account for the strength of soil/rock necessary to test Redstone installed anchors at the "rock face" and instead moving testing to the "wall face" which was a significant problem (JA 70, 71, 105-106); and failed to properly design the walers on the project, which were built and installed by Redstone. JA 71. The Circuit Court specifically found that Amec was negligent to MarkWest in the Judgment Order at for all of the above items. JA 117-123

The Circuit Court found that the "redesign of anchor testing and construction sequence that materially altered Redstone's work that were beyond Redstone's control or responsibility." JA 76.

Amec, in addition to being paid to design the Project, was paid hundreds of thousands of dollars to provide daily inspection services of the construction. *See e.g.* JA 6097; JA 63.

The Judgement Order accepted opinions from JFA's expert witness, Mr. Willougby, that were not supported by a sufficient factual basis to support the damages awarded to JFA against Redstone. Mr. Willoughby testified that he created his own numbers to value Redstone's work, while ignoring the contractual numbers and change orders submitted by Redstone and decreasing all of Redstone's submitted numbers in his report. JA 2766-2768; 2771-2774. Simultaneously, Mr. Willoughby ignored the much higher charges, for Redstone's work, that were submitted by JFA to MarkWest in change orders to devalue Redstone's work. JA 2771-2774. Mr. Willoughby's Report, which was admitted as a trial exhibit, uniformly decreased the value of all of Redstone's work, without sufficient factual basis. JA 5844. Mr. Willoughby used estimation documentation produced during discovery to discount Redstone's work while ignoring the contractual values of the work, and the change orders for that work submitted by JFA. *Id*; JA 5879 ("Cost evaluation"). The Circuit Court also erred by accepted Mr. Willoughby's delay analysis of Redstone's work, which grossly

overstated the impact of repairing a few anchors that did not bond properly in the grout cement area. *Id.* Once Circuit Court held that JFA breached its contract with MarkWest, and Amec breached its contract with JFA and negligently performed its duties as to MarkWest, Mr. Willoughby's analysis of Redstone's performance and costs became completely unreliable and should not have been used.

The negligence and breaches of contract committed by Amec, and breaches of contract by JFA, materially impacted Redstone and were not accurately calculated or accounted for by Mr. Willoughby. The Circuit Court erred by accepted his opinions in total without considering the impact of the other findings of the Circuit Court on the fundamental assumptions at the basis of Mr. Willoughby's opinions; i.e. that JFA was not at fault for fill settlement and anchor shearing.

Redstone is appealing the damages awarded against it to JFA, and seeks to have those awards reversed for the reasons identified in the assignments of error. Because some of those damages flow through from damages awarded to MarkWest against JFA, Redstone is appealing the delay damages for lost profits awarded to MarkWest.

Redstone also seeks to have the Circuit Court's ruling dismissing its negligence claim against Amec reversed. Redstone seeks to have the Court's ruling (there is nothing addressing the claims in the Judgment Order) ignoring its unjust enrichment and *quantum meriut* claims against MarkWest reversed.

Redstone also seeks to have the Circuit Court's "Order Granting in Part and Denying in Part Plaintiff's Motion to Dismiss Defendant Redstone International, Inc.'s Counterclaims Against MarkWest," entered May 7, 2019, which dismissed Redstone's "Failure to Coordinate" claim reversed. JA 4941. The Circuit Court held that West Virginia did not recognize such a claim. *Id.* In the Judgment Order, the Circuit Court made significant rulings against both JFA and MarkWest

based upon their "failure to coordinate" thereby explicitly recognizing the legal basis for the claim it previously dismissed. "The Court finds MarkWest's Project Management Team coordinated all the contracts for the Mobley V. Project." JA 50. "Had MarkWest, as the Owner and Project Manager for the entire Project, taken steps early on, much of these damages could have been alleviated and mitigated. Instead, the Court concludes that MarkWest was more intent on finishing the Project as quickly as possible at all costs than it was in coordinating this very complicated hybrid Wall project... seemingly at all costs, and ignored the coordination of its Excavation Contract, Design-Build Contract, and the Plant V Mechanical Construction Contract." JA 163. "The Court concludes J.F. Allen also did not coordinate with subcontractor Amec... the Court concludes that J.F. Allen failed to coordinate its subcontractors and adequately oversee their work, in breach of its contract with MarkWest... J.F. Allen also breached the Design-Build Contract with MarkWest by failing to coordinate with Lane." JA 97-98. A significant number of jurisdictions have recognized the importance of coordination duties on a construction site, and this case is a perfect opportunity for the law in West Virginia to be clarified on this issue.

SUMMARY OF ARGUMENT

Redstone is by far the smallest corporation and party in the litigation. It is now faced with insolvency due to the Judgment Order, and has no recourse other than this appeal to stay in business. The Circuit Court erred by finding that Amec had no duty to Redstone, despite listing, in great detail, both Amec's negligence and the direct impacts of that negligence as to Redstone. There is no West Virginia law that prohibits a sub-contractor from claiming negligence against a design professional. To the contrary, any contractor involved with a construction project that relies upon a design professional may present a claim for negligence. *Eastern Steel v. City of Salem,* 549 S.E. 2d 266 (2001). Large construction projects involve a multitude of contractors, sub-

contractors, and subsubcontractors, as well as suppliers, inspectors, engineers, architects, and project managers, and any impacted party should be able to make a claim against a design professional who breaches the applicable standard of care.

Next, the Circuit Court erred by ignoring two distinct contractual damages limitations in the Redstone-JFA subcontract that caused JFA to waive consequential damages claims against Redstone. Instead, $1.4 M was awarded against Redstone, in favor of JFA, for MarkWest's consequential damages as "lost profits," as a pass through. This is clearly a consequential damage award which should not have been allowed based upon the contractual consequential damages' waivers. Inexplicably, the Circuit Court enforced and analyzed a contractual damages waiver in favor of Amec. There is no analysis in the Judgment Order of Redstone's contractual damage waivers, which is plain error and should be reversed.

The Circuit Court did not provide a ruling on two claims brought by Redstone against MarkWest, for *quantum meriut* and unjust enrichment. This is also plain error. When a bench trial is conducted, the court must address and analyze all claims. The Circuit Court plainly held that Redstone performed extra work to address deficiencies caused by JFA and Amec, and Redstone asserted that MarkWest received the benefit of Redstone's extra work. These claims were never dismissed and were not ruled upon in the Judgment ORder

Next, the Circuit Court erred by dismissing a "failure to coordinate" claim brought by Redstone against MarkWest in a 12(b)(6) motion prior to trial. The Circuit Court held that West Virginia did not recognize such a claim. In the Judgment Order, the Circuit Court made significant rulings against both JFA and MarkWest based upon their "failure to coordinate" thereby explicitly recognizing the legal basis for the claim it previously dismissed. A significant number of

jurisdictions have recognized such a claim, and the law in West Virginia should be clarified on this issue.

Next, the Circuit Court only found that Redstone's work was deficient in a few areas during the completion of the project. The future repair damages awarded to MarkWest were entirely the fault of Amec and JFA. The Circuit Court erred by determining that a few of the anchors that failed on the project accounted for more than three months of delay by Redstone and nearly $1 M in expenses, based solely upon the opinions of Mr. Willoughby. The actual delay caused by those anchors failing was actually much less, and the cause of the failure was determined by the general consensus of the experts that testified to be a geologically weak area in the rock, and/or the presence of an unforeseen and large amount of ground water.

Once Circuit Court held that JFA breached its contract with MarkWest, and Amec breached its contract with JFA and negligently performed its duties as to MarkWest, Mr. Willoughby's analysis of Redstone's performance and costs became completely unreliable and should not have been used. Mr. Willoughby inaccurately opined as to the value of Redstone's work, and assumed, as a fundamental basis of his opinion, that JFA had correctly performed its work. The Circuit Court found JFA had committed numerous breaches and performed defective work, but still allowed Mr. Willoughby's damages opinions to stand without correction or modification.

Finally, the Circuit Court erred in determining that MarkWest was entitled to any delay damages for several reasons. First, the Project was not designed to create income for MarkWest. It was a disposal project and the Project provided a convenient basket to dump unwanted rock and soil from excavation in other areas. MarkWest's delay claim was predicated upon the construction of a fifth natural gas processing plant (Plant V) on another part of the site. It was conclusively proven during trial that Plant V construction was independently and concurrently delayed by a host

of factors independent of this matter, including engineering delays and errors, construction errors (which lead to another lawsuit) and regulatory permitting delays. Plant V could not have operated any sooner because of those independent delays, including necessary West Virginia Department of Environmental Protection air pollution permits. While the Project did not meet its contractual deadline, that deadline did not have any financial meaning and did not independently delay Plant V. Plant V would have been delayed in any event. The Circuit Court addressed this issue by reviewing case law from many other jurisdictions, and this is another area of law that needs to be clarified for future West Virginia jurisprudence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner asserts that a published decision would be beneficial to West Virginia's jurisprudence because this case is significant is scope and presents matters of first impression and material questions of law as to the application of significant legal standards in construction disputes in West Virginia. Petitioner requests Rule 20 oral argument because it would be beneficial to the decision-making process.

ARGUMENT

I. Standard of Review

"In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to *de novo* review." Syl. Pt. 2, *Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

"Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

II. Amec, as the Design Professional, Owed Redstone a Duty of Care and Redstone's Negligence Claim Against Amec Should Not Have Been Dismissed Without Analysis

In the Judgment Order, the Circuit Court found that Amec was negligent. JA 117-123; 192-193. Redstone hired expert witnesses who provided key opinions cited by the Circuit Court in support of this finding. In two sentences, the Circuit Court dismissed Redstone's negligence claim without analysis and stated Amec had no duty to Redstone. In a bench trial, the court is required to "find facts specifically and state separately its conclusions of law thereon." W.Va.R.C.P. 52(a). The rule is mandatory and where the findings of fact and conclusions of law are not separately made by the trial court, the case should be remanded to the trial court for purposes of complying with the rule. *Commonwealth Tire Co. v. Tri-State Tire Co.*, 156 W.Va. 351, 193 S.E.2d 544 (1972); *Nat'l Grange Mut. Ins. Co. v. Wyoming County Ins.*, 156 W. Va. 521, 195 S.E.2d 151 (1973); *Chandler v. Gore*, 170 W.Va. 709, 296 S.E.2d 350 (1982); *Landmark Baptist Church ex rel Conway v. Brotherhood Mut. Ins. Co.*, 199 W.Va. 312, 484 S.E.2d 195 (1997).

Redstone was a subcontractor, but their work was significantly impacted and increased by Amec's negligence, leading to significant damages. Redstone's subcontract with JFA was greater than 50% of JFA's contract with MarkWest.[3]

In *Eastern Steel v. City of Salem*, the Supreme Court of West Virginia held that "a contractor may assert a negligence cause of action against a design professional seeking purely economic damages even in the absence of privity of contract, that there exists an implied warranty

[3] $6.5 M of $12.3 M, P. 4 *supra*.

of plans and specifications that inures to a contractor in the absence of a contract." 549 S.E. 2d 266, 268 (2001).

As the Court further explained at 273-274, citing *Guardian Construction Co. v. Tetra Tech*, 583 A.2d 1378, 1386, and the Restatement, Second, Torts §552,

> Modern legal authority supports the proposition that if, in the course of its business, [a design professional] negligently obtained and communicated incorrect information specifically known and intended to be for the guidance of [contractors], and if it is specifically known and intended that [the contractors] would rely in calculating their project bids on that information, and if [the contractors] rely thereon to their detriment, then [the design professional] should be liable for foreseeable economic losses sustained by [the contractors] regardless of whether privity of contract exists.

The Court also elaborated that;

> **Design professionals have a duty to use ordinary skill, care, and diligence in rendering their professional services.... When they are called upon to provide plans and specifications for a particular job, they must use their skill and care to provide plans and specifications which are sufficient and adequate.... This duty extends to those with whom the design professional is in privity, ... and to those with whom he or she is not....**

Eastern Steel, 549 S.E. 2d at 274 (citing *Donnelly Construction Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 677 P.2d 1292 (1984)) (internal citations omitted, emphasis supplied).

Finally, the Court concluded that it was foreseeable that the contractor, who was "hired to follow the plans and specifications prepared by [the design professional], would incur increased costs if those plans and specifications were in error." *Eastern Steel*, 549 S.E. 2d at 275 (quoting *Donnelly*, 139 Ariz. at 187-88, 677 P.2d at 1295-96):

> We are persuaded by our prior analysis in *Aikens v. Debow*, and the foregoing authority from other jurisdictions allowing contractors to assert negligence causes of action to recover economic damages in the absence of contractual privity, consequently we expressly hold that a design professional (e.g. an architect or engineer) owes a duty of care to a contractor, who has been employed by the same project owner as the design professional and who has relied upon the design professional's work product in carrying out his or her obligations to the owner, notwithstanding the absence of privity of contract between the contractor and the design professional, due to the special relationship that exists between the two. Consequently, the contractor may, upon proper proof, recover

purely economic damages in an action alleging professional negligence on the part of the design professional.

Having established that a design professional owes a duty of care to contractors, we endeavor to give some definition to that duty. We note that the exact nature of the specific duty owed by a design professional *may* be impacted by provisions contained in the various contracts entered among the parties (e.g. the contract between the owner and the design professional, and the contract between the owner and the contractor), provided that such contractual provisions do not conflict with the law. **In addition, the duty of care may be further defined by rules of professional conduct promulgated by the agencies charged with overseeing the specific profession of which a defendant is a member. *See, e.g.,* West Virginia Rules of Professional Responsibility for Professional Engineers, 1A W. Va.C.S.R. § 7-1-16 et seq. (1993);** West Virginia Rules of Professional Conduct for Architects, 1A W. Va. C.S.R. § 2-1-9 et seq. (1998). Consequently, we hold that when a special relationship exists between a design professional and a contractor, the specific parameters of the duty of care owed by the design professional to the contractor must be defined on a case-by-case basis. However, in general, the duty of care owed by a design professional to a contractor with whom he or she has a special relationship is to render his or her professional services with the ordinary skill, care and diligence commensurate with that rendered by members of his or her profession in the same or similar circumstances.

Eastern Steel, 549 S.E. 2d at 275 (emphasis supplied).

The Project was a Design/Build Project, and Defendant Amec was the design professional of record. JA 117.

Amec's duty to Redstone arises under the law, such as West Virginia Code § 30-13-1 *et seq.*, "Engineers", the State's code as to engineers is set forth. Section 16(c) of that code, addressing "Certificates and seals" states as follows:

> **Every registrant shall obtain a seal for use in identifying his or her official professional work.** The design of the seal shall be determined by the board and shall bear the registrant's name, registrant's registration number, the legend "registered professional engineer, state of West Virginia" and such other words or figures as the board may prescribe. The seal may be a rubber stamp. Whenever the seal is applied, the registrant's written signature shall be adjacent to or across the seal. No further words or wording are required. A facsimile signature is not acceptable. **Whenever presented to a client or any public or governmental agency, the seal, signature and date shall be placed on all specifications, reports, drawings, plans, design information and calculations in accordance with rules promulgated by the board. The seal and signature shall be used by registrants only when the work being stamped was under the registrant's complete direction and control.**

W.Va. Code § 30-13-16(c) (emphasis supplied).

The significance of a professional engineer's seal and signature is immense. Amec, and its West Virginia licensed engineer Mr. Ramsey, are responsible for the design of the project, and all of its revisions, to which Mr. Ramsey affixed his signature and seal. *Id.* No one else is responsible for the design. Contractors, such as Redstone, may ask an engineer a question or make a suggestion, but the engineer is responsible to review the safety and practicality of the design, and to ensure it is proper. The contractor then has to follow that design:

> Q. Okay. Did you -- did Redstone do any design work associated with any of this?
> A. I have never designed anything in my life. I don't have a stamp to design anything. I don't have an education to design anything. I don't know how to run the calculations to design anything so my answer is no.
> Q. Is it fair to say that you were dependent upon Amec to do that work?
> A. Yes. Amec gives us the specifications and a picture. We make it look like the picture.

JA 3168, Tr. 140:4-13, Day 12 (Kefover).

In addition to the West Virginia Code, there is a set of state regulations called the West Virginia Rules of Professional Responsibility for Professional Engineers, 1A W.Va. C.S.R. § 7-1-1 *et seq.*, which state the following about an engineer placing his seal on a design document:

> 7-1-7.3, Seal on Documents. 7.3.a. A registrant's seal and signature and the date shall appear on the first or title page of all final and/or record documents of specifications, reports, drawings, plans, design information and calculations presented to a client or any public or government agency to certify that the work was done by the registrant or under the control of the registrant.
> 7.3.b. The registrant signing and sealing the first or title page of documents shall be the firm's PE in responsible charge as designated on the firm's COA application or the project engineer.
> 7.3.c. Revisions shall be numbered, dated, initialed, and sealed by the registrant responsible for the revision.
> 7.3.d. When copies are to be made, the registrant's seal and signature on all originals, tracings or other documents shall be reproducible.
> 7.3.e. Each registrant is solely responsible for the use of his or her seal.
> 7.3.f. When a registrant examines and verifies the engineering work of another, the registrant must take complete dominion and control of the design, which includes possession of the sealed and signed reproducible construction drawings with complete signed and sealed design calculations indicating all changes in design.

7-1-12 Professional Responsibility
12.2.a. All persons registered in West Virginia are required to be familiar with W. Va. Code §30-13-1 et seq., this rule, and all applicable laws relating to the practice of engineering.

7-1-12.3 – Obligation to Society
12.3.b. **Registrants shall approve and seal only those designs, plans or other documents that conform to accepted engineering standards and safeguard the life, health, property and welfare of the public**.

7-1-12.4 - Registrant's Obligation to Employer and Clients.
12.4.b. **Registrants shall not affix their signatures or seals to any plans or documents except in accordance with §30-13-1 et seq. and these rules**.

Amec, by and through Mr. Ramsey, a registered professional engineer in the State of West Virginia, who affixed his seal to the Project design, and the many revisions thereto, is solely responsible for the design. JA 118-119.

As the design professional of record, Amec knew, or had reason to know, that a subcontractor such as Redstone would rely upon its design effort to both bid for and perform the contract work at issue. JA 117-120.

Amec had a duty to perform it design responsibilities in amanner consistent with the standards in the industry, and to avoid causing harm to subcontractors such as Redstone. *Eastern Steel*, 549 S.E. 2d at 274- 275.

Amec also breached its duty to Redstone by failing to appropriately monitor the manner in which JFA placed fill material behind the wall, as Project inspector, and the subsequent impact the improper fill placement would have on Amec-designed wall tieback anchors. JA 121-122.

Amec also breached its duty to Redstone by under-designing portions of the wall. The walers were lacking required stiffeners, causing Redstone to perform additional work andadd additional materials to the wall. JA 122.

Amec further breached its duty to Redstone through faulty anchor design, which has led to

premature failure of those anchors, which were built to Amec's design specifications. This faulty design included, the failure to specify a rigid outer casing to protect the anchor tendons, and the failure to establish a phase of borehole water testing, pregrouting, and redrilling in order to account for the installation of anchors beneath the water table. These errors lead to $981,673 in damages being awarded against Redstone to the benefit of JFA. P. 3, *Supra.*

As a result of these breaches, Redstone has suffered money damages, including, but not limited to, work that it performed but for which it was not paid and repair work to correct deficient design.

The Circuit Court analyzed all of these breaches of Amec's duty in favor of MarkWest and found that Amec was negligent. JA 113-115, JA117-123. The same analysis should have applied to Redstone's negligence claim against Amec, which should not have been dismissed out of hand without analysis.

This Court should take this case as an opportunity to make it absolutely clear that a design professional can negligently breach its duties under *Eastern Steel* to a subcontractor, as well as to a "contractor" and an owner of a site.

III. Redstone's Contractual Consequential Damages Waiver Should Have Been Enforced to Prevent the $1.4 M Consequential Damages Award for Lost Profits

Black letter West Virginia law plainly allows consequential damages waivers to be enforced, and the JFA-Redstone contract clearly states that JFA waived the right to seek consequential damages from Redstone.

In the Judgment Order, the Circuit Court struck a significant portion of the damages, more than $1M, awarded to JFA against Amec because of a contractual damage limitation. JA 111-113, 192-193. The JFA-Amec contract stated "Amec shall not be responsible 'for any special, incidental, indirect, or consequential damages (including lost profits)'" JA 112. The ruling is final

and has not been appealed by JFA. The Circuit Court made detailed analysis of this consequential damages waiver language, but did not analyze or enforce the consequential damages waiver language in Redstone's contract with JFA. As stated above, Rule 52, and case law, require findings of fact and conclusions of law on this issue, and those findings were not made by the Circuit Court. W. Va. R. C. P. 52(a).

Redstone's contract with JFA contained the following language: "Redstone will not be liable for any additional costs, penalties, or back charges due to liquidated, actual, or consequential damages." JA 5358. A handwritten note by Mr. Hadjis, JFA's President, below that provision added the following clarifying language: "JFA shall have the right to recover actual damages as a result of acts or omissions by Redstone International which result in financial loss to JFA." *Id.*

The Circuit Court did not analyze or address this contractual provision in the Judgment Order, which is an error that should be reversed. Two specific categories of damages were clearly waived contractually, by JFA as to any claims made by JFA against Redstone, "liquidated" and "consequential" damages. *Id.*

Long standing West Virginia law classifies lost profit claims as consequential damages. "Lost profits, however, are classified as consequential economic loss ... loss of profit as consequential damages is transplanted from the fields of contract and commercial sales law." *Star Furniture Corp., v. Pulaski Furniture Co.*, 297 S.E.2d 854, 857-858, 171 W.Va. 79 (1982) ((*Eastern Steel v. City of Salem*, 549 S.E. 2d 266, 269 (2001) (suit for actual and consequential damages including lost profits) (*Booker T. Washington Const. Design Co. v. Huntington*, 383 S.E.2d. 41, 181 W.Va. 409, 411 (1989) (Suit for consequential damages including "lost profits") (*State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W.Va. 486, 729 S.E.2d 808, 820, FN41 (2012) (Court held that a mutual consequential damages waiver was enforceable, and also noted that a

limitation on consequential damages was added to all AIA form arbitration clauses after $14.5 M lost profits award in construction delay case captioned *Perini Corp., v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479, 610 A.2d 364 (1992)).

Lost profit claims are clearly classified as consequential damages under West Virginia law. *Id.* Redstone's contract with JFA clearly included a waiver of claims for consequential damages.

> **"Redstone will not be liable for any additional costs, penalties, or back charges due to liquidated, actual, or consequential damages.** Redstone cannot accept any liability for disturbance to existing structures and their inhabitants. Redstone requires that the Owner and General Contractor indemnify Redstone against any and all claims for such disturbances and also take precautions as necessary to avoid any such claims. This may include pre-performance property surveys, vibration monitoring, excavating trenches, etc. Payment terms will be 30 days from receipt of invoice.

JA 5358.

The MarkWest delay claim for "lost profits" that was passed on to Redstone, in part, is not a claim for "actual damages." The "lost profits" delay damages awarded to MarkWest against JFA, which were passed through to Redstone in favor of JFA, are clearly consequential damages. MarkWest sought $6.6 M in lost profit damages. JA 158. The Circuit Court awarded $2.6 M in lost profits for MarkWest against JFA. JA 191. Of that amount, $1,458,342.35 was improperly awarded to JFA against Redstone to the benefit of JFA, pursuant to JFA's breach of contract claim against Redstone. *Id.*

"Whether contract damages are direct or consequential is a question of law for the trial court." Syl. Pt. 3, *Desco Corp. v. Harry W. Trushel Const. Co.,* 186 W.Va. 430, 413 S.E.2d 85 (1991). Here, when analyzing the Amec-JFA contract, the Circuit Court plainly held that the lost profit claim was a consequential damages claim. JA 191-193. The Circuit Court held in favor of Amec that consequential damages were barred against it because of contractual language. This is the correct ruling. The same law should have been applied to Redstone's contract with JFA.

"Questions of law are subject to *de novo* review by this Court." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). The Circuit Court erred by allowing Amec's contractual damage limitation to protect it, but ignoring Redstone's similar contractual damage limitation. There is no analysis in the Order of this consequential damage waiver language in Redstone's contract with JFA. Redstone respectfully requests that this Court reverse the award of $1,458,342.35 for JFA against Redstone for consequential damages awarded for MarkWest's "lost profits" for delay on the project.

IV. JFA Was Contractually Required to Waive Claims Against Redstone for MarkWest's Lost Profits and Property Damage

Another key contractual provision in the JFA-Redstone contract that was ignored by the Circuit Court also clearly bars the $1,458,342.35 in "lost profits" awarded against Redstone, as well as damages for deficient work, $981,673.00. "When the language of a written instrument is plain and free from ambiguity, a court must give effect to the intent of the parties as expressed in the language employed and in such circumstances resort may not be had to rules of construction." *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W.Va. 484 128 S.E.2d 626, 631 (1962).

Under the JFA - Redstone Contract, Section 5.07, the following language appears:

> B. **Design/Builder [JFA/Amec] waives, and will cause Owner [MarkWest] to waive, all rights against Subcontractor [Redstone]**, Subsubcontractors, Suppliers and Design/Builder's Consultants and the officers, directors, members, partners, employees and agents, and other consultants and subcontractors of any of each and any of them for:
>
> > 1. **Loss due to business interruption, loss of use, or other consequential loss extending beyond direct physical loss or damage to Owner's or Design/Builder's property or the Work** caused by, arising out of or resulting from fire or other peril, whether or not insured by Owner or Design/Builder; and
> >
> > 2. Loss or damage to the completed Project or part thereof caused by, arising out of, or resulting from fire **or other insured peril or cause of loss covered by any property insurance maintained on the completed project** or part thereof by Owner during partial utilization pursuant to Paragraph 13.05, after substantial

> completion pursuant to Paragraph 13.04, or after final payment pursuant to Paragraph 13.07.

JA 5325-5326 (emphasis supplied). Accordingly, under the plain language of the JFA-Redstone Contract, JFA waived, and was required to make MarkWest waive, claims against Redstone for "Loss due to business interruption, loss of use, or other consequential loss extending beyond direct physical loss." *Id.* "The "lost profits" awarded to MarkWest were not for physical damage to the project that Redstone and JFA worked on, but were for a nearby gas processing plant being delayed. JA 135-176, 132-135. This clause is triggered because, under its contract with MarkWest, JFA was required to purchase insurance for the losses described in the preceding paragraph. JA 5570-5573 ("The contractual liability insurance covers the liability the insured [JFA] assumed under the indemnity and insurance provisions of this Contract"). *Id.*

Accordingly, the contractual delay claims that MarkWest was awarded against JFA damages due to lost profits, business interruption, etc., are "insured peril" under Section 5.07 of the JFA-Redstone contract, and JFA **is required to waive**, and to cause MarkWest to waive, any claims against Redstone for those claims. JA 5325-5326. Additionally, the "defective work" damages awarded to JFA should have been barred by this provision because JFA had builder's risk insurance for the project, as it was contractually required to do.

The Circuit Court erred, as a matter of law, by ignoring this plain, unambiguous, contractual language under W. V. R. C. P. 52(a) and failing to make findings of fact and conclusions of law about this provision. This contractual provision should have been given its full force and effect to bar damages against Redstone for claims that JFA has insurance for; i.e., all of the consequential damages awarded in this case against JFA and defective work/ property damage claims. The consequential lost profits award and property damage award for work repair should have not been awarded to JFA because of the plain language of this contractual provision.

V. Two of Redstone's Affirmative Claims Against MarkWest Were Ignored

Redstone brought affirmative claims against MarkWest for unjust enrichment and *quantum meriut*. Those claims were acknowledged to exist (JA 47) but not ruled upon in the Judgment Order. The Circuit Court abused its discretion by failing to adjudicate the claims and failing to award Redstone damages for the additional work performed to the benefit of MarkWest, namely repairing the defective work and damages caused by JFA and Amec.

In a bench trial, the court is required to "find facts specifically and state separately its conclusions of law thereon." W.Va.R.C.P. 52(a). The rule is mandatory and where the findings of fact and conclusions of law are not separately made by the trial court, the case should be remanded to the trial court for purposes of complying with the rule. *See Commonwealth Tire Co. v. Tri-State Tire Co.*, 156 W.Va. 351, 193 S.E.2d 544 (1972); *Nat'l Grange Mut. Ins. Co. v. Wyoming County Ins.*, 156 W. Va. 521, 195 S.E.2d 151 (1973); *Chandler v. Gore*, 170 W.Va. 709, 296 S.E.2d 350 (1982); *Landmark Baptist Church ex rel Conway v. Brotherhood Mut. Ins. Co.*, 199 W.Va. 312, 484 S.E.2d 195 (1997).

Because the Circuit Court did not rule upon two of Redstone's affirmative claims, this matter should be reversed and remanded for further proceedings.

VI. West Virginia Law Should Recognize A Failure To Coordinate Claim

Coordination is a critical element of construction projects, and construction litigation. There is minimal West Virginia law addressing coordination, and whether a claim for failure to coordinate may be asserted. Redstone seeks to have the Circuit Court's "Order Granting in Part and Denying in Part Plaintiff's Motion to Dismiss Defendant Redstone International, Inc.'s Counterclaims Against MarkWest," entered May 7, 2019, which dismissed Redstone's "Failure to Coordinate" claim reversed.

Redstone asserts there is a good faith basis for new law, or a change of existing law, for coordination claims in West Virginia. Numerous other states allow such claims, and the Circuit Court found in the Judgment Order that MarkWest was responsible for coordination on the project, because it was not designated or delegated to anyone else, and that MarkWest caused delays due to failures to coordinate.

The "duty to coordinate" generally means the duty to coordinate worksite activities among prime contractors and their schedules to ensure timely progress. *APAC-Georgia, Inc. v. Dep't of Transp.*, 221 Ga. App. 604, 607–08, 472 S.E.2d 97, 100 (Ct. App. 1996) (*Shalman v. Board of Educ.*, 31 App. Div. 2d 338, 297 N.Y.S.2d 1000 (1969) (owner impliedly agreed that contractor would not be unreasonably delayed by failure of other contractors to complete work which was essential to performance of work in question, and for breach of that duty contract may recover its resulting damages from the owner).

In the Judgment Order, the Circuit Court made significant rulings against both JFA and MarkWest based upon their "failure to coordinate" thereby explicitly recognizing the legal basis for the claim it previously dismissed. "The Court finds MarkWest's Project Management Team coordinated all the contracts for the Mobley V. Project." JA 50. "Had MarkWest, as the Owner and Project Manager for the entire Project, taken steps early on, much of these damages could have been alleviated and mitigated. Instead, the Court concludes that MarkWest was more intent on finishing the Project as quickly as possible at all costs than it was in coordinating this very complicated hybrid Wall project… seemingly at all costs, and ignored the coordination of its Excavation Contract, Design-Build Contract, and the Plant V Mechanical Construction Contract." JA 163. "The Court concludes J.F. Allen also did not coordinate with subcontractor Amec… the Court concludes that J.F. Allen failed to coordinate its subcontractors and adequately oversee their

work, in breach of its contract with MarkWest... J.F. Allen also breached the Design-Build Contract with MarkWest by failing to coordinate with Lane." JA 97-98. A significant number of jurisdictions have recognized the importance of coordination duties on a construction site, and this case is a perfect opportunity for the law in West Virginia to be clarified on this issue.[4]

As one court aptly observed, if "no one were designated to carry on the overall supervision, the reasonable implication would be that the owner would impliedly assume the duty to coordinate the various contractors to prevent unreasonable delays on the project." *Broadway Maint. Corp v. Rutgers State Univ.*, 90 N.J. 253, 265–66, 447 A.2d 906, 912 (N.J. 1982) (*Eric A. Carlstrom Constr. Co. v. Indep. Sch. Dist.*, 256 N.W.2d 479 (Minn. 1977) (owner responsible for coordination notwithstanding language in contract) (*accord U.S. ex rel. Va. Beach Mech. Servs., Inc. v. SAMCO Constr. Co.*, 39 F. Supp. 2d 661, 674 (E.D. Va. 1999); *Shea S&M Ball v. Massman-Kiewit-Early*, 606 F.2d 1245, 1251 (D.C. Cir. 1979) ("The contracting authority has the duty to invoke its contractual rights to compel cooperation among contractors.") (*accord Bolton Corp v. TA Loving Corp.*, 380 S.E.2d 796, 800 (1989) (N.C. Ct. of Appeals) (*accord Bergquist v. Penterman*, 134 A.2d 20, 46 N.J. Super 74 (1957).

MarkWest jocularly referred to the immediate conflicts amongst its multiple prime contractors in internal November 2014 email correspondence titled "the Battle Begins." JA 6159.

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[4] Several scholarly articles have been written on the subject:
Abdalla, Tarek & Hudock, David, "Liability Issues in Multiprime Contracting: The Duty to Coordinate and Direct Liability for Delay," 18 Construction Lawyer 31 (Jan. 1998).
Goldberg, "The Owner's Duty to Coordinate Multi-Prime Construction Contractors, A Condition of Cooperation," 28 Emory L.J. 377, 380-81 (1979).
Michael F. Nuecherlein & Bryan F. Stayton, "An Owner's Implied Duty to Coordinate," 21Constr. law. 22 (Summer 2001).
Herbert H. Gray III, "What to Do When Contract Performance Is Delayed? National Business Institute, Georgia Construction Law," 15609 NBI-CLE 61, 65 (2004) ("On multiple-prime projects, the obligation to coordinate the activities and work of the contractors usually remains with the owner.").

The correspondence was related to a lack of space for equipment and material which delayed Project construction. *Id.* MarkWest had an affirmative duty to coordinate and smooth over these disputes.

MarkWest referred to disputes over space and site access causing delays between multiple prime contractors JFA and Westcon as "trench warfare." JA 5681. "Trench warfare. Find a way to minimize costs to MarkWest. If that means a delay in start-up then that is probably the correct course." *Id.*

The battlefield analogy has been previously made, aptly:

> We note parenthetically and at the outset that, except in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project such as the building of this 100 million dollar hospital. Even the most painstaking planning frequently turns out to be mere conjecture and accommodation to changes must necessarily be of the rough, quick and *ad hoc* sort, analogous to ever-changing commands on the battlefield. Further, it is a difficult task for a court to be able to examine testimony and evidence in the quiet of a courtroom several years later concerning such confusion and then extract from them a determination of precisely when the disorder and constant readjustment, which is to be expected by any subcontractor on a job site, become so extreme, so debilitating and so unreasonable as to constitute a breach of contract between a contractor and a subcontractor. It is well established that there are certain implicit duties between contracting parties, particularly the duty not to prevent performance by the other party. *See* A. L. Corbin, 3 Contracts, § 570 at 346 (1960).

Blake Construction, Inc. v. C.J. Coakley Co., Inc., 431 A.2d 569, 575-576 (D.C. Ct. of Appeals, 1981).

Despite of all of the claimed delays MarkWest requested damages for, the Project was actually under budget. JA 5711, Feb 10, 2016 email. "We continue to be in a good position on the budget. We've been forecasting $12M under and continue to hold that number. That forecast is conservative and has priced in all known and expected costs." *Id.* The same email addressed Plant V delays caused by UOP, the primary Plant V engineer, which will be discussed further below.

MarkWest also played games with its accounting by moving unrelated change orders around to increase damage claims. JA 5752-5759 ("Changing inlet compression, completely unrelated to the Project, to "lost time in the substation.")

MarkWest played the different prime contractors on the site against each other to the detriment of the quality of the work and the project schedules, and create litigation. JA 163.

The Circuit Court found MarkWest failed to coordinate and decreased damages awarded to MarkWest because of this failure. This ruling is directly opposed to the Circuit Court's earlier ruling dismissing Redstone's claim as a matter of law. This Court should reverse the Rule 12(b)(6) ruling of the Circuit Court which held that West Virginia does not recognize a "failure to coordinate" claim and remand this matter for further proceedings. The clear weight of authority across the nation recognizes the duty of coordination in construction, and when that duty is breached, allows claims for damages.

VII. Redstone Did Not Perform Defective Work

The Circuit Court found that Redstone was responsible for $981,673.00 in repair costs supposedly incurred by JFA during construction for a few anchors that failed to adhere to cement grout in the bond zone that were repaired during construction. This amount was for damages supposedly incurred by JFA during construction. All of the future repair damages awarded by the Circuit Court to MarkWest were against Amec and JFA for their errors. Part of Redstone's duties on the project involved drilling, per Amec's design, horizontal anchors into the hill side behind the retaining wall. The wall included approximately 550 such anchors. The Circuit Court held that five such anchors failed in the bond zone, i.e., inside the hill where cement grout was injected around the steel anchor bar to hold it in place. JA 179.

The five anchors were installed the same as all other anchors on the project, per Amec's design, and could not be tested until JFA placed fill on top of them in the fill zone behind the wall. The anchors failed during testing due to an unforeseen geologically weak area in the hillside, and the presence of excessive ground water. "In this instance what happened was, this is an area where we get – hit a section of the wall where it was a different geological condition where there was water in the ground and it had washed out part of the rock socket." JA 1246; Trial Testimony, Amec lead engineer Chris Ramsey, Day 5., P. 12, L.20-24.

"I attribute this to probably a change in the geology in that location and either soft zone or the discontinuities there in the rock were large enough that they permitted the grout to escape into those discontinuities and, therefore, we had the loss of material. But had -- had we been testing at the rock face, this impact obviously would have had a lot less of an impact than it did." JA 3403; Ramsey, Day 13, P. 68, L3-10.

"Q. Are you aware of that area having any weak geological characteristics? A. Yes, I am, the slope where the anchors pulled out, I believe, in a zone of groundwater within the bedrock, which I believe subsequently created a weaker bond zone in the anchor." JA 1440; (Tom Stack, Lead CEC Engineer, Trial Testimony, Day. 5, P. 206, L. 7-12).

Dan Rowlands, MarkWest's corporate representative, testified that the anchors pulled out in a section of the mountain that had ground water. JA 604-605. Day 2, Afternoon trans. P. 24-25. Mr. Rowlands further testified that this issue led to 4-5 weeks of delay, not 3.3 months as opined by Mr. Willoughby. *Id.*

JFA did incur costs excavating fill to install replacement anchors, but Redstone also incurred costs dealing with this unforeseen condition and making repairs. Amec had to change the design for these anchors due to the geology of the area, and changed the anchor's angle from

horizontal to declined, and had Redstone install a vertical micropile for additional support of the anchors. These actions were not the fault of Redstone, who installed the anchors as originally designed in an area of weak rock that was an unforeseen condition, and the Circuit Court erred by abusing its discretion to award damages to JFA for this issue, and as to factual findings, the Circuit Court erred by in awarding unsubstantiated damages numbers created by JFA's expert witness that were clearly in excess of any actual costs incurred. Redstone's expert, Mr. Bolyard, opined that this issue lead to 15 days of extra work, not 3.3 months. JA 6225.

Once Circuit Court held that JFA breached its contract with MarkWest, and Amec breached its contract with JFA and negligently performed its duties as to MarkWest, Mr. Willoughby's analysis of Redstone's performance and costs became completely unreliable and should not have been used. Mr. Willoughby inaccurately opined as to the value of Redstone's work, and assumed, as a fundamental basis of his opinion, that JFA had correctly performed its work. The Circuit Court found JFA had committed numerous breaches and performed defective work, but still allowed Mr. Willoughby's damages opinions to stand without correction.

In order to be admissible, an expert's testimony **needs to have a factual basis**, which may be derived from personal observation. *Jones v. Garnes*, 183 W. Va. 304, 395 S.E.2d 548 (1990) (emphasis supplied). Additionally, expert testimony must be both reliable and relevant:

> The first and universal requirement for the admissibility of scientific evidence is that the evidence must be both 'reliable' and 'relevant.' Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, U.S. , 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), the reliability requirement is met only by a finding by the trial court under Rule 104(a) of the West Virginia Rules of Evidence that the scientific or technical theory which is the basis for the test results is indeed 'scientific, technical, or specialized knowledge.'

Craddock v. Watson, 197 W.Va. 62, 67, 475 S.E.2d 62 (1996). "In *State v. LaRock*, 196 W.Va. 294, 307, 470 S.E.2d 613, 626 (1996), we '**suggested that evidence which is no more than**

speculation is not admissible under Rule 702.' See *Gentry v. Mangum*, 195 W.Va. at 527, 466 S.E.2d at 186, quoting, *Newman v. Hy-Way Heat Systems, Inc.*, 789 F.2d 269, 270 (4th Cir.1986) (**'nothing in the Rules appears to have been intended to permit experts to speculate in fashions unsupported by, and in this case indeed in contradiction of, the uncontroverted evidence'**)." *Craddock*, 197 W.Va. at 68 (emphasis supplied).

Expert testimony is only admissible when it is based upon scientific, technical, or specialized knowledge, and not when it is speculative and unsupported by the evidence. Further, a court reviewing an expert's opinion for admissibility has to evaluate the basis for the opinion:

> Scientific' implies a grounding in the methods and procedures of science **while 'knowledge' connotes more than subjective belief or unsupported speculation.** In order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. **It is the circuit court's responsibility initially to determine whether the expert's proposed testimony amounts to 'scientific knowledge' and, in doing so, to analyze not what the experts say, but what basis they have for saying it.**

Gentry v. Magnum, 195 W.Va. 512, 466 S.E.2d 171, Syl. Pt. 6 (emphasis supplied).

"[A]ssessing 'reliability' is a shorthand term of art for assessing whether the testimony is to a reasonable degree based on the use of knowledge and procedures that have been arrived at using the methods of science — <u>rather than being based on irrational and intuitive feelings, guesses, or speculation</u>. If the former is the case, then the jury may (or may not, in its sole discretion) "rely upon" the testimony. *In re Flood Litigation*, 222 W.Va. 574, 582 n. 5, 668 S.E.2d 203, 211 n. 5 (emphasis supplied).

In *Gentry,* Justice Cleckley made the following relevant observation:

> Under *Daubert/Wilt,* the circuit court conducts an inquiry into the validity of the underlying science, looking at the soundness of the principles or theories and the reliability of the process or method as applied in the case. *The problem is not to decide whether the proffered evidence is right, but whether the science is valid enough to be reliable.*

Harris v. CSX Transportation, Inc., 232 W. Va. 617, 753 S.E.2d 275, 279-280 (2013) (Quoting *Gentry,* 195 W.Va. at 523, 466 S.E.2d at 182 (emphasis in original)).

The evidence at trial proved that the minimal number of anchors that pulled out of their grout sockets failed because of a geological weak area, and unforeseen amounts of ground water, not any breach by Redstone. The few anchors that failed in this manner were installed in the same manner as all of the other anchors. JA 3191-3193; (Trial Testimony, Heath Kefover, Redstone President, Day 12, P. 163-165). The damages numbers created by JFA's expert Mr. Willoughby were blown out of proportion entirely and not supported by any legitimate factual basis and should not have been relied upon by the Circuit Court. The amount awarded over these few anchors that failed because of unforeseen conditions is grossly disproportionate to the total contract.

For the forgoing reasons, the damages awarded to JFA against Redstone for $981,673.00 in repair costs should be reversed.

VIII. JFA Is Not Entitled to Damages for Contractual Overpayment

The Circuit Court accepted, entirely, JFA's expert witness's opinion about the value of Redstone's work, and awarded JFA $904,438.00 for "overpayment." Redstone asserts the valuation of its work was inaccurate and the Circuit Court's factual findings were clearly erroneous, and the legal conclusions were an abuse of discretion. It was clearly held by the Circuit Court in other sections of the Judgment Order that Amec's faulty design, and JFA's improper placement of fill material, lead to settlement of fill which sheared anchors installed by Redstone. Redstone incurred significant additional costs repairing those anchors. Additionally, the square footage of the wall project grew during construction, and Redstone was entitled to a fair, per square foot adjustment of its contract value for work completed. Redstone requests that the damage award

be reversed, and Redstone's affirmative claim for additional compensation under its valuation of the work, be awarded.

As argued above, and incorporated by reference herein, Mr. Willoughby's opinion was unreliable and unsupported by a sufficient factual basis. Redstone's change orders and contractual values were ignored by Mr. Willoughby, who simply decreased all of the numbers as part of his opinion. JA 5812-5836. Mr. Bolyard, Redstone's expert, accurately calculated the damages and unpaid contract values owed to Redstone, and his opinion was improperly ignored. JA 6166-6390. JFA chose to take a "blame everyone else" approach to managing its subcontractors, Redstone and Amec. Other than the wash out anchors, the Circuit Court did not find Redstone responsible for all of the significant issues with the project, while JFA was responsible for many issues, such as fill settlement causing anchors to shear.

Redstone received its last payment from JFA in April 2015, and continued working until August, 2015. JA 6375; JA 3629-3637 (Trial Testimony of Terry Cunningham, Redstone CFO, Day 14, P. 7-15). JFA decided to blame Redstone and then starve them out with non-payment. This behavior should not have been rewarded by the Circuit Court, and Mr. Willoughby's opinion certainly did not have sufficient factual support to justify the "contractual overpayment" damages awarded against Redstone, and it should be reversed.

IX. MarkWest Should Not have been Awarded Delay Damages

The Circuit Court conducted extensive analysis of the majority of MarkWest's delay damages claims, and found that MarkWest was responsible for some of the damages for failure to coordinate amongst multiple prime contractors and subcontractors. MarkWest did not delegate the coordination responsibility. The wall project that Redstone worked on was not meant to generate profit. It was for waste disposal of fill material generated nearby in other activities by MarkWest,

including preparation of a building site for a natural gas processing plant, the fifth such plant on the site.

The evidence clearly showed at trial that the fifth plant was significantly and concurrently delayed by MarkWest, and by others, regardless of progress by Redstone on the wall project. JA 6111. The only delay damage that the Circuit Court found Redstone responsible for was $1,458,342.35 in "lost profits" for this plant. Redstone asserts that there was insufficient underlying evidence for this finding, and that MarkWest, and/or other contractors employed by MarkWest.

> [There are] two categories of damages in a breach of contract action. The first is those directly flowing from the contract breach. As to these damages, there is no requirement that the parties must have actually anticipated them because they are a natural consequence of the breach. The second category is indirect or consequential damages that arise from the special circumstances of the contract. In order to recover these damages, the plaintiff must show that at the time of the contract the parties could reasonably have anticipated that these damages would be a probable result of a breach.

Syl Pt. 2, *Desco Corp. v. Harry W. Trushel Construction Co.*, 413 S.E.2d 85, 186 W.Va. 430 (1991) (citing Syl. Pt. 2, *Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro,* 158 W.Va. 708, 214 S.E.2d 823 (1975). The lost profit claim presented by MarkWest at trial was not foreseeable to JFA and or Redstone at the time of their 2014 contracts because it was for an entirely different contract awarded in 2015 and is therefore impermissible as a matter of law.

All of MarkWest's delay damage claims were predicated on the opinion of their expert, Mr. Wolf. As will be shown below, his entire opinion lacked a factual basis because of the testimony of Mr. Rowlands, MarkWest's fact witness and corporate representative, and was unreliable. MarkWest's delay claim is unsupported by law because of the multiple collateral delays to Plant V, entirely independent from the Project, which are discussed in turn below.

Rowlands and MarkWest Project Engineer, Tyler Adams ("Mr. Adams") prepared and issued monthly project status reports for MarkWest's senior management team. (*See* JA 5615); (JA 558; Tr. 98:18-24;99:1-4, Day 2 a.m.)

UOP was hired by MarkWest as the engineering firm to design Plant V. The UOP mechanical/electrical bid package was anticipated to be received in December 2014 but was extended until January 15, 2015. Per the October status report, Mr. Rowlands reported that its target milestone was to have all mechanical construction bids received on or before January 15, 2015. JA 559; (Tr. 99:7-10.)

UOP failed to meet this milestone. In fact, UOP did not achieve this milestone until April 15, 2015. Additionally, the milestone of achieving an air permit for the addition of Plant V was initially targeted for submittal on or before November 15, 2014. Yet, MarkWest's air permit application was not submitted to the West Virginia Department of Environmental Protection until April 2015. *Id.*

UOP was also responsible for issuing a flare study, as Plant V was adding new ignition sources to the Facility. JA 5620; JA 563 (Tr. 103:19-24;104:121, Day 2 a.m.). UOP was late with all of its deliverable designs, studies and equipment supply to MarkWest. JA 564 (104:9-21.)

The Plant V project could not be out for bid for any work to be done until the UOP bid package and design documents were available, which did not occur until April 15, 2015. JA 561 (101; 1-20.). Under the Baseline Schedule, exclusively relied upon by Mr. Wolf, these bid packages would have had to have been done, at the latest, in the summer of 2014 to keep the Baseline Schedule.

In December 2014, Mr. Rowlands advised his team internally that UOP continued to be late with engineering services and products, thereby putting MarkWest in a tough spot on bidding and construction. (JA 5626-5630); JA 570 (Tr. 110:15-24, Day 2, a.m.)

At this time, the Plant V construction bid was split into civil foundations and mechanical/electrical packages. *Id.* Mr. Rowlands was projecting the mechanical completion date for Plant V to be October 22, 2015 rather than the July 2015 date set forth in the Baseline Schedule. JA 571 (111:4-10.) Mr. Rowlands' supervisor, John Paul Elder ("Mr. Elder") advised that MarkWest would need to accelerate its contractor to achieve a July 2015 start-up and that this would be "extraordinarily costly and potentially impractical." JA 571 (111:11-18.)

In response to Mr. Elder's suggestion to accelerate the Plant V contract schedule, MarkWest's Chief Operating Officer Gregory Floerke ("Mr. Floerke") wrote Mr. Elder and Mr. Rowlands, "based on EQT 2015 volume update that Paul Kress sent in this week, does not appear that there will be justification to spend more money to accelerate Plant V." JA 572 (112:1-21.) This means that there was not enough gas being produced for Plant V to be necessary, and MarkWest was not losing profits.

UOP's design for Plant V continued to be delayed, with UOP projecting a complete mechanical package to be submitted by the second week of February 2015. JA 5630; JA 572 (Tr. 112:22-24;113:1-9, Day 2 a.m.) Mr. Rowlands responded that this was unacceptable; MarkWest expected a complete mechanical and electrical bid package by January 31, 2015. JA 573 (113:10-24.)

Mr. Rowlands justified this demand to UOP by advising "our full bid package release date slides with every day UOP missed the January 31, 2015 date." JA 574 (114:1-9.) UOP did not achieve the January 31, 2015 bid package deadline, which was already an extended date.

Ultimately, the UOP bid package was not received until April 15, 2015 – nine weeks beyond its extended deadline. *Id.*

Mr. Wolf's analysis does not account for this delay at all, instead he assumes that Plant V would have already been under construction, if not for the wall Project. Following the issuance of the UOP bid package, bids for Plant V were due on or before May 4, 2015. JA 5650; JA 596 (Tr. 16:8-15, Day 2 p.m.) By this time, the wall had not delayed the Plant V mechanical and electrical bid award. JA 596.

As of June 2, 2015, the date of the MarkWest/Westcon contract, to accept the Baseline Schedule's finish date of July 14, 2015, Westcon had 44 days to build Plant V, another impossibility. As Mr. Rowlands testified, the wall Project did not delay the design or award of the Plant V contract that wasn't scheduled to start until July 1, 2015. JA 595 (Tr. 15:16-23, Day 2 p.m.).

As of the date of the Westcon contract, June 2, 2015, the Project had not caused any delay to UOP's design and bid package, yet Mr. Wolf assumes under the baseless Baseline Schedule that the foundations for Plant V would have been done in 2014. Foundations that were not even designed until April, 2015, let alone awarded to a contractor for work to begin.

As of August 25, 2015, Chapman Corporation ("Chapman"), the MarkWest foundations contractor for Plant V, had completed all of its foundations except for the electrical substation. JA 5684; JA 608 (Tr. 28:4-9, Day 2 p.m.) All mechanical work was available for Westcon to perform at that time. Westcon did not have any piping work to perform in Plant V's substation. The only mechanical work within the electrical substation was structural steel for the setting of buildings. *Id.*

As of October 15, 2015, J.F. Allen had completed its fill operation for the Project and the electrical substation pad was available for foundations. JA 5686; JA 610 (Tr. 30:5-15, Day 2.)

As of September 17, 2015, Westcon was not on schedule to meet its in-service date of October 31, 2015. JA 5706; JA 622 (Tr. 42:1-3, Day 2 p.m.) In addition to electrical substation availability, Westcon delayed mechanical completion due to welding issues, crane tip over, and employee misconduct. These events caused Westcon to shut down for a safety review. *Id.* As of February 11, 2016, Westcon was still installing its original scope of piping work; work not considered punch list work by MarkWest, as testified to by Mr. Rowlands. JA 5709; JA 625 (Tr. 45:14-24, Day 2 p.m.)

Plant V could not operate without the remaining mechanical work being performed by Westcon. By this time, Plant V was very close to being electrically complete. In fact, Mr. Rowlands reported to David Fitch ("Mr. Fitch"), MarkWest's Vice President of Engineering, that he anticipated electrical completion to occur on February 19, 2016, with mechanical completion to be achieved by February 26, 2016. JA 5711; JA 628 (Tr. 48:7-22, Day 2 p.m.)

The DEP did not issue the necessary permit until December 31, 2015. JA 6311. Plant V could not have operated before this date, which was after completion of the Project. Also noteworthy is that repairing insulation required by the late delivery of the flare study commenced on March 22, 2016, under mechanical commissioning, and remained an item on the commissioning updates through April 8, 2016. JA 5712. Plant V could not start-up until these insulation repairs were complete. JA 639 (Tr. 59:20-24;60:1-20, Day 2 p.m.) Accordingly, Plant V's in-service date commenced on the day insulation repairs were completed. Mr. Rowlands testified that the late UOP flare study and resultant vessel insulation re-work were on their own critical path, independent of the electrical substation of Plant V. *Id.* Commissioning and start-up of Plant V

were complete and in-service as of April 8, 2016, a week shy of the one-year anniversary of the UOP design and bid package submittal. JA 616 (Tr. 36:15-22, Day 2 p.m.)

Following Plant V's start-up, MarkWest Project Engineers Mr. Adams and Mr. Rowlands were tasked with compiling a "UOP deficiency list". JA 5750; JA 649 (Tr. 69:17-24;70:1-15, Day 2 p.m.) In transmitting this UOP deficiency list to MarkWest contract specialist, Michael Fisher ("Mr. Fisher"), Mr. Rowlands wrote:

> Attached is the Plant V (J-362/D) UOP deficiency list. Each of these items to some degree was caused by UOP deficient engineering.
>
> Special note on line one – this was the true up with Westcon relating to missing drawings in the bid package that UOP supplied three days into the bid process (**months late**). This work would have been priced into the lump sum proposal from Westcon, but at a more competitive rate than COR amount.
>
> Special note on flare study COR's – **UOP completed the flare study over one year late. Original design work was installed, paid for, and demolished to make the changes. If UOP had performed the work on time, COR's wouldn't have occurred**. We are working on putting a price on the items at the end of the list. It will be six figures. I continue to hold their invoice for $950k.
>
> (*Id.* emphasis supplied).

As indicated by Mr. Rowlands, the flare study necessitated modification to the vessels as it related to their installation. This work was being performed in February 2016 because of the late flare study. In fact, Mr. Rowlands noted in the commissioning updates that the insulation repairs were being performed up to the last day of commissioning when Plant V started up on April 8, 2016. JA 5712. Plant V could not have come on-line without those changes to the insulation of the vessels. JA 639 (Tr. 59:20-24; 60:1-4.)

Mr. Rowlands acknowledged that the flare study and the modifications were on their own critical path to the start-up of Plant V. JA 640 (60:5-8.) Mr. Rowlands specifically acknowledged that the flare study and plant modifications were not dependent upon electrical substation

completion. Mr. Rowlands also testified that the entire Plant V project could not have been constructed without the flare study and resultant changes to vessel insulation. Although Mr. Rowlands attempted to discount the magnitude of the vessel insulation modifications, he did acknowledge that Plant V could not have operated without those changes being made. *Id.*

Mr. Rowlands testified that the electrical work on Plant V was complete in March 2016. JA 653 (Tr. 73:8-10, Day 2 p.m.) Mr. Rowlands further acknowledged that Plant V was not mechanically complete by the time electrical had reached completion in February 2016. Mr. Rowlands testified that mechanical completion was on a separate critical path from electrical completion. *Id.*

Mr. Rowlands further acknowledged that not only did UOP design deficiencies delay the flare study, but the missing mechanical drawings from the UOP bid package also delayed the Project's mechanical work. JA 638 (Tr. 58:19-24, Day 2 p.m.) MarkWest back charged UOP approximately $2 million in costs it incurred due to UOP's design deficiencies. JA 5750. Of that, $1.7 million was allocated to the flare study and missing drawing delays. *Id.*

For all of the foregoing factual reasons, MarkWest's delay claim, in its entirety, was unsupported by any sufficient factual basis to support the numbers claimed by Mr. Wolf in his opinion. Mr. Wolf's opinion was unreliable.

CONCLUSION

For all of the foregoing reasons, Petitioner, Redstone International, Inc., respectfully requests that the assignments of error described herein be addressed by this Court and that the Circuit Court's Judgement Order and findings complained of herein be reversed, with a remand to address additional issues at the trial court level.

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CERTIFICATE OF SERVICE

The undersigned, counsel for the Petitioner, Redstone International, Inc., does hereby certify that on this 17th day of February, 2022, a true copy of the foregoing "Petitioner's Brief" and "Joint Appendix" was served upon the counsel that have previously appeared in this matter, addressed as follows:

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