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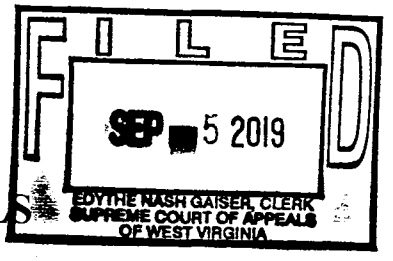

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-0369

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY

J.F. ALLEN CORPORATION,
a West Virginia corporation,
Plaintiff Below, Petitioner

v.

THE SANITARY BOARD OF THE CITY
OF CHARLESTON, WEST VIRGINIA,
a municipal utility,
AND BURGESS AND NIPLE, INC.,
an Ohio corporation,
Defendants Below, Respondents.

RESPONDENT THE SANITARY BOARD OF THE CITY OF CHARLESTON, WEST VIRGINIA'S BRIEF

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September 5, 2019

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS:

The Sanitary Board of the City of Charleston, West Virginia ("Respondent" or "CSB"), by counsel, respectfully submits its Respondent's Brief in opposition to J.F. Allen Corporation's ("Petitioner" or "J.F. Allen") Petition for Appeal, which challenges the Circuit Court of Kanawha County's March 20, 2019 *Order Granting Defendants a New Trial on Damages and Denying Defendants' Motions for Renewed Judgment as a Matter of Law*. In support, CSB respectfully states as follows:

I. STATEMENT OF THE CASE

For the convenience of the Court, a summary of the facts contained in the Circuit Court record is reproduced with citations to the Joint Appendix, as follows:

A. The Construction Agreement.

This appeal arises from a dispute involving a sanitary sewer replacement project, for work generally described as "Kanawha Two-Mile Creek Sewer Improvements—Sewer Replacements Sugar Creek Drive Sub-Area, Contract 10-8" (the "Project"). (JA 3363.) On or about December 13, 2011, J.F. Allen Corporation ("J.F. Allen"), as Contractor, entered into a standard construction contract with CSB, as Owner ("Agreement"). Burgess & Niple, Inc. ("B&N") provided professional services to CSB and was designated as the Engineer/Architect on the Project. (JA 3475.) The original contract price under the Agreement totaled $5,160,621.75, "subject to additions and deductions by Change Order and quantities actually performed." (JA 3476, ¶ 4.)[1] A total of six Change Orders and quantity adjustments increased the Contract Price in the amount of $394,977, for a final adjusted contract amount of $5,555,598. (JA 1388-1407.)

[1] Capitalized terms not otherwise defined here have the same meaning as those terms are defined in the parties' Agreement.

In entering into the Agreement, J.F. Allen, a seasoned contractor, agreed to the precise procedures and timeliness requirements for submitting claims within the life of the contract. For its work, J.F. Allen received from CSB full payment of the original contract amount, plus the cost of all properly submitted Change Orders and quantity adjustments, for a final adjusted contract amount of $5,555,598. Under the plain terms of the contract, J.F. Allen is entitled to no more.

Construction began on or about January 9, 2012. The Agreement required Substantial Completion by January 2, 2013 and required Final Completion by February 1, 2013. Actual Final Completion of the Project occurred on August 15, 2013. Thereafter, J.F. Allen submitted its request for Final Payment on or about November 4, 2013, and CSB issued Final Payment to J.F. Allen on or about November 20, 2013. The one-year correction period under the Agreement expired on June 19, 2014. (JA 1388-1407.) However, on June 30, 2014, J.F. Allen filed its original Complaint seeking—for the first time—an "equitable adjustment" of the Contract Price, a Claim never before made (or preserved) pursuant to the Agreement.

B. The Agreement Established the Procedure for Payments and Submission of Claims.

Article 12.03 of the General Conditions provides several provisions governing delays and equitable adjustments, which bar the recovery of damages for delay under certain circumstances. (JA 3571-72 § 12.03(C), § 12.03(E) ("Such an adjustment shall be Contractor's ***sole and exclusive remedy for the delays*** described in this Paragraph 12.03.C") (***"Contractor shall not be entitled to an adjustment in Contract Price or Contract Times for delays within the control of Contractor"***) (emphasis added).)

The contract provides that "[n]o Claim for an adjustment in Contract Price . . . will be valid if not submitted in accordance with [the Claims procedure of] this Paragraph 10.05." (JA 3565-66 ¶ 10.05(A)-(F); JA 3570 ¶ 12.01(A)). The agreed-upon protocols for all Change Orders, progress

and final payments, as well as the procedures for filing, reviewing, and ruling on any Claim are established by Article 10.05 of the contract, as follows:

> A. *Engineer's Decision Required:* All Claims, except those waived pursuant to Paragraph 14.09, shall be referred to the Engineer for decision. ***A decision by Engineer shall be required as a condition precedent to any exercise by Owner or Contractor of any rights or remedies either may otherwise have under the Contract Documents or by Laws and Regulations in respect of such Claims.***
> B. *Notice:* Written notice stating the general nature of each Claim shall be delivered by the claimant to Engineer and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. The responsibility to substantiate a Claim shall rest with the party making the Claim. Notice of the amount or extent of the Claim, with supporting data shall be delivered to the Engineer and the other party to the Contract within 60 days after the start of such event ***(unless Engineer allows additional time for claimant to submit additional or more accurate data in support of such Claim).*** A Claim for an adjustment in Contract Price shall be prepared in accordance with the provisions of Paragraph 12.01.B . . . .
> C. *Engineer's Action*: Engineer will review each Claim and, within 30 days after receipt of the last submittal of the claimant or the last submittal of the opposing party, if any, take one of the following actions in writing:
> 1. deny the Claim in whole or in part;
> 2. approve the Claim; or
> 3. notify the parties that the Engineer is unable to resolve the Claim if, in the Engineer's sole discretion, it would be inappropriate for the Engineer to do so. For purposes of further resolution of the Claim, such notice shall be deemed a denial.
>
> D. In the event that Engineer does not take action on a Claim within 30 days, the Claim shall be deemed denied.
> E. Engineer's written action under Paragraph 10.05.C or denial pursuant to 10.05.C.3 or 10.05.D will be final and binding upon Owner and Contractor, unless Owner or Contractor invoke the dispute resolution procedure set forth in Article 16 within 30 days of such action or denial.
> F. ***No Claim for an adjustment in Contract Price or Contract Times will be valid if not submitted in accordance with this Paragraph 10.05.***

(JA 3565-66 ¶ 10 (emphasis added).)

In particular, to comply with Paragraph 10.05, J.F. Allen was required, in part, to provide written notice of its Claim no later than thirty days after the start of the event giving rise to the Claim and to allow for B&N to render its decision. (JA 3565 ¶ 10.05.) The contract provides that Claims not timely asserted within the life of the contract are time-barred under Article 14.07. (JA

3581.) Significantly, "[t]he making and acceptance of final payment will constitute . . . a waiver of all Claims by Contractor against Owner other than those previously made in accordance with the requirements herein and expressly acknowledged by Owner in writing as still unsettled." (JA 3582 ¶ 14.09.)

C. Six Months After the Contract Expired, J.F. Allen Submitted, for the First Time, a Request for "Equitable Adjustment."

On November 4, 2013, J.F. Allen submitted its request for Final Payment pursuant to the contract. (JA 4253; JA 4683.) On November 5, 2013, B&N submitted its written recommendation to CSB for Final Payment to J.F. Allen. (JA 4673.) On November 20, 2013, CSB issued Final Payment, check no. 2068, in the amount of $146,320.43 to J.F. Allen. (JA 4681.) J.F. Allen retained the check in its possession, but never cashed it. (JA 1878.)

On May 7, 2014, approximately *six months* after J.F. Allen's request for Final Payment and B&N's recommendation for Final Payment had been made, J.F. Allen submitted a request to B&N for "Equitable Adjustment" under the contract. (JA 4083-4108.) On May 12, 2014, B&N returned J.F. Allen's request, noting that B&N "is no longer authorized to provide professional services for this project." (JA 4507.)

D. Litigation, Jury Trial and Verdicts, and Post-Trial Proceedings.

On June 30, 2014, J.F. Allen filed this civil action and subsequently amended its Complaint on November 13, 2014. (JA 0008-14; JA 0001.) The case was tried from January 22, 2018 to January 31, 2018 before a jury. (JA 1432-3345.) At trial, J.F. Allen presented two distinct legal theories (breach of contract against CSB and negligence against B&N) for the possible recovery of a single injury. During closing argument at trial, J.F. Allen's counsel informed the jury and the Court that J.F. Allen sought a single recovery of $1,252,392.43 against both Defendants:

> MR. JOHNSTONE: If you answer questions 1 and 2 yes, please assess damages. . . The damages are the same that we assert against

> both of these entities. Okay. So of this amount, you've got to decide how much you want to put against the sanitary board and what you want to put against Burgess and Niple.

(JA 3297-98.)

During deliberations, the jury submitted handwritten notes to the Circuit Court, which shed light on the jury's general state of confusion, and the Court submitted several clarifying instructions to aid the jury. (JA 1179-85.) For example, the jury foreperson sent the Circuit Court a note questioning how and on what basis to assess the breach of contract damages against CSB: "Do we assess the dollar amount for Question 3 on Part II? And, if yes, on what basis?" (JA 1180; JA 3315-16.)[2] The jury, twenty-five minutes later, then followed up with a note regarding the same question. Pointing to Part II, Question 3 of the verdict form, which instructed that "If the answer to question 1 and 2 are YES, please assess the breach of contract damages, if any, in dollars and cents below," the jury asked the Court, "What is this amount based on?" (JA 1183; JA 3318-19.) The jury also sent a note to the Court asking what amount it was supposed to assess for damages against Defendant B&N, "or do we come up with the $ amount?" (JA 1185; JA 3334-37.)

When the jury returned after its first round of deliberations, the Circuit Court read aloud the jury's verdict, which found $1,300,000.20 against CSB (for breach of contract) and found B&N 90% negligent and J.F. Allen 10% negligent. (JA 3323-36.) Upon the jury returning after its first round of deliberations, the Jury Foreperson stated to the Court, believing that the jury had a valid verdict, "we got it right, this time," even though the verdict form was incomplete in that the jury had left the damages portion against B&N blank. (JA 3323-36.) After reading the incomplete

[2] The trial transcript was made available on or about May 22, 2018. However, the transcript for Day 8 of trial provided to counsel was missing certain portions related to the jury's deliberation. The missing portions were transcribed and provided to counsel on August 20, 2018. For clarity, any references to the supplemented portion will be clarified with a reference to JA 3313-45.

verdict form aloud, the Circuit Court directed the jury to "return to the jury room" to permit the Court to "address some issues with counsel." (JA 3323-36.)

The Circuit Court then informed counsel that the jury left the verdict form blank as to damages against B&N after finding B&N 90% negligent and J.F. Allen 10% negligent, noting that the jury "got that they [were] supposed to give one recovery but may not have apportioned it among the defendants" and determined that what the Court needed to do was to "flesh out if it [was] their intent to assess the entire, [1.3] million dollars, to the Sanitary Board, but by virtue of the fact they have found negligence in the amount of [90%] as to [B&N], if they had intended to apportion any percentage of that to them." (JA 3323-36.) J.F. Allen's counsel agreed with the Court's concern: "Yes, your Honor. Did they intend for that to be zero damages or was it their intention that the [1.3] million be split between the defendants." (JA 3323-36.)

The Circuit Court brought the jury back into the courtroom and polled each juror and each juror agreed that the incomplete verdict was his or her verdict. The Circuit Court then instructed the jury to go back into the jury room and focus on the blank portion of the verdict form as to whether it was their intent to award zero damages against B&N. (JA 3323-36.) After the second attempt at deliberation, the Jury Foreperson stated, referring to the current verdict at issue, "we did get it right, this time;" however, the jury filled in the blank with a damages award against B&N in the amount of $3,000,000.20. (JA 3336-43.)

Even though the maximum recovery J.F. Allen sought for its alleged injury was $1,252,392.43, the jury awarded a total verdict of $4,300,000.40, including $1,300,000.20 against CSB (for breach of contract) and $3,000,000.20 against B&N (for negligence). The jury also apportioned ten percent (10%) comparative fault to J.F. Allen on its negligence claim, resulting in damages against B&N in the amount of $2,700,000. (JA 3336-43; JA 1124-28.) After polling the

jury again and then excusing the jury, the Circuit Court expressed its concern with the verdict and present sense impression as follows:

> THE COURT: I'm going to suggest strongly that I have concerns that the verdict that we had could be problematic. It may not be based on law, reason or judgment. I am going to strongly suggest that you all talk. When I say talk, I mean try to get some resolution in this case. You haven't been able to do it before as mediation failed, and I don't care to know where you all were. I suggest that you talk over the weekend and avail yourself the opportunity to do that. I certainly suggest this. Thank you.

(JA 3342-43.)

Judgment was subsequently entered on March 1, 2018. (JA 1129-35.) On March 14, 2018, CSB filed its *Renewed Motion for Judgment as a Matter of Law*, or, alternatively, *Motion for New Trial Pursuant to Rules 49 and 59 of the West Virginia Rules of Civil Procedure*. (JA 1151-212.) On March 20, 2019, the Circuit Court issued its *Order Granting Defendants a New Trial on Damages and Denying Defendants' Motions for Renewed Judgments as a Matter of Law*, wherein it ordered that the matter be retried as to damages only, but recognizing that as a practical matter the entire case would essentially be retried. (JA 1388-1407; JA 1403 ¶ 63.)

II. SUMMARY OF ARGUMENTS

The Petitioner's brief filed by J.F. Allen does nothing to undermine the Circuit Court's decision to grant a new trial on damages in this matter on grounds that the verdict rendered by the confused jury was inconsistent, against the clear weight of the evidence, in excess of a single recovery, and irreconcilable. In fact, the arguments Petitioner now raises on appeal are defeated by its own position *during the trial itself,* including for example, by the statements and instructions of Petitioner's counsel to the jury readily acknowledging that although J.F. Allen was pursuing two distinct legal theories for its alleged single injury, it would be error for the jury to award more than a single recovery, and also, that the jury was obligated to determine as a factual matter which damages, if any, were the result of breach of contract and which damages, if any, were the result

of negligence. (JA 3297-98.) There is no question that the jury failed to properly discharge its duties under West Virginia law in this regard. The fact that an error occurred is not genuinely in dispute. Instead, the question is whether the error that resulted was akin to an error that could have been fixed by the Circuit Court, or whether correction of the error would have required factual findings that are the sole province of the jury. For the reasons set forth below and as supported by the record, the clear answer is that the verdict, as rendered, was irreconcilable, and thus could not form the basis of a valid judgment. Under these circumstances, where the resulting verdict is unreliable and cannot be cured due to the jury's fundamental and pervasive error and confusion, the proper remedy was a new trial with respect to both liability and damages.[3]

After two separate attempts at deliberation, the jury in this case could not render a consistent and rational verdict. The Circuit Court elected not to re-submit any further clarifying instructions for the jury to attempt to correct the inconsistent verdict, and instead dismissed the jury and directed counsel to submit post-trial briefs. Indeed, the jury's lack of understanding was apparent to everyone in the courtroom, and was the basis for defense counsel's immediate motions for mistrial. (JA 3327-34.) Notably, after excusing the jury, the Circuit Court itself expressed its present sense impression as follows:

> THE COURT: I'm going to suggest strongly that I have concerns that the verdict that we had could be problematic. It may not be based on law, reason or judgment.

(JA 3342-43.)

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[3] In its Petitioner's Brief, which is currently pending before the Court, CSB argues that the Circuit Court should have granted CSB judgment as a matter of law at the conclusion of J.F. Allen's case-in-chief and during post-trial proceedings. In the alternative, CSB agrees that the Circuit Court's grant of a new trial as to damages was proper, but asserts that the Circuit Court erred in not granting Respondents a new trial as to both liability and damages. CSB's appellate arguments are more fully set out in *Petitioner The Sanitary Board of the City of Charleston, West Virginia's Brief*, Supreme Court of Appeals of West Virginia Docket No. 19-0398, styled *The Sanitary Board of the City of Charleston, West Virginia v. J.F. Allen Corporation*, and are incorporated fully by reference herein.

Based on the verdict as rendered, it cannot be determined whether the jury, in actuality, awarded only those damages against CSB that it found to have proximately resulted from CSB's breach and awarded only those damages against B&N that it found to have proximately resulted from B&N's negligence. Based on the math alone, it is apparent that the jury's confusion impacted both its assessment of damages and liability.

At trial, Petitioner presented two distinct legal theories for the possible recovery of a *single* injury. While the maximum recovery Petitioner sought for its alleged injury was $1,252,392.43, the jury awarded a total verdict of $4,300,000.40, including $1,300,000.20 against CSB (for breach of contract) and $3,000,000.20 against B&N (for negligence). The jury then apportioned ten percent (10%) comparative fault to Petitioner on its negligence claim, resulting in damages against B&N in the amount of $2,700,000. Despite Petitioner's attempt to reconcile the jury's fundamental error as an "approximation of the amount claimed as contract damages in Petitioner's REA," the jury returned a $1.3 million verdict against CSB, which *in and of itself* constitutes error as Petitioner only sought approximately $1.2 million in total damages. (Pet's Brief, at 16.) In addition, the total damage award is more than *three times* the full amount of Petitioner's alleged injury.

In the face of the jury's clear and substantial error, Petitioner's only response is that the Circuit Court could have possibly addressed this issue by remittitur. (Pet's Brief, at Assignment of Error "V.") Petitioner did not provide <u>any</u> suggestion to this Court on <u>how</u> the Circuit Court could have properly remitted this verdict—because it could not. Instead, Petitioner glances over the grave nature of the issues associated with the Court exercising remittitur in this case. The gravamen of the problem was that it was impossible for the Circuit Court to discern which of the two Respondents should have to pay (or, if apportioned, how much each would pay) if the Court

had entertained a motion to remit the damages without the Circuit Court improperly assuming the function of the jury and making additional factual findings.

The beginning of the analysis—and despite Petitioner's attempt to present its theories on appeal as separate and independent causes of action entitled to separate verdicts—is the fact that Petitioner sought a *single recovery under two theories of liability at trial.* In fact, during closing argument at trial, Petitioner's counsel specifically informed the jury and the Circuit Court that Petitioner sought a single recovery against both Defendants:

> MR. JOHNSTONE:
> If you answer questions 1 and 2 yes, please assess damages. . . **The damages are the same that we assert against both of these entities. Okay. So of this amount, you've got to decide how much you want to put against the sanitary board and what you want to put against Burgess and Niple.**

(JA 3297-98.)

Under West Virginia law, Petitioner is precluded from receiving a double recovery for the single injury alleged. However, with the current verdict, the Court cannot determine *which* Respondent is liable for which damages, and the Court cannot apportion or exercise remittitur without making additional factual findings. This is especially true considering that the liability determination itself is called into serious question due to the jury's general confusion. CSB can only be held liable for breach of contract damages, and the jury's confusion in awarding $1.3 million to Petitioner—in excess of the $1.25 million total requested—calls into question CSB's liability.

Even though this is not a joint and several liability case, it appears the excessive verdict impermissibly awards negligence damages against CSB, which is prohibited. Under the West Virginia Governmental Tort Claims and Insurance Reform Act, CSB as a municipal utility cannot be liable for another party's negligence. *See* W. Va. Code § 29-12A-4(b)-(c) (recognizing limited

exceptions to immunity). So, not only was CSB not sued in tort, but also under the immunity statute there is no legal basis for the Court to apportion any damages that may have arisen from B&N's negligence, if any, to CSB.

Moreover, the law of contracts and the law of torts have entirely different ramifications. *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 219, 314 S.E.2d 166 (1983). In an action for breach of contract, the damages recovered must be such as will give, and only such as will give, compensation for the actual loss directly flowing from the breach of contract. On the other hand, in tort law, the loss is measured by criteria completely within the control of the party sustaining the alleged loss. *Hurxthal v. St. Lawrence Boom & Lumber Co.*, Syl. Pt. 10, 53 W.Va. 87, 44 S.E. 520 (1903); *Torbett*, 173 W.Va. at 219. Tort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation. Therefore, an action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract. *Lockhart v. Airco Heating & Cooling, Inc.*, 211 W.Va. 609, 624, 567 S.E.2d 619 (2002). Because Petitioner did not sue CSB in tort, there was no legal basis for the Court to apportion damages to CSB that may have arisen from B&N's negligence, and, if any damages for breach of contract were apportioned to CSB in excess of actual loss directly flowing from the breach of contract, those damages were unwarranted and grounds for a new trial. *Hurxthal*, 44 S.E. at 526.

To illustrate the impossibility of remittitur, on top of awarding $1.3 million in damages against CSB, the jury found B&N 90% responsible for $3 million in damages, for a verdict of $2.7 million against one particular defendant, despite the fact that Petitioner sought only $1,252,392.43 in damages against both Respondents under one recovery. *Each verdict rendered thus exceeded*

the total amount in damages requested by Petitioner at trial. So, if the Court had hypothetically remitted the damages verdict to $1.2 million, who would have been responsible for paying that $1.2 million verdict—CSB or B&N? Further, how could the Court even exercise remittitur and apportion the verdict between CSB and B&N when Petitioner sought a *single recovery* against *both* Defendants, yet the jury found B&N responsible for 90% of the verdict and Petitioner responsible for 10% of the verdict? How could CSB be apportioned even a single penny of the jury verdict when the jury already found that 100% of the verdict should be split between B&N and Petitioner?

Both the logic and the math are inescapable: remittitur was impossible with this verdict. To apply remittitur and apportion any part of Petitioner's total recovery to either of the Respondents in this case, the Circuit Court would have had to determine which damages actually resulted from CSB's breach and which damages were the proximate result of B&N's negligence considering CSB cannot be liable for B&N's negligence by law.

Accordingly, the inconsistency of the verdicts goes directly to liability (the proximate cause determination) and damages. Indeed, after the jury was dismissed, the Circuit Court immediately expressed its concern with the verdict by stating "[t]he verdict that we had could be problematic" as "[i]t may not be based on law, reason or judgment." (JA 3342-43.) Now, at the appeal stage and without the benefit of specific factual findings, questions that remain cannot be answered, and without answers, the inconsistency of the verdicts cannot be harmonized. Faced with the verdicts as rendered, there is no principled basis upon which the Court can reconcile the jury's inconsistent verdicts into a coherent judgment and properly remit the damages. As a result, the Circuit Court did not err in granting Respondents a new trial as to damages.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

CSB believes this matter is appropriate for oral argument and decision under Rule 19 of the West Virginia Rules of Appellate Procedure for two reasons: (1) the Circuit Court erred in the application of settled law, and (2) its entry of judgment and *Order Granting Defendants a New Trial on Damages and Denying Defendants' Motions for Renewed Judgment as a Matter of Law* was against the clear weight of the evidence.

IV. ARGUMENT

A. PETITIONER'S FIVE ASSIGNMENTS OF ERROR MUST FAIL BECAUSE THEY ARE BASED ON THE FALSE PREMISE THAT PETITIONER SOUGHT TWO SEPARATE AND INDEPENDENT RECOVERIES AT TRIAL. IN FACT, PETITIONER PRESENTED TWO LEGAL THEORIES FOR THE RECOVERY OF A SINGLE INJURY AT TRIAL.

1. Assignments of Error I-V are Defeated by Petitioner's Own Statements and Position at Trial.

Petitioner's first, second, third, fourth and fifth Assignments of Error must fail because they rely entirely on the fundamental—and false—premise that Petitioner presented two separate and independent causes of action against the Respondents at trial with recovery under either not dependent on the other. In these five assignments of error, Petitioner argues that the Circuit Court erred in finding that Petitioner's maximum possible recovery at trial was approximately $1.25 million because $1.25 million only represented Petitioner's request for recovery against CSB under contract. Under Petitioner's theory on appeal, "J.F. Allen submitted evidence at the trial of this matter that it suffered damages recoverable under its contract with [CSB] in the amount of $1,250,392.43," but there "is no basis, however, for the Trial Court's finding that J.F. Allen's total damages, including damages awarded under its tort claim against [B&N], should be capped at the amount claimed as contract damages." (Pet's Brief, at 22.) According to Petitioner, this distorted argument somehow excuses the jury's excessive awards against the Respondents as not

inconsistent. (Pet's Brief, at 11.) Petitioner's argument is plainly incorrect given its own comments and case presented at trial, and the Court should disregard Petitioner's attempt to rewrite history on appeal.

Indeed, Petitioner's argument raised on appeal is defeated by its own words *during the trial itself.* For example, in his statements and instruction to the jury, Petitioner's counsel readily acknowledged that although J.F. Allen was pursuing two distinct legal theories for its alleged single injury, it would be error for the jury to award more than a single recovery. Petitioner's counsel also instructed that the jury was obligated to determine as a factual matter which damages, if any, were the result of breach of contract and which damages, if any, were the result of negligence. (JA 3297-98.) While explaining the jury verdict form during closing argument at trial, Petitioner's counsel reiterated to the jury and the Circuit Court that Petitioner sought a single recovery of $1,252,392.43 against both Respondents:

> MR. JOHNSTONE: If you answer questions 1 and 2 yes, please assess damages...**The damages are the same that we assert against both of these entities. Okay. So of this amount, you've got to decide how much you want to put against the sanitary board and what you want to put against Burgess and Niple.**

(JA 3297-98 (emphasis added).)

In addition, during the jury's deliberations, Petitioner's counsel again confirmed that it sought a single recovery against both Respondents. Upon the jury returning after its first round of deliberations, the Jury Foreperson stated to the Court, believing that the jury had a valid verdict, "we got it right, this time," even though the verdict form was incomplete in that the jury had left the damages portion against B&N blank. (JA 3323-36.) After reading the incomplete verdict form aloud, the Circuit Court directed the jury to "return to the jury room" to permit the Court to "address some issues with counsel." (JA 3323-36.) The Circuit Court then informed counsel that the jury left the verdict form blank as to damages against B&N after finding B&N 90% negligent

and J.F. Allen 10% negligent, noting that the jury "got that they [were] supposed to give one recovery **but may not have apportioned it among the defendants**" and determined that what the Court needed to do was to "**flesh out if it [was] their intent to assess the entire, [1.3] million dollars, to the Sanitary Board, but by virtue of the fact they have found negligence in the amount of [90%] as to [B&N], if they had intended to apportion and percentage of that to them.**" (JA 3323-36 (emphasis added).) Petitioner's counsel agreed with the Court's concern: "Yes, your Honor. **Did they intend for that to be zero damages or was it their intention that the [1.3] million be split between the defendants.**" (JA 3323-36 (emphasis added).)

Notably, Petitioner does nothing on appeal to address its own comments to the Circuit Court and the jury during the trial itself, which make clear Petitioner sought recovery for a single injury under two legal theories. Moreover, Petitioner presents no evidence from the trial transcript or record to refute these comments or the fact that it sought recovery for a single injury against both Respondents for a total amount of $1,252,392.43. Furthermore, Petitioner does not sufficiently address why the Court on appeal should set aside the Circuit Court's findings of fact on this issue, as this Court must review the Circuit Court's findings of fact under a clearly erroneous standard. (JA 1388-1406, ¶ 13.) *See, e.g., Cantrell v. Cantrell*, 242 W.Va. 116, 829 S.E.2d 274 (2019); *Robertson v. B.A. Mullican Lumber & Mfg, Co., L.P.*, 208 W.Va. 1, 537 S.E.2d 317 (2000).

Rather than addressing the trial record directly, Petitioner instead attempts to utilize the layout of the parties' jury verdict form to theorize that the jury intended to make two separate awards in the "two separate spaces for the express purpose of allowing the jury to make the award as to each defendant that it found appropriate." (Pet's Brief, at 12.) It is not in dispute that the jury verdict form was organized into separate sections with interrogatories to understand the jury's

findings and conclusions. However, the fact that the jury had "two separate spaces" on the jury verdict form to fill out is immaterial and does not alter Petitioner's presentation of its case or its comments to the Circuit Court and jury at trial. As reflected in the trial record, Petitioner's counsel specifically instructed the jury to take that jury verdict form—broken down into separate sections against the two Respondents—and **"decide how much you want to put [of the same damages asserted against both Respondents] against the sanitary board and what you want to put against Burgess and Niple."** (JA 3297-98 (emphasis added).) Petitioner's appellate arguments to the contrary are unavailing.

Notably, the revisionist argument Petitioner raises on appeal has already been considered and rejected by the trial court. As reflected in the record, the Circuit Court did not hesitate to reject Petitioner's argument during the post-trial phase of this case, when Petitioner argued that it did not seek a single recovery under two legal theories:

> THE COURT: The instructions that went to the jury were about one single recovery with respect to dual theories.
>
> MR. JOHNSTONE: Well, no. I mean, I don't agree with that.
>
> . . .
>
> THE COURT: There are two causes of action which jointly result in damages. And that's what happened. Right?
>
> . . .
>
> THE COURT: . . . When you submitted the REA, let's just be honest. When you submitted the REA, you believed when you were submitting that as your damages- -
>
> MR. JOHNSTONE: All the contract damages we - -
>
> THE COURT: All the damages you could.
>
> MR. JOHNSTONE: Well, contract damages. I mean.
>
> THE COURT: That's not my recollection of the way it was presented.
>
> MR. JOHNSTONE: Well, I mean, they can cite to you what - - no one ever said, even in the closing when I wrote the number down, what I said --

THE COURT: You wrote the number down?

MR. JOHNSTONE: Yeah. And I said, "We expect these damages. You figure out who pays what all now."

THE COURT: Right. You - - figure out who pays what. This is all you can give - -
MR. JOHNSTONE: No.

THE COURT: - - and you got to divvy it up between these two - -

MR. JOHNSTONE: I didn't say that.[4]

. . .

THE COURT: That certainly was my - -

. . .

THE COURT: Under the law, that's one single recovery in different causes of action and alleged wrongs contributing to that recovery.

(JA 5155-60.)

In essence, Petitioner's claims against Respondents arose from the construction contract it entered into with CSB: (1) J.F. Allen had a contract with CSB; (2) B&N was designated as Engineer, (3) J.F. Allen did not have a contract with B&N, and (4) B&N would communicate directly with and make recommendations to CSB as the impartial and unbiased "referee" during the Project (5) before CSB could take action or make payments to J.F. Allen.[5]

Clearly, the Circuit Court found no merit in Petitioner's post-trial argument, and this Court should also reject it on appeal. Almost two years have passed since the trial in this matter.

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[4] *Compare* JA 3297-98: While explaining the jury verdict form during closing argument at trial, Petitioner's counsel informed the jury and the Circuit Court that Petitioner sought a single recovery of $1,252,392.43 against both Respondents:

> MR. JOHNSTONE: If you answer questions 1 and 2 yes, please assess damages...**The damages are the same that we assert against both of these entities. Okay. So of this amount, you've got to decide how much you want to put against the sanitary board and what you want to put against Burgess and Niple.**

[5] *See also* JA 5160-61 ("**THE COURT**: But the negligence claims against [B&N] contribute to and are the cause of the alleged breach, right? **MR. JOHNSTONE**: Well, yeah . . . **MR. JOHNSTONE**: No, it's not the cause of the breach. The breach was by CSB. But as referee - - . . . [B&N] could've said "Please pay," and they didn't. **THE COURT**: Right. So it contributes to the fact you didn't get the $1.2 million.").

However, it is still clear that Petitioner's case at trial consisted of two legal theories, and a maximum recovery of $1,252,392.43 to "be split between the defendants." (JA 3323-36.) For these reasons, the Court should reject Petitioner's faulty attempt to rewrite history. Moreover, the Circuit Court's findings on the damages portion of the verdict are clear and should not be reversed or remanded on Petitioner's asserted grounds.

2. The Circuit Court Erred in Admitting into Evidence the Expert Report Prepared by J.F. Allen's Expert, Bryon Willoughby, Which Report Was, in Fact, Considered by the Jury Resulting in Substantial Error.

On separate and independent grounds, the Court should reject Petitioner's attempt to retroactively change the nature of its case in Assignments of Error I-V through witnesses who lightly mentioned in testimony that J.F. Allen suffered losses on the Project up and above the $1.25 million requested by Petitioner at trial. In support of its argument, Petitioner states that "the most compelling evidence to support the jury's verdict was the testimony of Bryon Willoughby," who testified that J.F. Allen spent three million dollars more on this Project than it had budgeted. (Pet's Brief, at 16.) Petitioner thus hangs its entire appeal on one sentence in an eight-day trial, and on an expert report (the REA) that should never have been admitted by the Circuit Court to the jury in the first place. Despite Petitioner's contentions, the $3 million was <u>not</u> included in Petitioner's single $1.25 million "claim" against both Respondents under two legal theories at trial. The Court should reject Petitioner's appeal based on Petitioner's revisionist theory and the Circuit Court's clear error.

During the trial, Petitioner asserted that Mr. Willoughby's testimony and the "Request for Equitable Adjustment" (created by Mr. Willoughby) was Petitioner's "claim." On appeal, however, Petitioner is attempting to use Mr. Willoughby's testimony and his REA to the opposite effect. Now, Petitioner asserts that the REA was not just J.F. Allen's "claim."

The fact that Petitioner attempts to now utilize Mr. Willoughby's testimony and his expert report to change history on appeal further demonstrates why the report should not have been admitted to the jury in the first place, and why the Court should reject Petitioner's argument regarding its new "claim" on appeal. Overruling the objections of both B&N and CSB, the Circuit Court committed reversible error by admitting the "Request for Equitable Adjustment" ("REA") document authored by J.F. Allen's expert, Byron Willoughby, into evidence as Exhibit 3. (JA 2087.) Specifically, Exhibit 3 was J.F. Allen's attempt to establish its damages in this case via the REA submitted approximately six months *after* J.F. Allen's request for Final Payment and B&N's recommendation for Final Payment had been made (i.e. when the contract was already over). The REA should not have ever been submitted to the jury as substantive evidence for consideration during deliberations, and Petitioner's use of Mr. Willoughby's testimony in support of its arguments on appeal makes clear that the Circuit Court should not have permitted the expert report to go back to the jury during deliberations and that such action was prejudicial to the Respondents at trial.

On days one and two of the trial, CSB objected to the admission of the REA into evidence as an expert report and as a hearsay document. (JA 1574; JA 1618; JA 1622.) While the lower Court was considering B&N and CSB's objections, J.F. Allen represented that the document constituted its claim and should be admitted. (JA 1571-79; JA 1622.) J.F. Allen represented that, at the time it was prepared, the REA was not prepared by an "expert," but by a "consultant," and that it was not prepared in anticipation of litigation. (JA 1573.) Supposedly, Mr. Willoughby and J.F. Allen worked together to create the document. (JA 1572-73.)

Importantly, during day two of the trial, the Circuit Court agreed with Defendants that Exhibit 3 was "Mr. Willoughby's document." (JA 1615.) The Circuit Court also noted that J.F.

Allen's counsel did not refute that Exhibit 3 was a hearsay document. (JA 1622-23.) With these remarks, however, the Circuit Court decided to delay ruling on the admissibility of Exhibit 3 and take up the matter at a later time. (JA 1624.)

Through testimony in the case by J.F. Allen's management[6] and by Mr. Willoughby himself, it was revealed that the document was prepared solely by Mr. Willoughby in advance of litigation and at the express direction of J.F. Allen's attorney. (JA 2084-86; JA 2236; JA 2239-40; JA 1447 ("[E]xhibit 3 was prepared by [J.F. Allen's] expert").)[7]

During Mr. Willoughby's testimony, J.F. Allen's counsel moved for Exhibit 3's admission into evidence and CSB objected again based on its previous objections. The Circuit Court, however, overruled the objections and admitted the REA without explanation despite the testimony and evidence in the record in support of non-admissibility. (JA 2087.)

J.F. Allen's expert report should not have been submitted to the jury as substantive evidence. The admission of this document was highly prejudicial to the Respondents below. By admitting the expert report, the Circuit Court improperly permitted the jury to take this report of J.F. Allen's expert into the jury room for deliberations. (JA 1618.) *See* W.Va. R. Evid. 103(a), (d) ("To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.").

Additionally, the document is itself hearsay and contained within it are multiple hearsay statements from J.F. Allen—thus constituting double hearsay. (JA 1619; JA 1622.) *See* W.Va. R. Evid. 802; *see also State v. Lambert*, 236 W.Va. 80, 96, 777 S.E.2d 649, 665 (2015) ("[A] party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying

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[6] *See* JA 1558 ("I actually had to hire a third-party expert to help me wade through [capturing the true costs].").

[7] *See also* JA 1573-74 ("You know, the expectation at the time [of the REA's preparation] was this would be litigated because of request to correct the adjustment.").

expert used the hearsay as the basis for his testimony") (citations omitted). As the REA contained opinions and estimations by a third-party that were offered for their truth, the REA was inadmissible hearsay. For that independent reason, the document should not have been admitted.

Importantly, the Circuit Court's error in this regard was not harmless. It is clear that the jury consulted the document because the jury specifically asked for a portion of it during deliberations. During deliberations, the jury did not understand how to calculate breach of contract damages against CSB, and it sent multiple notes to the Court for assistance. Counsel for J.F. Allen had previously used a demonstrative exhibit poster board[8] listing the cost information provided by Mr. Willoughby's REA, and the jury sought clarity on how to find that information for their breach of contract damages calculation. (JA 3319-20.)

Not only did the jury actually utilize Exhibit 3, but the decision to admit the REA into evidence clearly affected the outcome of the trial. For instance, the poster board utilized by J.F. Allen for demonstrative purposes during the trial listed the amount of total damages J.F. Allen sought against both CSB and B&N—albeit under two different theories of liability—for a total amount of $1,252,392.43. (JA 3297-98.) However, the REA lists $1,309,943, and the jury awarded $1,300,000.20 against CSB alone, exceeding the total amount of damages sought against the two defendants.[9]

8

Cumulative Loss of Productivity	$90,316
Temporary Paving Issue	$4,790
Temporary Paving Issue Interest[5]	$232,485
Restoration Costs	$37,274
Extended General Conditions Costs	$75,695
Additional Asphalt Type A-3 Repair Costs	
Contract Balance	$146,320.43

$1,252,392.43

In accordance with General Conditions 10.C5 Claims, please consider this as a Claim f
adjustment in Contract Price and Time.

[9] J.F. Allen does not dispute this. *See* JA 1233 ("The jury's verdict awarding damages against the CSB . . . represents a close approximation of the amount claimed as contract damages in JFA's [REA].").

Accordingly, the error in admitting the report into evidence was not harmless, and it clearly affected CSB's substantial rights and the outcome at trial. Moreover, the fact that Petitioner now attempts to use Mr. Willoughby's testimony and the REA to support its retroactive alteration of its theories presented at trial further supports its unreliability, the confusion it caused the jury during deliberations, and the prejudicial effect it had on CSB at trial.

B. PETITIONER'S ASSIGNMENT OF ERROR I FAILS BECAUSE THE CIRCUIT COURT DID NOT ERR IN FINDING THE JURY'S VERDICT INCONSISTENT AND GRANTING DEFENDANTS A NEW TRIAL AS TO DAMAGES.

In its first assignment of error, Petitioner claims the Circuit Court committed error by finding that the jury verdict rendered in this case was inconsistent and by awarding the Respondents a new trial as to damages on that basis. Notably, Petitioner concedes that "**when the verdict form was initially received it did, in fact, contain an inconsistency**," and agrees the Circuit Court properly returned the jury for further consideration in accordance with Rule 49 of the West Virginia Rules of Civil Procedure. (Pet's Brief, at 10 (emphasis added).) According to Petitioner, however, the jury's initial and incomplete verdict—$1,300,000.20 against CSB, a finding of 90% negligence on the part of B&N and 10% negligence against Petitioner, and the damages portion against B&N left blank—was the <u>only</u> inconsistent verdict rendered by the jury at the trial in this matter. This argument is not logical in light of the verdict ultimately rendered, and, in fact, mischaracterizes the true nature of the Circuit Court's findings during and after the trial in this matter.

For instance, Petitioner appears to speculate (for the first time on appeal) that the Circuit Court must not have found any inconsistencies in the verdict at the time of entry of judgment because Rule 49 of the West Virginia Rules of Civil Procedure would not have permitted the Circuit Court to enter an inconsistent verdict. In support of this argument, Petitioner mistakenly asserts that the Circuit Court did not return the jury for further consideration after the jury's second

attempt at deliberation "but, instead, finding no inconsistency, directed the entry of the judgment upon the jury's answers and verdict." (Pet's Brief, at 11.) This argument is simply false.

Here, the Circuit Court returned the jury twice to work out the verdict's inconsistencies, and ultimately concluded that the source of confusion would not be resolved by a third attempt at deliberation. The Circuit Court did not, as Petitioner alleges, enter judgment at that time because it found no inconsistency. Instead, the Circuit Court chose in its discretion to dismiss the jury and directed counsel to submit post-trial briefing. (JA 1388-1406, ¶ 53.) In fact, the Circuit Court expressed its present sense impression and concerns with the verdict at trial:

> THE COURT: **I'm going to suggest strongly that I have concerns that the verdict that we had could be problematic. It may not be based on law, reason or judgment.**

(JA 3342-43 (emphasis added).) Thereafter, the Circuit Court did not enter judgment until approximately one month after the trial's conclusion, on March 1, 2018. (JA 1129-35.)

Based on the record in this case, it is clear the Circuit Court had significant concerns with the second and final verdict rendered by the jury. Contrary to Petitioner's position, it would be incorrect in light of the circumstances and record of this case to conclude that the Circuit Court entered judgment based on the jury's verdict because it found no inconsistency and because Rule 49 would not have permitted the Circuit Court to enter an inconsistent verdict. Indeed, the Circuit Court clearly found the verdict problematic and later entered judgment based on that verdict anyway, directing that the parties submit post-trial briefs.

Accordingly, the error was not in the Circuit Court granting Respondents a new trial as to damages based on the inconsistency of the verdict—because it was, among other concerns, inconsistent. Instead, the Circuit Court erred when, rather than ordering a new trial or returning the jury for another attempt at deliberation, the Circuit Court instead entered judgment based on

the inconsistent and invalid verdict it found problematic, and not based on law, reason or judgment. Furthermore, the Circuit Court erred when it failed to grant Respondents a new trial with regards to the jury's *liability* determination, as well as damages, based on the inconsistent verdict rendered. [10] (JA 1388-1406, ¶ 47.)

1. The Circuit Court Erred in Entering Judgment Based on the Jury's Inconsistent and Invalid Verdict.

Over CSB's objections, the Circuit Court entered judgment based on the jury's inconsistent verdict. (JA 1388-1406, ¶ 25.) As clearly contemplated by Rule 49 of the West Virginia Rules of Civil Procedure, when a verdict rendered by a jury is inconsistent, the circuit court may return the jury for further consideration of its answers and verdict (in an attempt to resolve the inconsistency) or the court may order a new trial. Here, the verdict rendered triggered the procedure and remedies of Rule 49. Under Rule 49, if a verdict rendered by the jury is inconsistent in that the answers to special interrogatories are inconsistent with each other and one or more is likewise inconsistent with the general verdict, "the court ***shall not direct the entry of judgment*** but may return the jury for further consideration of its answers and verdict ***or may order a new trial***." W. Va. R. Civ. P. 46(b) (in part) (emphasis added). In general, a court should not direct that an inconsistent verdict be entered.

Generally, a verdict is inconsistent when there is no rational, non-speculative way to reconcile two essential jury findings. Franklin D. Cleckley, *Litigation Handbook on West Virginia Rules of Civil Procedure* 1173 (5th ed. 2017). To determine whether a conflict in the verdict can be reconciled, a trial court must ask whether the jury's answers could reflect a logical and probable

[10] *See Petitioner The Sanitary Board of the City of Charleston, West Virginia's Brief*, Supreme Court of Appeals of West Virginia Docket No. 19-0398, styled *The Sanitary Board of the City of Charleston, West Virginia v. J.F. Allen Corporation*, at Assignments of Error "D" and "E," incorporated fully by reference herein.

decision on the relevant issues submitted. *Id.* If a trial judge concludes that an inconsistent verdict reflects jury confusion or uncertainty, the trial judge has a duty to clarify the law governing the case and resubmit the verdict for jury decision. *Jones v. Southpeak Interactive Corp. of Delaware*, 777 F.3d 658, 674 (4th Cir. 2015).

To set aside a jury verdict, the Court must find that the verdict was against the clear weight of the evidence, based on false evidence, or will result in a miscarriage of justice. Syl. Pt. 3, *In re State Public Bldg. Asbestos Litig.*, 193 W.Va. 119, 454 S.E.2d 413 (1994). A new trial should be granted where it is "reasonably clear that prejudicial error has crept into the record that substantial justice has not been done." *Sneberger v. Morrison*, 235 W.Va. 654, 776 S.E.2d 156, 175 (2015). Moreover, "a verdict of a jury will be set aside where the amount thereof is such that, when considered in light of the proof, it is clearly shown that the jury was misled by a mistaken view of the case." Syl. Pt. 3, *Raines v. Faulkner*, 131 W.Va. 10, 48 S.E.2d 393 (1947).

In support of its position that the verdict was not inconsistent, Petitioner cites *Hopkins v. Coen* to demonstrate to this Court what is meant by an "inconsistent verdict." In *Hopkins v. Coen*, the Sixth Circuit determined that when faced with inconsistent verdicts, the trial court had an initial duty to send the jury back with instructions in order to attempt to alleviate the confusion. The Court determined, however, that remand for a new trial was appropriate because the judgments could not be reconciled. 431 F.2d 1055, 1059–60 (6th Cir. 1970).

While *Hopkins* is important because it reflects the Circuit Court's duty to send back the jury when faced with inconsistent verdicts, Petitioner ignores the fact that this case demonstrates just *one example* of an inconsistent verdict. It is true that the facts of the case at hand do not fit squarely into the facts of the *Hopkins* case (considering it was not a breach of contract case), but that point is irrelevant as there exist a multitude of examples which demonstrate a Court's response

when faced with inconsistent verdicts. Indeed, Courts routinely order new trials when verdicts are inconsistent and cannot be reconciled with the instructions given by the Court or what the law requires.[11] Petitioner simply provides one example of error that can occur during a jury's deliberations and one example of how a verdict may be inconsistent. Certainly, the *Hopkins* case does not stand for the proposition that no other grounds for an inconsistent verdict warranting a grant of new trial exist.

Ultimately, the jury's logically incompatible assessment of damage awards on the verdict form in this case reveals a fundamental misunderstanding or confusion of the jury, which is supported by the jury's comments and conduct during deliberations as well. On January 31, 2018, the jury began its deliberations after receiving the Circuit Court's instructions of law. As the jury deliberated, the jury foreperson brought notes to the Court. (JA 1179-85.) It became clear through the jury's notes and conduct that the jury was profoundly confused as to what it was supposed to do in rendering its verdicts and assessing damages. For example, the jury foreperson sent the Court a note about how to assess the breach of contract damages against CSB: "Do we assess the dollar amount for Question 3 on Part II? And, if yes, on what basis?" (JA 1179-85; JA 3315; JA 3318.) The jury, twenty-five minutes later, then followed up with a note regarding the same question:

[11] *See, e.g.*, *Kosmynka v. Polaris Indus., Inc.*, 462 F.3d 74, 87 (2d Cir. 2006) (vacating a judgment because of an inconsistent verdict finding negligence but no strict liability when the court instructed the jury "negligence mandated a corollary finding of strict products liability"); *Custer v. Terex Corp.*, 196 F. App'x 733, 737-38 (11th Cir. 2006) (unpublished) (remanding for a new trial because it was inconsistent for a jury to award damages that is 30% of the stipulated amount when the defendant is more than 50% at fault under the law); *Essex v. Prince George's Cty Maryland*, 17 F. App'x 107, 117 (4th Cir. 2001) (unpublished) (granting a new trial where the court could not harmonize jury verdict reaching different outcomes on claims that hinged on the same underlying contentions); *Fox v. Dynamark Sec. Ctrs., Inc.*, 885 F.2d 864 *4 (4th Cir. 1989) (remanding for a new trial due to inconsistent verdict because "there is no theory, legal or factual" on which the inconsistent verdicts can be reconciled"); *Frain v. Andy Frain, Inc.*, 660 F. Supp. 97, 100 (N.D. Ill. 1987) (ordering new trial due to inconsistent verdict where jury reached different conclusions on three claims that required the same proof).

"Part II, Question 3. 'If the answer to question 1 and 2 are YES, please assess the breach of contract damages, if any, in dollars and cents below.' What is this amount based on?" (JA 1179-85; JA 3318-19.) In addition, the jury sent a note to the Court regarding the amount in damages requested by J.F. Allen: "Mr. Johnstone had a chart that had a break-down of damages asked for. What exhibit is that?" (JA 1179-85; JA 3319-20.) The jury was referring to the demonstrative poster board "chalk" prepared by J.F. Allen's counsel, wherein counsel wrote in marker the sum of $1,252,392.43, reflecting J.F. Allen's total requested damages.

Moreover, during deliberations, the jury prematurely returned an incomplete verdict form to the Circuit Court as "complete." However, the jury left blank the amount assessed in compensatory damages against B&N for negligence in Part IV, Question 3. (JA 3327-34.) It is not in dispute that this initial verdict rendered by the jury was inconsistent. (Pet's Brief, at 10.) At this point, prior to a complete verdict being rendered by the jury, counsel for CSB objected and requested the Circuit Court declare a mistrial. (JA 3327-34.) After consulting with counsel, the Circuit Court sent a note to the jury to point out its error: "Was it your intent to award 0 damages against Burgess & Niple?" (JA 1179-85; JA 3335-36.) In response, the jury returned a note to the Court at approximately 9:25 p.m. asking what amount it was supposed to assess for that question "or do we come up with the $ amount?" (JA 1179-85; JA 3336-37.) After originally leaving the amount in damages against B&N blank, which seemed to indicate a $0 damage award, the jury ultimately returned a shocking verdict of $3,000,000.20 against B&N. (JA 3337-38.)

Despite Petitioner's arguments to the contrary, the total damage award was more than *three times* the full amount of J.F. Allen's alleged injury. Not only is the damage award impermissibly excessive, but the verdict is clearly inconsistent as there is no rational, non-speculative way to reconcile the jury findings against the two Respondents, and calls into question the jury's liability

determination as well. (JA 1388-1406, ¶ 57.) In fact, because of the jury confusion, it appears the verdict impermissibly awards negligence damages against CSB, which is prohibited. (JA 1388-1406, ¶¶ 58-59.) Under the West Virginia Governmental Tort Claims and Insurance Reform Act, CSB as a municipal utility is not liable for another party's negligence. *See* W. Va. Code § 29-12A-4(b)-(c) (recognizing limited exceptions to immunity). This is not a joint and several liability case, and CSB can only be held liable for breach of contract damages. As a result, the $1.3 million award—in excess of the $1.25 million total requested—calls into question CSB's liability. *See US ex rel Pileco, Inc. v. Slurry Systems, Inc.*, 804 F.3d 889, 892 (7th Cir. 2015) (determining that retrial of breach of contract claims was warranted, where ". . . the jury's confused responses to the damages provisions in the verdict form called into doubt the dependability of the jury's other findings"); *Wood v. Holiday Inns, Inc.,* 508 F.2d 167, 175 (5th Cir. 1975) ("Where verdicts in the same case are inconsistent on their faces indicating that the jury was confused, a new trial is certainly appropriate and may even be required.").

There are other examples that came up during, and after, the course of the trial demonstrating juror confusion and, at a minimum, a disregard of the Circuit Court's basic instructions. For example, the Jury Foreperson, on her public Facebook page, was posting about her jury duty despite the Court's instructions not to discuss the trial with anyone or via social media. (JA 1186-91.) In addition, one of the other members of the jury appeared for jury duty for a trial that began on February 5, 2018, *only five days after* the verdict was rendered against CSB. During *voir dire*, this juror indicated that she had participated in the deliberations to decide the verdict rendered in this case, yet she could not communicate to the attorneys what this case was about, or even who won.

Here, after two unsuccessful attempts, the Circuit Court concluded that the source of the confusion would not be resolved, and in error, elected not to re-submit to the jury any further clarifying instructions for the jury to attempt to correct the inconsistent verdict. *See* W.Va. R. Civ. P. 49. Instead, it dismissed the jury and directed counsel to submit post-trial briefs. (JA 3340-43.) The resulting verdict, however, is clearly inconsistent and improperly awarded excessive damages based on sheer speculation. The jury's notes during their deliberations indicate that the jury mistakenly thought it could just "come up with" the damages amounts irrespective of the evidence. Moreover, the jury's submissions during its deliberations and resulting verdict clearly reflect that—for whatever reason—the jury did not follow the Circuit Court's instructions regarding evidence and damages.

For all of these reasons, it is difficult to comprehend Petitioner's assertion that there is no inconsistency among the jury's findings. The jury's assessment of damages was inherently inconsistent given the facts and law in the record. As reflected in the verdict, at Part II, Question 3, the jury listed $1,300,000.20 for the breach of contract damages assessed against CSB while in Part IV, Question 3, the jury listed $3,000,000.20 against B&N for negligence. (JA 1124-28.) Because J.F. Allen sought approximately $1.25 million <u>total</u> in damages for its one injury under two distinct theories of liability, there was no non-speculative way for the Circuit Court to reconcile the jury's findings between the Respondents, and a new trial was necessary. (JA 1388-1406, ¶¶ 48-63; JA 3297-98.)

In *Hopkins v. Coen*, the Sixth Circuit determined that when faced with inconsistent verdicts, the trial court had an initial duty to send the jury back with instructions in order to attempt to alleviate the confusion. The Court determined, however, that remand for a new trial was appropriate because the judgments could not be reconciled:

> Were the errors in the verdicts merely clerical in nature, the problem would easily be remedied. [citations omitted] Were this Court able to divine that one of the judgments in these consolidated cases was intelligently rendered by the jury, we should remand only the ambiguous one for retrial. [citations omitted] ***But the error is not merely clerical: the verdicts, as returned, reflect a lack of understanding on the part of the jury.*** Because the confusion appears to have been general, and insofar as retrial of one of these consolidated cases will require proof of facts of the other, the judgments entered . . . against the defendants . . . must be remanded to the District Court for a new trial.

431 F.2d 1055, 1059–60 (6th Cir. 1970) (emphasis added).

A new trial was also the appropriate remedy here on both liability and damages. The Circuit Court did not err when it later set aside the jury's damages determination and granted CSB a new trial on damages. However, because the Circuit Court did not resubmit the final verdict before the jury was discharged—and because it is not possible now to reconcile the inconsistent verdict without additional factual findings on both liability and damages—the verdict as a whole should have been set aside and a new trial granted. Therefore, the Circuit Court should not have entered judgment based on the jury's inconsistent verdict, but should have either (1) returned the jury for another attempt at deliberation; or (2) ordered a new trial. Because the Circuit Court did not return the jury for another attempt at deliberation, the Court should uphold the Circuit Court's determination as to a new trial on damages but reverse its findings as to liability, or remand for a new trial on both damages <u>and</u> liability.

C. ASSIGNMENTS OF ERROR II-V FAIL BECAUSE THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE JURY'S VERDICT WAS EXCESSIVE, UNSUPPORTED BY THE EVIDENCE IN THE RECORD, AND IN VIOLATION OF THE SINGLE-RECOVERY RULE. SIMILARLY, THE CIRCUIT COURT DID NOT ERR IN GRANTING DEFENDANTS A NEW TRIAL ON DAMAGES BECAUSE REMITTITUR WAS NOT AVAILABLE TO RESOLVE THE VERDICT'S INCONSISTENCIES.

Despite Petitioner's attempt to now present its theories as separate and independent causes of action entitled to the individual excessive verdicts rendered, and despite Petitioner's attempt to force a cross-claim on CSB despite West Virginia's well-settled law that cross-claims are

permissive and not mandatory, it is clear Petitioner sought a single recovery under two theories of liability. *See Westwood v. Fronk*, 177 F.Supp.2d 536 (N.D. W.Va. 2001). Accordingly, Petitioner is precluded from receiving double recovery in West Virginia for the overall injury alleged. *See Cleckley*, at 1360 ("It is well established that double recovery is precluded when alternative theories seeking the same relief are pled and tried together. If two claims arise from the same operative facts, and seek identical relief, an award of damages under both theories will constitute double recovery."); *see also Meade v. Slonaker*, 183 W.Va. 66, 69, 394 S.E.2d 50 (1990) ("A plaintiff may not recover damages twice for the same injury simply because he has two legal theories.").

Furthermore, to the extent Petitioner's "additional losses" are in the nature of damages for pain and suffering, Petitioner cannot recover these damages as a corporation, and its theory that the verdict against B&N is proper as a stand-alone verdict because it can recover these damages is improper. "Pain and suffering" constitute non-economic damages and refer to what an injured plaintiff can recover from a defendant caused by the negligence of that defendant, generally in a personal injury action or action that involves medical or hospital expenses or mental or physical pain. None of these factors are present here and the Petitioner corporation cannot suffer mental or physical pain. *See Delong v. Kermit Lumber & Pressure Treating Co.,* 175 W.Va. 243, 245, 332 S.E.2d 256 (1985); *Giambalvo v. U.S.*, 2015 WL 4132042, at *14 (N.D. W.Va. July 8, 2015); *Jones v. U.S.*, 2014 WL 4495110, at *20 (N.D. W.Va. Apr. 7, 2014); *see also Scott v. Vandiver,* 476 F.2d 238, 243 (4th Cir. 1973) ("Ascertainment of damages arising from personal injuries involves questions that are essentially factual, and an award by a district judge will not be upset unless it is clearly erroneous."); *Front Royal v. Town of Front Royal,* 135 F.3d 275, 284 (4th Cir. 1998) (("A finding is clearly erroneous when, although there is evidence to support it, on the entire

evidence the reviewing court is left with the definite and firm conviction that a mistake has been committed") (quoting *Faulconer v. Comm'r,* 748 F.2d 890, 895 (4th Cir.1984))).

Because *both* verdicts exceed the total amount requested by Petitioner, remittitur of this verdict was impossible. To reconcile the findings and make a determination as to remittitur, the Circuit Court would have had to pick and choose factual findings or make additional factual findings and therefore improperly usurp the jury's function. *See Wood,* 508 F.2d at 175 ("Where verdicts in the same case are inconsistent on their faces indicating that the jury was confused, a new trial is certainly appropriate and may even be required."). Petitioner's response to the jury's clear error is that the Circuit Court could have simply (1) found that Petitioner was not limited to a maximum recovery of approximately $1.25 million—even though that is what it specifically requested at trial—or (2) addressed any issues in the verdict by remittitur. The first "solution," as discussed previously, is incorrect as Petitioner presented a single-recovery theory of $1.25 million at trial. For the second "solution," Petitioner misunderstands the grave nature of the issues associated with the Circuit Court exercising remittitur in this case.

As discussed previously, the gravamen of the problem is that it would be impossible for the Circuit Court to discern which of the two Respondents should have to pay (or, if apportioned, how much each would pay) if the Court entertained a motion to remit the damages without the Court improperly assuming the function of the jury and making additional factual findings. In post-trial proceedings and on appeal, this verdict as rendered cannot be reconciled or fixed by procedures generally available to the Court. Based on the verdict as rendered, it cannot be determined whether the jury, in actuality, awarded only those damages against CSB that it found to have proximately resulted from CSB's breach and awarded only those damages against B&N

that it found to have proximately resulted from B&N's negligence. Accordingly, the Circuit Court did not err in finding remittitur improper and granting Respondents a new trial as to damages.

V. CONCLUSION

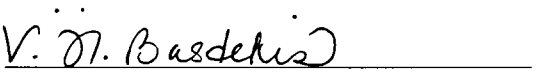
Based on the foregoing facts, authorities, and the arguments made in *The Petitioner The Sanitary Board of the City of Charleston, West Virginia's Brief*, Docket No. 19-0398, the Charleston Sanitary Board of the City of Charleston, West Virginia respectfully requests that this Honorable Court deny Petitioner's Brief in its entirety. In addition, for the reasons set forth in CSB's *Petitioner's Brief*, CSB respectfully requests the entry of an Order reversing the Circuit Court's *Order Granting Defendants a New Trial on Damages and Denying Defendants' Motions for Renewed Judgment as a Matter of Law* as to its determination on judgment as a matter of law. In the alternative, CSB requests that this Honorable Court remand the matter for a new trial on both liability and damages in accordance with this Court's instructions.

Respectfully submitted,

THE CHARLESTON SANITARY BOARD OF THE CITY OF CHARLESTON, WEST VIRGINIA

By Counsel

Jackson Kelly PLLC



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