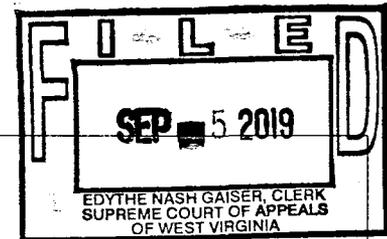


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 19-0398



**THE SANITARY BOARD OF THE
CITY OF CHARLESTON, WEST
VIRGINIA a municipal utility,
and BURGESS AND NIPLE, INC.,
an Ohio Corporation,**

Defendant Below/Petitioner,

V.)

**J.F. ALLEN CORPORATION,
a west Virginia Corporation,**

Plaintiff Below/Respondent.

Appeal from a final order
of the Circuit Court of Kanawha
County (14-C-1182)

**RESPONSE BRIEF OF J.F.
ALLEN CORPORATION**

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

After a long, arduous and expensive litigation this case was tried to a jury over the course of eight days in January of 2018, more than three and a half years after J.F. Allen Corporation's Complaint was filed in June of 2014. Throughout the course of this case, The Sanitary Board has repeatedly argued that J. F. Allen's claims are barred by the terms of its contract. This argument has been consistently rejected by the Circuit Court in response to the Sanitary Board's Motion for Summary Judgment before trial, its Motion for Judgment is a Matter of Law during trial and its post-trial Motion, and by The Supreme Court of Appeals upon prior Appeal in this case. As noted by The Supreme Court of Appeals in *J.F. Allen v. Sanitary Board of The City of Charleston*, 237 W.Va. 77, 785 S.E.2d 627 (2016), the contract between the parties in this case specifically provides for the adjustment of the contract amount where existing underground facilities are mismarked or unmarked.¹

The Sanitary Board asserts in its statement of the case that J.F. Allen first sought an equitable adjustment to the contract in the form of its Complaint initially filed on June 30, 2014. This is untrue as J.F. Allen submitted evidence at trial that the parties discussed and understood that claims would be submitted after completion of the work. Multiple witnesses testified at trial that J. F. Allen's representatives were told on multiple occasions that its claims would be addressed at the end of the work.² J.F. Allen submitted its claim, in the form of its Request for Equitable Adjustment under letter from its president, Greg Hadjis, dated May 5, 2014.³

¹ General conditions §4.04(b), Jt. Appendix p. 3537-3538.

² Greg Hadjis advised the owner's representatives to make sure everyone was keeping good notes so J.F. Allen could file an appropriate claim (Jt. Appendix p. 1647); J.F. Allen made it known to The Sanitary Board and Burgess & Niple that it intended to make a claim (Jt. Appendix p. 1691-1692, 1785); Allen Shreve told the owner's representatives that J. F. Allen was incurring a lot of costs that it was going to have to be reimbursed for and was told it would be taken care of, "we'll make you good" (Jt. Appendix pp. 2278, 2281-2282); Mr. Shreve received assurance at progress meetings that the Owner and its representative would work with J.F. Allen on the strikes, "we know you have a problem and we are going to work with you" (Jt. Appendix p. 2318).

³ Jt. Appendix pp 4084 et seq.

Regarding the verdicts returned by the Jury after the trial of this action, the Jury expressed no confusion concerning The Sanitary Board's liability. The Jury found The Sanitary Board to be in breach of its contract with J.F. Allen and awarded an amount that approximated the contract damages sought. Questions only arose as to the amount that should be awarded against Burgess & Niple for its professional negligence, which was addressed after the Trial Court returned the Jury for further deliberation on that point.

SUMMARY OF ARGUMENTS

A. i. Throughout the more than five-year pendency on this matter The Sanitary Board has repeatedly argued that J.F. Allen's claims were barred, or that The Sanitary Board was insulated from liability by, the terms of the contract between the parties. These arguments were repeatedly and consistently rejected by the Trial Court, and by the Supreme Court of Appeals upon prior appeal, noting that the contract contains an express provision providing for the adjustment of the contract amount when the contractor encounters mismarked or unmarked existing underground facilities. J.F. Allen proved at trial that it encountered large numbers of mismarked and unmarked existing underground utilities, that it incurred substantial additional costs as a result, that the Sanitary Board, through its project representatives, had adequate notice of these matters but failed to compensate J.F. Allen for its additional costs.

ii. Further, it is not undisputed, as argued by The Sanitary Board, that contractual procedures for filing and preserving claims were not waived or modified. J.F. Allen presented more than sufficient evidence at trial of waiver of the contract protocols for submission of change orders and claims, actual notice by The Sanitary Board and its project representatives, and subsequent oral modifications of the contract, to support the jury's conclusion that The Sanitary Board waived its right to rely on strict adherence to the change order and claims provisions of the Contract or had adequate notice of claims.

B. Admission of J.F. Allen's request for equitable adjustment into evidence did not constitute abuse of the Trial Court's discretion as it was J.F. Allen's claim document submitted, as anticipated by the parties, after the completion of work. This document constitutes a business

record prepared and submitted in the ordinary course of business to support J.F. Allen's claim for an adjustment of the contract amount.

C. Notwithstanding the argument of The Sanitary Board, J.F. Allen's expert witness, Charles Dutill was more than adequately qualified to give opinion testimony concerning the standard of care owed by a project engineer to a contractor in the performance of its duties on a utility construction project. Mr. Dutill is an experienced engineer licensed by the state of Pennsylvania and is not required to be registered by the state of West Virginia in order to give testimony at a trial. The qualifications of an expert witness to testify are set out in the Rules of Evidence at Rule 702 which contains no requirement that an engineer offered to give testimony be registered in the state of West Virginia. Further, as there was no contract between J.F. Allen and the Project Engineer, Burgess & Niple, its duties are established by the common law, a matter within Mr. Dutill's experience and expertise. As such, the Trial Court's qualification of Mr. Dutill to offer opinion testimony as an expert witness was not an abuse of discretion.

D. The verdict rendered by the jury in this case was not "inconsistent". Justice Cleckley defined "inconsistency" in a jury verdict as where there is no rational, non-speculative way to reconcile two essential jury findings. See, *Cleckley Litigation Handbook on West Virginia Rules of Civil Procedure*, 1173 (5th Ed. 2017). An example of this would be where the jury returns a verdict in favor of both the Plaintiff and Defendant, or where the jury finds no liability on the part of the Defendant but still awards damages to the Plaintiff. In such cases, an inconsistency should be resolved or a new trial awarded, prior to the entry of judgment. In this case there is no inconsistency in the jury's findings and, therefore, judgment was entered upon the jury's verdicts. Although it is true that the jury asked questions during deliberation and was returned for further deliberation to resolve an inconsistency when the space for assessment of damages against Burgess & Niple for the negligence was initially left blank, there is no indication of any impropriety in the verdicts ultimately rendered by the jury in this case. In fact, it would be necessary to engage in speculation to reach the conclusion that the jury did not intend two separate verdicts and awards.

J.F. Allen's claims against the two Defendants in this case are based on separate causes of action and the remedy for each is not dependent on the other. J.F. Allen's remedy for Burgess & Niple's negligence is not limited to or dependent on the damages recoverable under J.F. Allen's contract with The Sanitary Board. The fact that the jury returned awards against both Defendants in this case is neither inappropriate nor should it have been unexpected. The jury verdict form submitted to the jury contained two separate spaces for the express purpose of allowing the jury to make the award as to each Defendant that it found to be appropriate. As such, the Trial Court correctly refused to vacate the Jury's verdict on liability and in fact, should have upheld the verdict against The Sanitary Board in its entirety.

E. The Trial Court did not err in failing to order a new trial on liability. The verdict of the jury was clear as to liability. There was no question or confusion expressed by the jury in finding that The Sanitary Board breached its contract with J.F. Allen and the Trial Court was correct in refusing to disturb its finding on that point. In addition, the jury returned a verdict awarding damages against The Sanitary Board and in favor of J. F. Allen in an amount approximating the contract damages asserted by J.F. Allen in its claim and at trial. The only question requiring further deliberation was the amount of damages to be awarded for Burgess & Niples's negligence. The jury found The Sanitary Board to have breached its contract with J.F. Allen and awarded a sum approximating the amount claimed by J.F. Allen as its contract damages, an amount not susceptible to apportionment. The fact that the jury rendered a separate award against Burgess & Niple does not, in any way, affect its findings as to The Sanitary Board.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent believes that oral argument is necessary under the criteria of Rule 18 of the Rules of Appellate Procedure and that the Court would benefit from oral argument in this case. The Respondent asserts that the case is suitable for a Rule 19 argument as a case involving assignments of error in the application of settled law. The Respondent further asserts that, as the Order appealed from involved error in the application of well settled, existing law, the matter is appropriate for a memorandum decision.

ARGUMENT

A. 1. THE LANGUAGE OF THE CONTRACT ENTITLES J.F. ALLEN TO RECOVER LOSSES INCURRED WHEN IT ENCOUNTERS UNDERGROUND FACILITIES “NOT SHOWN OR INDICATED” ON THE PLANS.

The Sanitary Board continues to argue that its contract with J.F. Allen places all of the risk of loss relating to existing underground facilities on the contractor and that this bars J.F. Allen’s claims for extra work, additional costs, and lost efficiency related to the huge number of unmarked or mismarked underground utilities encountered on this project. First, the testimony reflects that the number of obstructions encountered on this project was far beyond what could have been contemplated by a reasonable contractor preparing a bid for the contract.⁴ More importantly, however, the contract expressly provides for the recovery of such costs. General Conditions Section 4.04,⁵ relating to underground facilities, “Not Shown or Indicated”, provides as follows:

1. If an Underground Facility is uncovered or revealed at or contiguous to the site which was not shown or indicated, or not shown or indicated with reasonable accuracy in the Contract Documents, Contractor shall, promptly after becoming aware thereof and before further disturbing conditions affected thereby or performing any Work in connection therewith (except in an emergency as required by Paragraph 6.16.A), identify the owner of such Underground Facility and give written notice to that owner and to Owner and Engineer. Engineer will promptly review the Underground Facility and determine the extent, if any, to which a change is required in the contract documents to reflect and document the consequences of the existence or location of the Underground Facility. During such time Contractor should be responsible for the safety and protection of such Underground Facility.
2. If Engineer concludes that a change in the Contract Documents is required, a Work Change Directive or a Change Order will be issued to reflect and document such consequences. An equitable adjustment shall be made in the Contract Price or Contract Times, or both, to the extent that they are attributable to the existence or location of any Underground Facility that was not shown or not shown indicated with reasonable accuracy in the Contract Documents and that Contractor did not know of and could not reasonably have been expected to be aware of or to have anticipated. If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, Owner or Contractor may make a Claim therefore as provided in Paragraph 10.05.”

⁴ Jt. Appendix p. 1655.

⁵ Jt. Appendix pp. 3537-3538.

General Conditions, Section 4.04. Thus, the contract not only does not preclude J.F. Allen's claims related to underground utilities "not shown or indicated" on the plans or not shown with reasonable accuracy but, in fact, makes specific provision for such claims and *requires* that an equitable adjustment be made. As stated by the Supreme Court of Appeals in this case, "Given that the contract expressly provided for a possible equitable adjustment of the contract price as a result of the existence of an underground facility not shown on the construction plans, the circuit court's conclusion that J.F. Allen's claims were barred by the contract was clearly erroneous." *J. F. Allen Corp. v. Sanitary Board of the City of Charleston*, 237 W. Va. 77, 785 S. E. 2d 627 (2016).

J.F. Allen has also presented evidence of a number of other claims not related to the additional costs of delays and lost efficiency incurred when unmarked or mismarked utilities were encountered and for which J.F. Allen is entitled to recovery under its Contract with The Sanitary Board. These included costs related to an informal oral agreement relating to payment for temporary paving, extra quantities of concrete, and extra restoration costs. Further, a party to a contract has an obligation to refrain from impeding or interfering with performance by the other party. The Sanitary Board had an express duty to give notice to J.F. Allen prior to allowing its own forces or other contractors to interfere with J.F. Allen's work. The contract required the Board to provide written notice of the conflicting work and to compensate J.F. Allen for additional costs and or interruptions that the conflicting work caused. In this case The Sanitary Board and the City of Charleston, of which it is a part, did allow other contractors to delay or interfere with J.F. Allen's work and failed to give the required notice, causing delays and disruptions in J.F. Allen's performance.⁶

Rather than precluding damages for delays caused by The Sanitary Board's conduct, the contract between the parties specifically provides for additional compensation in such cases, as follows:

⁶ Jt. Appendix pp. 1699-1701.

12.03.B. If Owner, Engineer, or other contractors or utility owners performing other work for Owner as contemplated by Article 7, or anyone for whom Owner is responsible, delays, disrupts, or interferes with their performance or progress of the Work then Contractor shall be entitled to equitable adjustment in the Contract Price or the Contract Times, or both. Contractors' entitlement to an adjustment of the Contract Times is conditioned on such adjustment being essential to Contractors ability to complete the Work with the Contract Times.

General Conditions Paragraph 12.03.B.⁷ So, the various claims asserted by J.F. Allen in its Amended Complaint are not barred by the terms of the Contract but are, in fact, consistent with the types of claims contemplated by the Contract and the law. As such, The Sanitary Board's argument that J.F. Allen accepted the risk of all costs resulting from existing facilities has no more merit now than when previously raised in this case.

A. 2. THE FORMAL REQUIREMENTS OF THE CONTRACT RELATING TO TIMELY WRITTEN NOTICE AND CLAIMS WERE WAIVED OR ABROGATED BY THE SANITARY BOARD'S CONDUCT DURING PERFORMANCE.

As acknowledged by representatives of The Sanitary Board during trial testimony, it is commonplace on construction projects that the parties, when dealing with each other during performance of the work, do not strictly adhere to the formal written notice or change order provisions of their contract. In fact, more often than not, changes in the work or contract amount are adjusted informally. Even when formal change orders are executed they typically do not precede the work to which they relate as the terms of most contracts require. Recognizing these commercial realities, the West Virginia Supreme Court of Appeals has long held that contract provisions providing for timely written notice of changes or claims can be amended, waived, or abrogated by the conduct of the parties. A constructive change may be made by means other than by written change order, such as by oral direction or by knowledge of or acquiescence in some change made necessary by an unforeseen condition. In one often cited case from the Northern District of West Virginia, *Caldwell & Drake v. Schmulbach*, 175 F. 429 (N. D. W. Va. 1909), the Court found an implied obligation to pay the reasonable cost of alterations or requests to perform extra work. The Court stated:

⁷ Jt. Appendix p. 3572.

If, therefore, extra work was performed by the contractors here, under express oral contract upon the part of the Owner personally or by and through its agents, the architects, or under such circumstances implying a consent to be liable therefore, such extra work should be allowed for;

Id. at 437.

In *Ground Breakers, Inc. v. City of Buckhannon*, 188 W. Va. 42, 422 S. E. 2d 519 (1992), the Court combined waiver and subsequent oral modification arguments and found that where unanticipated work became necessary as a result of an unforeseen condition and the need for extra work was known to and discussed by both parties to the contract, and where the contractor testified that the owner orally authorized the additional work, the contractor's claim was not barred by the requirement of a written change order. *Id.* Also, in *W.L. Thaxton Construction Co. v. O.K. Construction Co., Inc.*, 170 W. Va. 657, 295 S. E. 2d 822 (1982), the Supreme Court of Appeals held that the requirement of a written change order could be modified or abrogated by subsequent oral agreement between the parties. *Id.* The Court observed in *W.L. Thaxton Construction*, that there is no more validity in a written contract not to agree orally than there is in an oral contract not to agree in writing and found that whether a written contract had been orally modified was a question of fact for the jury. *Id.*

The Supreme Court of Appeals reaffirmed its adherence to these holdings in this case, expressly acknowledging that documentation of problems encountered during the work by the Owner's on-site representative could constitute written notice. *J. F. Allen Corp. v. Sanitary Bd of the City of Charleston, supra* at 632. The Court further stated, "This Court has recognized that contract provisions providing for timely written notice of changes or claims can be amended, waived, or abrogated by the conduct of the parties." *Id.*

In the appeal in this case from Judge Kaufman's grant of The Sanitary Board's Motion to Dismiss, the Supreme Court of Appeals recognized that actual notice of events on a job-site may be sufficient to satisfy the notice provisions of the parties' contract. The Court recognized that J.F. Allen's complaint alleged that The Sanitary Board had actual notice through its onsite

representative who documented each event as it occurred. The Court stated, “The circuit court wholly ignored the fact that such documentation could constitute a written notice if viewed in the light most favorable to J.F. Allen.” *J. F. Allen Corp. v. Sanitary Board of the City of Charleston*, 237 W. Va. 77, 82, 785 S. E. 2d 627, 632 (2016). Courts of other jurisdictions have also often held that if the owner has actual knowledge of the delay, formal notice may be unnecessary. This is particularly true if the delay is the owner’s fault or under its control. *Chaney and James Construction Company, Inc. v. United States*, 421 F. 2d 728 (Ct. Cl. 1970); *Kelly Electric Inc.*, DOT CAB No. 71-34, 71 B.C.A. (CCH) Section 9127 (1971). For example, in *James Corp. v. North Allegheny School District*, 938 A.2d 474, WL 4208589, 2007 P.A. Commonwealth 636 (November 30 2007), the contractor failed to give notice of a delay within a contractually set period after the event that gave rise to the claim. The court noted that the owner knew that the project was behind schedule and knew the operative facts that gave rise to the delays and the contractor’s claims and allowed the contractor’s claim for delay damages. Sometimes courts have even allowed updates to a critical path method (CPM) schedule to serve as notice of delay. In *Vanderlinde Electric Corporation v. City of Rochester*, 388 N. Y. S. 2d 388, 54 A. D. 2d 155 (1976), the court held that the owner was fully and continuously informed of delays through the monthly schedule updates and that further formal notice was not required.

In other cases, an owner’s course of dealing or informal conversations with the contractor have been found sufficient to meet the requirements of a notice of claim. In *Redondo Construction Corp. v. Puerto Rico Highway & Transport Authority*, 678 F. 3d 115 (1st Cir. 2012), failure to give formal notice of a claim did not prevent a contractor’s claims where the owner had dealt informally with the contractor and had been orally advised of the contractor’s claims and thus had actual knowledge of the claims. As noted above, the West Virginia Supreme Court of Appeals has long recognized that the requirement of a writing can be waived by the conduct of the parties, for example where past billing practices indicate that the writing requirement has been disregarded. *Pasquale v. Ohio Power Company*, 186 W. Va. 501, 413 S. E. 2d 156 (1991); *Ground Breakers, Inc. v. City of Buckhannon*, *supra*.

In this case, the evidence, viewed in the light most favorable to J.F. Allen and giving the benefit of all reasonable inferences, supports a finding of waiver of notice provisions or subsequent oral agreement. As discussed above, The Sanitary Board or its project representative had actual knowledge of J.F. Allen's claims and, with respect to the additional costs and delays attributed to damage to unmarked or mismarked existing underground utilities, those events were documented by the Resident Project Representatives.⁸ Further, the evidence reflects that the parties had ongoing conversations about extra and changed work to be performed by J.F. Allen, that such work was directed by The Sanitary Board with the expectation of additional compensation on the part of J.F. Allen, and that J.F. Allen was directed to present its claims after completion of its work.⁹ The evidence, when giving J.F. Allen the benefit of all reasonable inferences, is more than adequate to support the jury's verdict and award against The Sanitary Board. For these reasons, the Trial court properly denied The Sanitary Board's Motion for New Trial as to liability, and should have denied it in its entirety.

B. IT WAS NOT IMPROPER TO ALLOW J.F. ALLEN'S REQUEST FOR EQUITABLE ADJUSTMENT INTO EVIDENCE.

As anticipated by the parties during the course of the work, J.F. Allen prepared its claim for contract damages for submission to The Sanitary Board, through its project representative, Burgess & Niple, after the work was completed and its loss could be quantified. Because of the unique complexities in the calculation of losses relating to a delay-type claim, J.F. Allen hired a consultant, Bryan Willoughby, to assist with the calculation of extra work and lost efficiency costs in the preparation of its claim for contract damages. Greg Hadjis testified that he worked with Mr.

⁸ Jt. Appendix pp. 1636, 3033-3034.

⁹ Greg Hadjis advised Burgess & Niple's representatives to make sure everyone was keeping good notes so J.F. Allen could file an appropriate claim (Jt. Appendix p. 1647); J.F. Allen made it known to The Sanitary Board and Burgess & Niple that it intended to make a claim (Jt. Appendix pp. 1691-1692, 1785); Alan Shreve told Burgess & Niple's representatives that J.F. Allen was incurring a lot of costs that it was going to have to be reimbursed for and was told it would be taken care of, "We'll make you good" (Jt. Appendix pp. 2278, 2281-2282); Mr. Shreve received assurance at progress meetings that they would work with J.F. Allen on the strikes, "We know you have a problem and we're going to work with you" (Jt. Appendix p. 2318).

Willoughby in the preparation of J.F. Allen's claim and that he submitted the claim to The Sanitary Board through its Project Representative, Burgess & Niple.¹⁰ As such, the Request for Equitable Adjustment is a project document submitted for the purpose of requesting a change in the contract amount just like the series of other requests for changes submitted during the course of the work and were likewise admitted as evidence in this case. These records qualify as business records and are admissible under Rule 803(6) of the West Virginia Rules of Evidence.

A Trial Court's decision to admit or exclude evidence at the trial of an action in the exercise of its discretion will not be disturbed by an Appellate Court unless it appears that the Trial Court's action amounts to an abuse of discretion. *State v. Whitaker*, 221 W.Va. 117, 650 S.E.2d 216 (2007). "The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the of appropriateness a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." Syl. pt. 5, *Lacy v. CSX Transport, Inc.*, 205 W.Va. 630, 520 S.E.2d 418 (1999), quoting Syl. pt. 1, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995). Here, the Trial Court reviewed the evidence and the circumstances of the creation of the Request for Equitable Adjustment, determined it to be trustworthy and exercised her discretion to admit it into evidence. For these reasons the admission of J.F. Allen's Request for Equitable Adjustment is not barred by the hearsay rule and was properly admitted into evidence.

C. CHARLES DUTILL WAS PROPERLY QUALIFIED AS AN EXPERT CONCERNING THE STANDARD OF CARE FOR A PROFESSIONAL ENGINEER.

The Sanitary Board also argues that J.F. Allen's standard of care expert regarding professional engineering, Charles Dutill, should not have been qualified to give opinion testimony as an expert witness because he is not registered or licensed to practice engineering in the State of

¹⁰ Jt. Appendix pp. 1754-1756.

West Virginia. This argument, likewise, is not supported by the law of this state. This argument is based on language of West Virginia Code Chapter 30, Article 13, which regulates the practice and registration of engineers in West Virginia. That Chapter of the Code does not, however, concern the qualification or admissibility of an engineer to testify as an expert witness at trial. The requirements for qualification as expert witnesses are set out in the West Virginia Rules of Evidence at Rule 702.

Rule 702 states, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact and issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Rule 702 requires that, 1) the witness must be an expert; 2) the expert must testify to scientific, technical or specialized knowledge; and 3) the expert testimony must assist the trier of fact. This rule is also well recognized by the Supreme Court of Appeals. See, Syl. Pt. 3, *Ventura v. Winegardner*, 178 W. Va. 82, 357 S. E. 2d 764 (1987); Syl. Pt. 1, *Cargill v. Balloon Works, Inc.*, 185 W. Va. 142, 405 S. E. 2d 642 (1991). As recognized by the Court at the trial of this action, Mr. Dutill meets all three of these requirements and was, therefore, qualified to testify regarding his opinions at the trial of this case. There is no requirement in Rule 702 that an expert be licensed or registered in West Virginia to be qualified to give expert testimony in this state.

In *Cargill v. Balloon Works, Inc.*, *supra*, the plaintiff sought to present the testimony of an expert regarding balloon flight, repair, maintenance, operation, training, inspection, and safety. The offered expert was not a licensed aeronautical engineer and did not have a degree in aeronautical engineering or any other field of engineering. He also did not possess expertise regarding balloon design. Nevertheless, the Supreme Court of Appeals found that he should have been allowed to testify about the cause of a hot air balloon crash that resulted in the death of its occupants. The expert's knowledge of ballooning was sufficient for the Supreme Court of Appeals to conclude that his testimony would have been helpful to the jury's understanding of the issues involved in the case. The court said, "[W]here the evidence demonstrates as in the present case that the individual sought to be introduced as an expert witness is qualified by knowledge, skill,

experience, training, or education as an expert and that the individual's specialized knowledge will assist the trier of fact, it is an abuse of the trial court's discretion to refuse to qualify that individual as an expert." *Cargill v. Balloon Works, Inc., Id.* at 646. In *Cargill*, the Supreme Court of Appeals found that the trial court had, in fact, abused his discretion by failing to qualify the plaintiff's expert despite his lack of engineering or design degree. *Id.*

Courts in other states have dealt specifically with the issue of whether an engineer could testify as an expert witness despite not being registered or licensed within the state where the testimony is to be given. In *Baggerly v. CSX Transportation, Inc.*, 370 S. C. 362, 635 S. E.2d 97 (2006), the Supreme Court of South Carolina addressed the same argument as that posed by The Sanitary Board in this case. In addition, the engineering licensing statute in South Carolina was nearly identical to the language of West Virginia's Code, except for the fact that South Carolina's statute added the phrase "expert technical testimony" in its definition of what constitutes the practice of engineering, as ours does not. Even so, in that case the court found that the South Carolina Legislature could not have reasonably intended to prevent out-of-state engineers from giving testimony in a court of law. It found that the statute was intended to protect the citizens of South Carolina seeking traditional professional engineering services, not to prevent otherwise qualified witnesses from assisting a jury in a civil trial.

The court in *Baggerly* also recognized that such a rule would "clearly contravene" South Carolina's Evidentiary Rule 702, which also contains language similar to West Virginia's Rule 702, and held that South Carolina's engineer licensing statute did not preclude an out-of-state professional engineering expert from testifying in the case. *Id.* Courts in New York Rhode Island, and Alabama have reached similar conclusions. *See, Pember v. Carlson*, 845 N.Y.S.2d 566, 45 A. D. 3d 1092 (2007) ("The fact that he had never obtained an engineering license in this state does not preclude him as an expert if he otherwise establishes adequate qualifications, but instead goes to the weight of the evidence."); *Owens v. Payless Cashways, Inc.*, 670 A.2d 1240 (1996) ("We find no language in Chapter 8 of Title 5 mandating registration as a prerequisite to expert

witness qualification. Rule 702 would in any event trump any statutorily implied mandate.”) *Federal Mogul Corporation v. Universal Construction Company*, 376 S.2d 716 (1979).

It should also be noted that with respect to other professions it is common to allow professionals licensed in other states to give testimony as an expert witness in West Virginia. For example, nearly every medical malpractice trial involves the presentation of medical testimony from expert witnesses who are not licensed in West Virginia. In fact, the West Virginia Medical Professional Liability Act, Section 55-7B-7, addressing the testimony of expert witnesses on standard of care in medical malpractice cases, specifically provides that an expert witness may be qualified who has a license to practice medicine in any state, not just West Virginia.

Mr. Dutill has over 38 years in experience performing engineering services across the country. He has a Bachelor of Science in civil and environmental engineering from Cornell University and was certainly qualified to assist the jury in this case. At best, The Sanitary Board’s argument that Mr. Dutill should be licensed in West Virginia goes to the weight of his testimony, not its admissibility. The West Virginia Supreme Court of Appeals has said that “disputes as to the strength of an expert’s credentials, mere differences in methodology, or lack of textual authority for the opinion go to weight and not the admissibility of their testimony.” *Gentry v. Mangum*, 195 W. Va. 512, at 527, 466 S. E.2d 171, at 186 (1995). For all these reasons, the Court properly concluded at the trial of this action that Mr. Dutill was qualified to give testimony as an expert witness notwithstanding the fact that he is not registered in the State of West Virginia.

D. THERE IS NO INCONSISTENCY IN THE VERDICTS RENDERED BY THE JURY IN THIS CASE.

The Sanitary Board argues that the verdict returned by the jury in this case is inconsistent and that it should, therefore, be awarded a new trial on all issues. Inconsistencies in a jury’s answers to special interrogatories submitted on a jury verdict form is a matter to which Rule 49 of the West Virginia Rules of Civil Procedure applies. That rule is intended to address such

inconsistencies by allowing the Court to return the jury for further consideration or, when necessary, order a new trial, *before* entering judgment. Rule 49(b) provides as follows:

General Verdict Accompanied by Answer to Interrogatories.

The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers 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.

Rule 49(b) of the West Virginia Rules of Civil Procedure.

When a jury returns a verdict with special interrogatories Rule 49 contemplates several possible responses. Where answers to interrogatories are consistent with each other but one or more is inconsistent with the general verdict the Court may either 1) direct entry of judgment in accordance with the answers notwithstanding the general verdict; 2) return the jury for further consideration of its answers and verdict; or 3) order a new trial. Where answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict the trial court shall not direct entry of judgment but may either return the jury for further consideration of its answers and verdict or order a new trial. Where there is no inconsistency in the answers or verdict the Court shall direct the entry of the appropriate judgment upon the verdict and answers. *Id.* In this case, when the verdict and answers to interrogatories were initially received, the Court, finding that one of the blanks on the verdict form was left empty, after a lengthy discussion with counsel, returned the jury for further consideration as contemplated by Rule 49(b). When the jury subsequently returned the completed verdict form, there being no inconsistency, the Court accepted the verdict, did not return the jury for any further consideration and did not order a new

trial. Rather, the Court entered judgment in accordance with the answers and verdicts. Once judgment was entered Rule 49 had no further application. It provides no remedy to any party after entry of judgment. Nevertheless, the Trial Court referenced inconsistency in the verdicts as support for its award of a new trial on damages.

Justice Cleckley defined “inconsistency” in a jury verdict as where there is no rational, nonspeculative way to reconcile to essential jury findings. *See, Cleckley, Litigation Handbook on West Virginia Rules of Civil Procedure, 1173 (5th Ed. 2017)*. Here, however, there is no inconsistency in the jury’s findings. There is no indication of any impropriety in the verdict rendered by the jury in this case. It would be necessary to engage in speculation to reach the conclusion that the jury did not intend two separate verdicts and awards. J.F. Allen’s claims against the two defendants are based on separate causes of action and the remedy for each is not dependent on the other. The remedy for Burgess & Niple’s negligence is not limited to or dependent on the damages recoverable under Plaintiff’s Contract with The Sanitary Board. Also, the jury was specifically instructed not to duplicate awards and the Court’s instruction to that effect was read to the jury twice.

An example of what is meant by an “inconsistent verdict” can be found in the case of *Hopkins v. Coen*, 431 F. 2d 1055 (6th Cir. 1970). In that case a car driven by George Hopkins and in which Terry Hopkins was a passenger collided with an escort vehicle following a wide-load. George Hopkins was killed in the accident. Mr. Hopkins’s estate and Terry Hopkins filed suit against the escort vehicle company and the transport company operating the trailer pulling the wide-load. The defendants counterclaimed that George Hopkins’s negligence was the sole cause of the accident. After trial the jury returned a jury verdict form containing a verdict for Terry Hopkins against the defendants in the amount of \$75,000.00; a verdict against Terry Hopkins for the defendants; a verdict for the estate of George Hopkins and against the defendants in the amount of \$0.00; and a verdict against the Estate of George Hopkins for the defendants. *Id.* at 1058. As noted by the Court in that case, all four of the verdicts returned were inconsistent with the others.

But here there is no inconsistency between a finding of a breach of contract on the part of The Sanitary Board and a breach of Burges & Niple's common law duty to avoid professional negligence. There is no inconsistency in a verdict in favor of a plaintiff against separate defendants. The fact that the jury returned awards against both defendants is neither inappropriate nor should it have been unexpected. The jury verdict form submitted to the jury contained two separate spaces for the express purpose of allowing the jury to make the award as to each defendant that it found to be appropriate. When the verdict form was initially returned without an award in the space provided for damages for Burgess & Niple's negligence, the Court returned the jury for the express purpose of making such an award. The fact that the defendants disagree with the jury's damages awards does not make them inconsistent.

In any case, the Court has directed entry of judgment upon the interrogatories and verdicts and therefore Rule 49 has no further bearing. If the verdict in this case had been inconsistent the Court could have refused to enter judgment on it. The verdict and special interrogatories originally rendered by the jury that found a breach of the standard of care on the part of Burgess & Niple but failed to award damages, leaving the space for damages blank, could have been interpreted as an inconsistency in the verdict. In response, the Court returned the jury for further consideration whereupon it returned a verdict awarding damages for Burgess & Niple's breach. Inconsistencies in the jury verdict must be addressed prior to the entry of judgment. There is no inconsistency in the jury's verdict against The Sanitary Board and the award of contract damages is not subject to apportionment. If The Sanitary Board believed that its project representative, Burgess & Niple, should be liable for all or part of its potential liability for breach of contract, it should have asserted that as a cross-claim.

E. THE CIRCUIT COURT PROPERLY UPHELD THE JURY'S FINDING IN FAVOR OF J.F. ALLEN AND AGAINST THE SANITARY BOARD ON THE ISSUE OF LIABILITY.

The verdict of the jury was clear and exhibited no confusion or uncertainty as to whether The Sanitary Board breached its contract with J.F. Allen and was therefore liable for contract

damages. It also, very clearly, assessed damages against The Sanitary Board in a sum approximating the amount claimed by J.F. Allen at trial as its contract damages, the same amount submitted to The Sanitary Board through its project representative, Burgess & Niple, as its claim for additional compensation after completion of the project.

The only matter that required the Court to return the jury for further deliberation was its initial failure to make an award against Burgess & Niple for its breach of duties to J.F. Allen. The verdict form, when originally returned by the jury, made a clear finding of negligence on the part of Burgess & Niple but failed to enter an amount as damages, leaving that space blank. After further deliberation the jury returned its verdict awarding an additional sum of \$3,000,000 in favor of J.F. Allen and against Burgess & Niple. The jury also assessed ten percent contributory negligence against J.F. Allen which would reduce its recovery from Burgess & Niple to \$2,700,000.00.

This assessment of separate awards, along with its allocation of negligence between J.F. Allen and Burgess & Niple, reflects a clear understanding of the relative rights and obligations of the parties involved in this case. J.F. Allen submitted two separate claims, one against The Sanitary Board based in contract and one against Burgess & Niple based in tort. One who is guilty of breach of contract is liable for all of the reasonably foreseeable contract damages proximately resulting therefrom. These damages are not subject to apportionment. The separate claim against Burgess & Niple based on a claim of negligence was a separate claim for which J.F. Allen was entitled to separate and distinct damages. The fact that the amounts awarded were greater than the parties anticipated is not evidence of juror confusion or impropriety. Nor is it evidence of a double recovery. One would be required to speculate to conclude that the jury did not intend a separate, albeit large, award against Burgess & Niple.

Further, as argued by J.F. Allen in its separate appeal brief, the verdict in this case is not disproportionate to the injuries suffered and was supported by evidence that J.F. Allen suffered a loss on the project in the range of \$3,000,000.00. Where a verdict is large but not so disproportionate to the injuries suffered as to shock the conscious or lead to the belief that the jury

was influenced by improper motives, it would be an invasion of the province of the jury and, therefore, an abuse of power on the part of the Court, to set it aside. *5C Michies, Damages Session 51, n. 693*. A verdict rendered is entitled to considerable deference and an appellate court should decline to disturb a trial court's award of damages so long as the award is supported by some competent, credible evidence going to all essential elements of the award. Syl. pt. 4, *Reed v. Wimmer*, 193 W.Va. 199, 465 S.E.2d 199 (1995).

The Sanitary Board also impugned the credibility and integrity of the jury by referencing a Facebook post by the jury foreperson saying that her jury service was boring, an obvious and harmless observation. The Sanitary Board further points to *voir dire* responses by one of the jury members at another trial the following week. However, The Sanitary Board's complaints about the conduct of the jury in the case are unfounded and do not form a basis for relief from the verdict. The Supreme Court of Appeals has said that the internal operations of a jury panel are presumed to be fair. "*Voir dire* allows litigants to discover juror prejudice before a trial. We will not allow a post-trial, collateral attack on a jury's integrity in the absence of a showing of corruption or bias." *Roberts v. Stevens, Clinic Hospital, Inc.*, 176 W.Va. 492, 498, 345 S.E.2d 791, 798 (1986). There has been no assertion of, and certainly no showing of, corruption or bias by the jury in this case. The jury completed the verdict form prepared by Defendant's counsel and approved by the Court and unambiguously responded to each of the Interrogatories contained therein. The jury was polled before being released at the request of counsel for The Sanitary Board and the verdicts were confirmed unanimously.

Therefore, not only did the Court not err by upholding the jury's finding as to liability against The Sanitary Board but it should also have upheld the unambiguous award of contract damages in an amount approximating the contract damages claimed by J.F. Allen.

CONCLUSION

At the trial of this action J.F. Allen submitted substantial evidence to support the jury's finding of breach of contract on the part of The Sanitary Board. Among other things, J.F. Allen

demonstrated that The Sanitary Board failed to adequately compensate it for its extra work and additional costs incurred as a result of encountering unmarked or mismarked existing underground facilities. J.F. Allen further submitted substantial evidence to demonstrate to the jury that the Sanitary Board waived its right to rely on strict adherence to the change order and claims protocols set out in the written contract between the parties. J.F. Allen also proved that The Sanitary Board had actual notice of events leading to claims and assured J.F. Allen that its claims would be addressed once the work was completed.

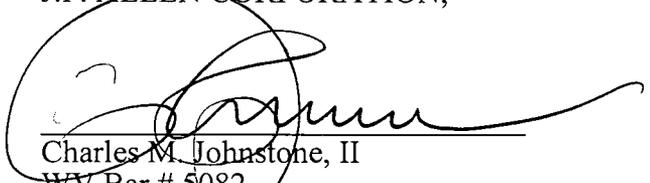
In addition, the admission of J.F. Allen's Request for Equitable Adjustment submitted upon completion of the work was not an abuse of the Trial Court's discretion as it was a record of J.F. Allen's claims incurred during the course of the work prepared with the assistance of J.F. Allen's representatives soon after completion of the project and in the ordinary course of its business. As such it qualified as a business record admissible under Rule 803(6) of the West Virginia Rules of Evidence. Regarding the expert testimony of Charles Dutill, there is no question that Mr. Dutill was adequately qualified to give testimony concerning the duties of a project engineer on a utility construction project. There is no requirement that an engineer be registered in the state of West Virginia in order to give expert testimony at a trial.

Finally, the verdict rendered by the jury in this case was not inconsistent. In fact, it conformed to the instructions of the Court and the evidence presented in the case. The fact that the jury rendered a verdict awarding contract damages against The Sanitary Board for its breach of contract and made a separate award against Burgess & Niple for damages in tort is not an indication of a double recovery. A return of a verdict with a separate award for damages in tort should have been anticipated by the parties in light of the proof presented at trial.

For these reasons the appeal by The Sanitary Board of the City of Charleston should be denied. Further, J.F. Allen's separate appeal should be granted and this matter remanded to the Circuit Court with instructions to enter judgment on the jury's verdict as rendered.

Respectfully Submitted,

J.F. ALLEN CORPORATION,

A handwritten signature in black ink, appearing to read "C. Johnstone, II", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the beginning and a long tail extending to the right.

Charles M. Johnstone, II

WV Bar # 5082

Johnson W. Gabhart

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