STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Redstone International, Inc.,
Petitioner

vs.) No. 21-0934 (Wetzel County 16-C-82)

J.F. Allen Company,
AMEC Foster Wheeler Environment & Infrastructure, Inc., MarkWest Liberty Midstream & Resources, L.L.C.,
Respondents

MEMORANDUM DECISION

Petitioner Redstone International, Inc. contracted with Respondent J.F. Allen Company in the fall of 2014 to construct an approximately 100' high, 1250' wide retaining wall at a natural gas processing facility owned by Respondent MarkWest Liberty Midstream & Resources in Wetzel County, West Virginia.[1] Miscoordination, design and construction errors, and hard feelings plagued the project, causing significant delays and additional costs.

MarkWest sued J.F. Allen, Redstone, and Respondent AMEC Foster Wheeler Environment & Infrastructure, Inc.[2] (another J.F. Allen subcontractor) in contract and tort in August 2016. Counterclaims and crossclaims followed. The Business Court Division of the West Virginia Judiciary conducted a seventeen-day bench trial in September and October 2020. The court entered a lengthy judgment order approximately one year later, adjudging Redstone liable for more than $3.3 million in favor of J.F. Allen. Redstone appeals that order along with a May 2019 order in which the court dismissed its "failure-to-coordinate" claim against MarkWest.

[1] Petitioner Redstone is represented by Michael Jacks. Respondent MarkWest is represented by Joseph M. Ward and Mary Claire Davis. Respondent J.F. Allen is represented by Jeffrey M. Wakefield.

[2] Respondent AMEC is represented by Vic L. McConnell.

For the reasons discussed below, we affirm the business court's order dismissing Redstone's failure-to-coordinate claim and final judgment order.[3]

I. FACTUAL & PROCEDURAL BACKGROUND

This is an appeal by Redstone from a judgment order entered by the Business Court Division of the West Virginia Judiciary, following a seventeen-day bench trial in September and October 2020.[4] The other parties who tried claims in the case—MarkWest, AMEC, and J.F. Allen—do not seek appellate review from the judgment. So, we limit the following presentation of facts to those necessary to outline the construction project underlying this litigation and the business court's resolution of it.

A. Wall Construction

MarkWest processes natural gas for EQT Corporation at its facility in Mobley, located in Wetzel County. Under MarkWest's contract with EQT, EQT had the option to direct MarkWest to expand the Mobley plant to process additional gas. In the spring of 2014, EQT directed MarkWest to expand the Mobley plant by adding a processing plant to the four already operating onsite. That added plant was known as "Mobley V," also referred to as "the Plant" and "Plant 5." Under its contract with EQT, MarkWest had 24 months to complete Mobley V.

Flat land was at a premium in Mobley, and MarkWest had to make more to accommodate Mobley V. In consultation with Civil & Environmental Consultants, Inc. (CEC), a civil engineering firm, MarkWest chose an approach that involved construction of a an approximately 100' high, 1250' wide retaining wall (the Wall). As found by the business court:

> The stated purpose of the Wall was to establish a location to deposit waste soil material excavated and removed in connection with the proposed location of Plant 5. . . . [T]he Wall was going to accommodate a gas processing [Plant 5] and that . . . the newly created flat surface on top of the Wall would accommodate future buildings.

MarkWest issued a request for bids for the design and construction of the Wall.[5] MarkWest wanted a "design-build" contract, meaning that it would hire a single contractor who would then subcontract the design and construction of the Wall. Those three entities (a prime contractor, design subcontractor, and construction subcontractor) formed a "design-build team." Despite that

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[3] A memorandum decision affirming the business court's order is appropriate. *See* W. Va. R. App. P. 21

[4] Redstone also appeals the business court's partial grant of MarkWest's motion to dismiss Redstone's claims against it.

[5] MarkWest collaborated with CEC to prepare this bid package. As part of the effort, CEC conducted preliminary soil analysis.

"team" approach, MarkWest would form a contractual relationship with only one team member: the prime contractor at the top of the design-build pyramid.[6]

In late August 2014, MarkWest awarded the Wall contract to a design-build team headed up by J.F Allen ("the Contract"), with AMEC subcontracted to J.F. Allen for professional design services ("the Design Subcontract") and Redstone subcontracted to J.F. Allen for Wall construction ("the Construction Subcontract"). Under the Contract, J.F. Allen was required to achieve mechanical completion of the Wall by February 28, 2015, and complete the Wall by March 31, 2015.[7]

AMEC designed the Wall for J.F. Allen as a "hybrid wall consisting of a soldier pile wall with rock anchors and reinforced soil slope ('RSS')." Under the Construction Subcontract, Redstone was to construct the soldier-pile Wall area according to that design in exchange for $6,584,687.77.[8] Redstone was to drill, install, and grout vertical soldier piles into the mountainside once unsuitable existing material had been removed by J.F. Allen; drill, install, and grout rock anchors horizontally into the mountainside; and install precast concrete lagging panels and walers between the vertical soldier piles up to the elevation of the horizontal rock anchors. Then, J.F. Allen would dump and compact fill processed by another prime contractor between the backside of the lagging panels and the side of the mountain. Redstone would next set a tie-rod to connect the rock anchor (extending out from the mountainside) through the lagging panel to the front of the Wall. Redstone would then secure the tie-rod to the waler on the face of the Wall. Redstone would install more horizontal, concrete lagging panels on top of those already in place. J.F. Allen would then place at least five feet of additional fill, but no more than fifteen feet, on top of the fill it had already placed between the backside of the Wall and the mountainside. Redstone would then "proof" test the rock anchor. Redstone would later "performance" test the rock anchors once the final anchors in a row had a maximum of fifteen feet of backfill placed above them.

Construction on the Wall started in mid-September 2014. Redstone's initial work—installation of the vertical soldier piles—was delayed from the start of construction for various reasons. Once Redstone did start, its work proceeded more slowly than anticipated. Other issues cropped up: in late October, AMEC and J.F. Allen learned that the fill to be placed behind the Wall was denser than designed for. In addition, the slow pace created a bottleneck for placement of fill and site congestion.

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[6] MarkWest requested separate bids for the work of excavating the mountainside. It hired Lane Construction Corporation to excavate the mountain, process the excavated material, and stockpile the excavated material for J.F. Allen to dump behind the Wall.

[7] MarkWest intended the Wall to be completed by January 1, 2015. But because MarkWest was delayed in issuing a notice to proceed to J.F. Allen, the mechanical completion date was extended to February 28, 2015, and project completion to March 31, 2015.

[8] The original Wall design called for anchor testing at the face of the mountain. That was later changed, as discussed, *infra*. We describe the amended construction sequence, here.

Redstone started drilling for horizontal anchors in late November 2014. The design prepared by AMEC and provided to Redstone by J.F. Allen called for Redstone to proof test horizontal anchors at the face of the prepared mountainside. That method did not work, and Redstone asked AMEC for a design change to proof test the horizontal rock anchors at the face of the Wall, instead. AMEC agreed and Redstone proceeded to test anchors in that fashion. Yet, as Redstone tested anchors, vertical soldier piles moved, and the concrete lagging panels installed between the piles cracked. Between March and August 2015, installed horizontal rock anchors began to "shear" off the face of the Wall. AMEC designed a method to repair those sheared anchors, which Redstone executed.

Under the Contract, J.F. Allen was to have completed the Wall by March 31, 2015. That date came and went; the Wall was not done, and J.F. Allen's and Redstone's relationship had soured. In June 2015, J.F. Allen learned that Redstone had not paid some of its vendors on the Wall project, so that the vendors had recorded mechanics' liens. J.F. Allen satisfied Redstone's delinquent accounts payable. Then, in July 2015, several rock anchors installed by Redstone (and which J.F. Allen had already covered in approximately twenty feet of fill) failed. Redstone had installed the failed anchors in May, a time when, according to its president, it had been behind on anchor testing. J.F. Allen had to excavate approximately twenty feet of fill and RSS wall before the anchors could be replaced, delaying construction by about one month. Also in July 2015, Redstone began to withhold anchor test reports from AMEC.

J.F. Allen terminated Redstone for cause in August 2015. By then, Redstone had completed about 95% of its scope of work. J.F Allen hired another subcontractor to complete the remainder. That subcontractor completed work in mid-October 2015. Engineering and then construction of the Mobley V plant were also delayed. The business court found MarkWest to be responsible for approximately 40% of delays and the J.F. Allen Design-Build Team responsible for the rest. Plant operations commenced in early April 2016, roughly one year behind schedule.

B. Litigation

On August 18, 2016, MarkWest filed its complaint in the Circuit Court of Wetzel County against J.F. Allen, AMEC, and Redstone. In its complaint, MarkWest alleged that J.F. Allen breached the Contract and was negligent. It also alleged negligence claims against AMEC and Redstone.

J.F. Allen filed a counterclaim against MarkWest alleging that it was owed approximately $1.7 million on the Contract, a crossclaim against AMEC alleging breach of the Design Subcontract, and a crossclaim against Redstone alleging breach of the Construction Subcontract. As to Redstone, J.F. Allen's allegations were (1) engaging in design modification, (2) failing to advise J.F. Allen of the different site conditions it encountered on the project, (3) failing to timely pay its vendors resulting in liens against the project that J.F. Allen satisfied, and (4) defective work. J.F. Allen asserted a contractual indemnification claim against Redstone pursuant to the subcontract. AMEC and Redstone filed crossclaims against J.F. Allen.

Redstone also filed counterclaims against MarkWest alleging failure to coordinate the multiple prime contractors, unjust enrichment, and quantum meruit. It filed breach of contract and tortious interference claims against J.F. Allen and a negligence claim against AMEC.

In April 2018, the case was transferred to the Business Court Division, after which the parties engaged in extensive discovery. In December 2018, MarkWest moved to dismiss Redstone's failure-to-coordinate, quantum meruit, and unjust enrichment claims. In responding to that motion, Redstone represented that "it is only entitled to one recovery for one loss," and that it had pleaded the quantum meruit and unjust enrichment claims against MarkWest in the alternative to its breach-of-contract claim against J.F. Allen and negligence claim against AMEC. On May 7, 2019, the business court entered an order dismissing Redstone's failure-to-coordinate claim, explaining "this doctrine has not been accepted in West Virginia and [the court] declines to recognize the claim in the case at bar." The business court denied that part of the motion seeking dismissal of the unjust enrichment and quantum meruit claims, finding that Redstone had properly pleaded them in the alternative to its breach-of-contract claim against J.F. Allen and negligence claim against AMEC.

The business court conducted a bench trial from September 21 through October 15, 2020. Evidence included testimony from the principals and employees of the parties; hundreds of exhibits; and reports and/or testimony from experts on the design and/or construction of retaining walls and experts on construction scheduling and damages analysis. Following trial, the parties submitted proposed findings of fact and conclusions of law.

C. The Judgment Order

On October 15, 2021, the business court issued its 153-page judgment order. There, the court found that J.F. Allen breached the Contract, Redstone breached the Construction Subcontract, and AMEC breached the Design Subcontract. The court also found that MarkWest breached the Contract by failing to completely compensate J.F. Allen for its work on the Wall. Regarding negligence claims, the court found that all failed as a matter of law *except* MarkWest's negligence claim against AMEC, the design professional. The court found that Redstone had not proven its tortious interference claim against J.F. Allen. Finally, the court found that the Design and Construction Subcontracts contained indemnification provisions, but that J.F. Allen had waived indemnification from AMEC for consequential damages and had agreed to cap damages recoverable from AMEC at $2,000,000.

Regarding damages, the court found that MarkWest owed J.F. Allen $1,581,405.10 on the Contract and entered judgment against MarkWest for that amount. As for J.F. Allen, the court found that Redstone owed it $981,673—the cost to repair the rock anchors installed by Redstone in May 2015, which failed in July 2015. The court also found that J.F. Allen had overpaid Redstone for its work on the Wall by $904,438 and entered judgment against Redstone and in favor of J.F. Allen for that amount. The court found that AMEC's design errors caused J.F. Allen to incur $695,527 in repair costs and entered judgment for J.F. Allen in that amount. Finally, the court found that MarkWest was entitled to damages from J.F. Allen caused by delayed construction of the Wall. Pertinent to Redstone's appeal, the court found that MarkWest incurred $2,651,531.54

in delay damages in the form of lost profits under its contract with EQT.[9] The court entered judgment in that amount against J.F. Allen. The court ruled that Redstone was responsible for $1,458,342.35 of those delay damages (lost profits). So, the court invoked the indemnification provision in the Construction Subcontract and ordered Redstone to indemnify J.F. Allen in that amount. Redstone timely appealed the judgment order and the business court's dismissal of its failure-to-coordinate claim against MarkWest.[10]

II. STANDARDS OF REVIEW

The standard of review applicable to the final judgment order is well-settled:

> "In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review." Syl. Pt. 1, *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (1996).[11]

And the deference afforded the trial court's findings is substantial:

> Following a bench trial, the circuit court's findings, based on oral or documentary evidence, shall not be overturned unless clearly erroneous, and due regard shall be given to the opportunity of the circuit judge to evaluate the credibility of the witnesses. W.Va.R.Civ.P 52(a). Under this standard, if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety, we may not reverse it, even though convinced that had we been sitting as the trier of fact, we would have weighed the evidence differently. We will disturb only those factual

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[9] MarkWest's contract with EQT was a "take-or-pay" contract. As the business court found,

> given the nature of these contracts between MarkWest and EQT, MarkWest deploys the capital expenditure necessary to build a plant without speculation or risk because MarkWest is assured that EQT will either utilize the plant and generate revenue—thus creating a return on the investment of building the plant—or EQT will pay MarkWest for the capacity of the plant. Thus, EQT will either "take" the capacity created by the plant and compensate MarkWest through processing fees, or EQT will "pay" MarkWest for the unused opportunity to do so.

[10] MarkWest, J.F. Allen, and AMEC satisfied the respective judgments entered between them, and the business court entered an order granting their Rule 60(b)(5) motion for relief from the final judgment order due to satisfaction of judgment on January 4, 2022.

[11] Syl. Pt. 1, *Miller v. St. Joseph Recovery Ctr., LLC*, 246 W. Va. 543, 874 S.E.2d 345 (2022).

> findings that strike us wrong with the "force of a five-week-old, unrefrigerated dead fish." *United States v. Markling,* 7 F.3d 1309, 1319 (7th Cir.1993), *cert. denied*, [514] U.S. [1010], 115 S.Ct. 1327, 131 L.Ed.2d 206 (1995).[12]
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> Further,
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> a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm "[i]f the [circuit] court's account of the evidence is plausible in light of the record viewed in its entirety [.]" *Anderson v. City of Bessemer City, North Carolina,* 470 U.S. 564, 573–74, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985). Finally, "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings[.]" 470 U.S. at 575, 105 S.Ct. at 1512, 84 L.Ed.2d at 529.[13]

Redstone also challenges the court's dismissal of its failure-to-coordinate claim against MarkWest under West Virginia Rule of Civil Procedure 12(b)(6). Under Rule 12(b)(6),

> "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).[14]

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*,"[15] meaning that we "'give a new, complete and unqualified review to the parties' arguments and the record before the trial court.'"[16]

III. ANALYSIS

Redstone challenges the business court's order granting MarkWest's motion to dismiss its failure-to-coordinate claim. It also challenges portions of the final order entered by the business court following the bench trial. We address the failure-to-coordinate claim, first, then move on to Redstone's remaining arguments.

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[12] *Brown v. Gobble*, 196 W. Va. 559, 563, 474 S.E.2d 489, 493 (1996).

[13] *Phillips v. Fox*, 193 W. Va. 657, 661–62, 458 S.E.2d 327, 331–32 (1995).

[14] Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977).

[15] Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995).

[16] *Gastar Expl. Inc. v. Rine*, 239 W. Va. 792, 798, 806 S.E.2d 448, 454 (2017) (quoting *Blackrock Capital Inv. Corp. v. Fish*, 239 W.Va. 89, 799 S.E.2d 520, 526 (2017)).

A. Failure-to-Coordinate Claim

Redstone brought a counterclaim against MarkWest for its "failure to coordinate" the Project. Redstone alleged that MarkWest had a duty to manage and coordinate the contractors and subcontractors on the project and that MarkWest did not delegate that duty to J.F. Allen via the Design-Build Contract. Redstone claimed that MarkWest's breach of its duty to coordinate caused Redstone to incur millions of dollars in damages. The business court dismissed this claim under Rule 12(b)(6), finding that a claim for failure to coordinate "has not been accepted in West Virginia" and "declin[ing] to recognize the claim in the case at bar."

On appeal, Redstone argues that "there is a good faith basis for new law, or a change of existing law, for coordination claims in West Virginia." While Redstone concedes that the "'duty to coordinate' generally means the duty to coordinate worksite activities among prime contractors,"—which Redstone was not—Redstone nonetheless contends that the business court erred in dismissing this claim. MarkWest responds that "West Virginia does not currently recognize a cause of action against an owner for failure to coordinate, separate and apart from any existing contractual obligations." MarkWest continues that even if the theory was sanctioned in this State, the business court properly dismissed Redstone's claim because Redstone was not in privity of contract with MarkWest.

We concur with MarkWest that the business court did not err by dismissing this claim. The cases cited by Redstone demonstrate that the "duty" it tries to leverage against MarkWest is one based in a contractual relationship, not a tort duty. For example, in *Department of Transportation v. APAC-Georgia, Inc.*, the project owner-defendant "had a contractual duty to coordinate the project," based on specific language in its contract with the prime contractor-plaintiff.[17] In *Shea-S&M Ball v. Massman-Kiewit-Early*, this language in the contracts between the owner and prime contractors—"the Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or by [owner's] employees"—obliged the project owner to "compel cooperation" among its prime contractors.[18] Here, MarkWest was in privity only with J.F. Allen, a prime contractor; MarkWest did not have a contractual relationship with

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[17] *Dep't of Transp. v. APAC-Georgia, Inc.*, 456 S.E.2d 668, 670 (Ga. Ct. App. 1995); *see, e.g.*, *APAC-Georgia, Inc. v. Dep't of Transp.*, 472 S.E.2d 97, 98 (Ga. Ct. App. 1996); *Blake Const. Co. v. C. J. Coakley Co.*, 431 A.2d 569, 576 (D.C. 1981) (affirming the district court's finding that general contractor breached its contract with its subcontractor "on the basis of an implied duty on their part to schedule work reasonably, when *the contract* was silent on the work sequence in which this complex construction project was to be effected") (emphasis added); *Shalman v. Bd. of Ed. of Cent. Sch. Dist. No. 1 of Towns of Thompson et al.*, 31 A.D.2d 338, 341 (N.Y. 1969) ("A duty is imposed upon the employer not to interfere with the prosecution of the work of *his contractor*, and he impliedly agrees that the contractor will not be unreasonably delayed by the failure of other contractors to perform work which is essential to the performance of the work in question.") (emphasis added).

[18] 606 F.2d 1245, 1251 (D.C. Cir. 1979).

Redstone, a subcontractor to J.F. Allen. For that reason, and based on the authorities cited by Redstone, the business court did not err.

B. "Pulled Out" Anchors

We turn now to the errors that Redstone assigns to the final judgment order. We first consider Redstone's arguments regarding the $981,673 judgment entered against it in favor of J.F. Allen for the cost to repair certain rock anchors.

The business court found that Redstone installed five anchors in late May 2015 that, when tested in July 2015, "pulled out" of the rock—this after being covered in twenty feet of fill and RSS baskets by J.F. Allen. The business court found that the anchors pulled out because the grouting done around the anchors by Redstone failed to adhere to the anchor shaft. J.F. Allen had to remove the RSS baskets and excavate the fill to access the pulled anchors and repair them. The business court awarded J.F. Allen $981,673 in damages against Redstone, the cost to repair those anchors as testified to by J.F. Allen's expert, Mr. Bryon Willoughby.

On appeal, Redstone argues that it is not responsible for the costs to repair the pulled-out anchors under the Construction Subcontract because the evidence at trial showed that grout around the anchors failed due to an "unforeseen geologically weak area in the hillside," rather than an error on Redstone's part. Redstone points to testimony by witnesses for MarkWest, AMEC, and CEC to support this view of the evidence. J.F. Allen responds that the business court "considered extensive evidence and made findings which cannot, in viewing the record in its entirety, be deemed to be clearly erroneous." We agree.

Broadly, the business court found that "Redstone committed errors in construction." Specific to the anchors that pulled out of the rock, the court found that "pursuant to the [Construction Subcontract's] differing site condition clause, Redstone was required to give notice of any condition that differed materially from those indicated in the [Construction Subcontract]." The record supports this finding.[19] The court further found that "despite encountering ground water in the process of attempting to install anchors in May of 2015, Redstone did not provide notice to J.F. Allen of this differing condition," and that "[m]ainly because of this, the grouting process utilized by Redstone failed, causing some of the anchors to pull out." Again, there is support in the record for this finding.[20] In addition, the business court found that "Redstone's failure to identify the grout washout for anchors that were installed in May 2015 in the presence of ground water constituted a breach of the [Construction Subcontract] that resulted in J.F. Allen

[19] The Construction Subcontract required Redstone to "promptly, and before the conditions are disturbed, give a written notice to [J.F. Allen] of . . . subsurface or latent physical conditions at the Site which differ materially from those indicated in the Subcontract Documents . . . ."

[20] Greg Hadjis, president of J.F. Allen, testified that when Redstone attempted to redrill the failed anchors in July 2015, Redstone "immediately hit water. There was no question. So I don't - - you know, that water just didn't materialize at that point. My guess is that it was there before."

sustaining $981,673 in repair costs." The record also contains support for this finding.[21] Again, we "may not overturn a finding because [we] would have decided the case differently, and [we] must affirm if the circuit court's amount of the evidence is plausible in light of the record viewed in its entirety."[22] For those reasons, we will not overturn the business court's findings on this point.

Redstone also disputes the damages awarded to J.F. Allen by the business court for the costs to repair the pulled anchors. The business court concluded that

> J.F. Allen shall be awarded $981,673.00 in repair costs for the five failed anchors in the bond zone with no resistance due to grout washout. In support of this finding, the [business court] relied upon Mr. Willoughby's expert testimony and the testimony of Mr. Hadjis [president of J.F. Allen] and Mr. Leatherman [project manager for J.F. Allen].

Redstone asserts that Mr. Willoughby's damages opinions are not supported by "any legitimate factual basis" and should not have been relied on by the business court. According to Redstone, "[o]nce [the business court] held that [J.F. Allen] breached its contract with MarkWest, and [AMEC] breached its contract with [J.F. Allen] and negligently performed its duties as to MarkWest, Mr. Willoughby's analysis of Redstone's performance and costs became completely unreliable . . . ." J.F. Allen responds that the business court considered Mr. Willoughby's report and testimony, found them credible, and made extensive findings to which this Court should defer.

We conclude that Redstone has not established that the business court clearly erred by adopting Mr. Willoughby's calculation of the costs incurred by J.F. Allen to repair the failed anchors. First, the business court found Mr. Willoughby's report "credible" and that "the values and calculations performed by Mr. Willoughby are reasonable." Second, the business court found that "the anchor pull-outs were not the result of deficient design." That is, the business court found that AMEC's design did not cause the anchor pull-outs, so Redstone's allusion to AMEC's negligence does not fatally undercut Mr. Willoughby's opinion. Third, Redstone does not detail how J.F. Allen's breach of the Contract with MarkWest weakens Mr. Willoughby's opinion as to repair costs incurred by J.F. Allen due to the failed anchors at issue, here. For those reasons,

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[21] Redstone president Heath Kefover admitted that the anchors that pulled out in July 2015 would have been discovered had the anchors been proof tested when they were installed in May 2015. More generally, Mr. Kefover testified that Redstone was behind on its anchor testing. Mr. Hadjis described Redstone's testing protocol as "[a]lmost fraudulent," explaining that

> when you're being told in daily reports and conversations face to face that anchor X, Y, and Z are locked off and ready and then you do your prerequisite sequence of construction to add fill and in some cases add RSS wall which required baskets and geogrid then later at proof testing you find that not only are those anchors not coming up to design strength but they're not holding any strength at all which called into question in my mind whether or not that anchor test was – or the proof that the test was actually performed.

[22] *Phillips*, 193 W. Va. at 661−62, 458 S.E.2d at 331−32 (internal quotation omitted).

Redstone is not entitled to relief on this assignment of error, and we affirm that portion of the judgment order awarding J.F. Allen a total of $981,673 in repair costs from Redstone.

C. Delay Damages

MarkWest sought damages from J.F. Allen attributable to project delays, including lost profits. MarkWest argued that J.F. Allen was responsible for 8.8 months of delays to the project, relying on the opinion of its delay expert, Mr. Bradley Wolf. According to Mr. Wolf, J.F. Allen's 8.8 months of delay cost it $6,681,981 in lost profits under the take-or-pay contract with EQT. J.F. Allen's expert, Mr. Willoughby, opined that there were 5.82 months of delay, with J.F. Allen responsible for one month, Redstone for 3.2 months, and AMEC for 1.6 months. The business court adopted Mr. Willoughby's opinion and, after performing the necessary calculations, found that MarkWest was due $2,651,531.54 in delay damages (lost profits) from J.F. Allen and entered judgment against J.F. Allen in that amount.

Redstone contests the award of delay damages (lost profits) to MarkWest. Redstone argues that it was not foreseeable that any delays in completion of the Wall would cause MarkWest to lose profits because the design-build contract was separate from the contracts to construct the Mobley V processing plant.[23] Redstone argues that MarkWest's delay damages claims rested on unreliable testimony by its expert, Mr. Wolf. Redstone asserts that Mr. Wolf ignored the impact of delays by actors other than Redstone. Redstone argues that MarkWest's own failings significantly delayed completion of the Mobley V project.

MarkWest responds that the evidence shows that Redstone was aware that MarkWest undertook construction of the Wall to allow for the addition of a fifth processing plant at the Mobley site. MarkWest also argues that the business court expressly rejected Mr. Wolf's opinion regarding delay damages and fully considered MarkWest's own contributions to project delays when assessing delay damages.[24]

Initially, we agree with MarkWest that the evidence demonstrates that Redstone was aware that MarkWest sought to construct the Wall to permit expansion of its gas processing facility at

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[23] Redstone characterizes these delay damages (lost profits) as consequential damages, which "arise from the special circumstances of the contract." Syl. Pt. 2, in part, *Desco Corp. v. Harry W. Trushel Const. Co.*, 186 W. Va. 430, 413 S.E.2d 85 (1991). We have held that "[i]n order to recover these damages, the plaintiff must show that at the time of the contract the parties could reasonably have anticipated that these damages would be a probable result of a breach." *Id*.

[24] MarkWest also responds that Redstone may not challenge its award of delay damages from J.F. Allen because J.F. Allen has satisfied that judgment and, by effect of the order granting Rule 60(b) relief to MarkWest, J.F. Allen, and AMEC that judgment, in fact, no longer has prospective effect and is not subject to attack. *See* note 12, *supra*.

Mobley.[25] It is also clear from the final judgment order that the business court rejected Mr. Wolf's opinion regarding delay damages; the court expressly found that "J.F. Allen was responsible for some delay which resulted in lost profits, but [*did*] *not find Mr. Wolf's testimony and opinion of an 8.8 month delay to be credible* because he used schedules that were 'impossible' and 'lacked logic' according to MarkWest's own witness, Mr. Rowlands."[26] Further, it is also clear from the final judgment order that the business court considered and accounted for delays attributable to MarkWest. The court found that

> based upon the evidence presented, that 8.8 months of delay [the span advocated by MarkWest and Mr. Wolf] has not been proven by a preponderance of the evidence, and that 5.82 months of delay has been proven by a preponderance of the evidence. Therefore, the [c]ourt finds that based upon a monthly profit loss of $759,316.20, multiplied by 5.82 months, equals $4,419,219.24 for total lost profits. Of this amount, the Court finds that MarkWest is responsible for 40% due to concurrent delays associated with the remainder of the Plant V Project, and that the J.F. Allen Design-Build Team is responsible for 60% in the amount of $2,615,531.54.

We acknowledge Redstone's arguments that the delay was wholly attributable to MarkWest and other contractors. But we are also mindful that "we may not reverse [the business court's account of the evidence]" if it "is plausible in light of the record viewed in its entirety . . . even though convinced that had we been sitting as the trier of fact, we would have weighed the evidence differently."[27] In view of that standard, and based on the arguments before us, we conclude Redstone is not entitled to relief on this assignment of error.

D. Contractual Overpayment Damages

Redstone also argues that the business court abused its discretion in awarding J.F. Allen $904,438 in contractual "overpayments." Redstone generally asserts that the business court clearly erred in adopting Mr. Willoughby's opinion as to the reasonable value of Redstone's work performed on the Wall. Redstone again insists that Mr. Willoughby's opinion is unreliable considering the business court's findings regarding AMEC's faulty design and J.F. Allen's improper placement of fill material.[28] J.F. Allen responds that the business court assessed the opinions of Redstone's expert and Mr. Willoughby's and found Mr. Willoughby's opinion to be

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[25] Mr. Kefover, Redstone's president, testified at trial that at a pre-bid meeting, he understood why the Wall was being built: "[t]o get rid of the mountain. That was where Plant 5 was going to go."

[26] Emphasis added.

[27] *Brown*, 196 W. Va. at 563, 474 S.E.2d at 493.

[28] The business court found that J.F. Allen placed "non-conforming backfill" behind the Wall, which contributed to the anchor-shearing problem.

credible. Again, J.F. Allen argues that this Court should defer to the business court's assessment of the credibility of the opposing experts' opinions.

The business court's finding that J.F. Allen overpaid Redstone on the Construction Subcontract by $904,438.00 withstands a clear-error review. Mr. Willoughby (upon whose opinion the business court relied) arrived at that figure as follows: Redstone claimed damages for additional work and repairs performed on the Wall based on three unpaid Change Orders. Change Order 1 related to beam splices and grout mobilization. Change Order 2 related to anchor repair, additional anchors installed in the north end of the Wall, cased length of anchors, and beam splices due to slip and change in waler design. Change Order 3 related to work necessary to build additional Wall square footage.[29]

Mr. Willoughby valued the work listed in Change Orders 1 and 2 at $302,389.00 and Change Order 3 at $451,906.[30] Because J.F. Allen had not paid Redstone for that work, Mr. Willoughby added those outstanding amounts to the original value of the Construction Subcontract, $ 6,584,687.77, resulting in an "amended contract value" of $7,338,983. Mr. Willoughby then subtracted from that "amended" contract value the money J.F. Allen had already paid to Redstone or had paid to Redstone's vendors ($7,335,834.51) and the cost to J.F. Allen to complete Redstone's unfinished work on the Wall ($907,587.07), to arrive at the conclusion that Redstone had received $904,438 more from J.F. Allen than it was due under the "amended" value of the Construction Subcontract.

Redstone's true issue with Mr. Willoughby's opinion appears to be his valuation of the work performed by Redstone to add square footage to the Wall and to make repairs. But, again, the business court adopted Mr. Willoughby's opinion, finding his report "credible" and "the values and calculations performed by Mr. Willoughby [to be] reasonable." Further, the business court found that Redstone had not offered testimony or documentation to support its pricing of those change orders. Even so, the business court gave Redstone "credit" for the work in those change orders when it adopted Mr. Willoughby's opinion as to the amount of contract overpayments made by J.F. Allen to Redstone. We will not disturb the business court's credibility finding and assessment of Mr. Willoughby's report lightly; on review, they do not "'strike us [as] wrong with the 'force of a five-week-old, unrefrigerated dead fish.'"[31] Accordingly, we affirm the business court's judgment of $904,438 against Redstone and in favor of J.F. Allen.

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[29] Mr. Willoughby also opined that "Redstone had not proven entitlement to any compensation for overhead or inefficiency costs . . . ." Again, the business court found Mr. Willoughby's report "credible" and his "values and calculations . . . reasonable."

[30] Redstone's expert, Mr. Charles Bolyard, Jr., assigned a value of $410,000 to Change Orders 1 and 2, and $975,960.25 to Changer Order 3.

[31] *Brown*, 196 W. Va. at 563, 474 S.E.2d at 493 (quoting *Markling*, 7 F.3d at 1319).

E. Sufficiency of the Judgment Order

Redstone argues that portions of the final judgment order are insufficient under West Virginia Rule of Civil Procedure 52(a) because they lack sufficient findings of fact and conclusions of law regarding (1) Redstone's negligence claim against AMEC, (2) Redstone's quantum meruit and unjust enrichment clams against MarkWest; and (3) J.F. Allen's indemnification claim against it (Redstone). We outline Rule 52(a) before addressing those individual arguments.

Rule 52(a) applies to all actions tried without a jury. Subsection (a) of the rule states, in pertinent part:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . . It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.[32]

Rule 52(a) requires the trial court to make specific findings of fact and separate conclusions of law "to enable an appellate court to apply the law to the facts upon the review of such a case, and it has been held that a case may be remanded where the rule has not been complied with."[33] Practically, we held that the absence of findings of fact and conclusions of law sufficient to permit appellate review may require remand of the matter for further proceedings:

> Rule 52(a) mandatorily requires the trial court, in all actions tried upon the facts without a jury, to find the facts specially and state separately its conclusions of law thereon before the entry of judgment. The failure to do so constitutes neglect of duty on the part of the trial court, and if it appears on appeal that the rule has not been complied with, the case may be remanded for compliance.[34]

But we have also held that,

> [a] case will be disposed of without remanding it to the trial court to find the facts specially and state separately its conclusions of law in accordance with Rule 52(a) of the Rules of Civil Procedure, when there is sufficient information in

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[32] Rule 52(b) also permits a party to move the court to add to or amend its findings within ten days after entry of judgment.

[33] *Blevins v. May*, 158 W. Va. 531, 533, 212 S.E.2d 85, 86 (1975).

[34] Syl. Pt. 1, *Commonwealth Tire Co. v. Tri-State Tire Co.*, 156 W. Va. 351, 193 S.E.2d 544 (1972).

> the record with regard to the facts which control the proper disposition of the case.[35]

1. Quantum Meruit and Unjust Enrichment

Redstone pleaded two, quasi-contractual claims against MarkWest: unjust enrichment and quantum meruit. Although those claims were acknowledged in the final judgment order, they were not expressly ruled on. Redstone now argues that we should remand this matter to permit the business court to address these claims.

MarkWest responds that Redstone conceded in its proposed findings of fact and conclusions of law that it was not entitled to relief on these claims and, barring that, the final judgment order contains findings and conclusions sufficient for this Court to dispose of them. In addition, MarkWest argues that Redstone pursued these quasi-contractual claims *in the alternative to* its tort claim against AMEC and contract claim against J.F. Allen. Parallel to that, MarkWest argues that Redstone's work on the Project was covered by the Construction Subcontract with J.F. Allen and so these quasi-contractual claims against MarkWest are barred.

We concur with MarkWest that remand is unnecessary to dispose of this issue given the business court's extensive factual findings and Redstone's acknowledgment that its equitable claims against MarkWest were *alternatives* to its breach-of-contract claim against J.F. Allen and tort claim against AMEC. Specifically, in its response to MarkWest's motion to dismiss these claims, Redstone stated that it

> certainly does not dispute that it is only entitled to one recovery for one loss. Accordingly, to the extent that Redstone is successful in its breach of contract claim against [J.F. Allen], and damages recovered by way of that claim are not also recoverable from MarkWest . . . . Accordingly, Redstone's equity claims against MarkWest are made in the alternative.

And in its order granting-in-part and denying-in-part MarkWest's motion to dismiss, the business court recognized Redstone's alternative pleading:

> Redstone avers that it is not looking to recover from [MarkWest] that which it may recover in breach of contract from J.F. Allen or in tort from Defendant AMEC. To the extent Redstone does not recover under those theories, Redstone avers the result would be that [MarkWest] will have received and retained the benefits from Redstone's extra work without payment, and Redstone believes it's entitled to a recovery for the extra work directly from [MarkWest].
>
> . . . .
>
> In light of Rule 8 and the relevant case law, the Court finds Redstone has validly pled Counts II [quantum meruit] and III [unjust enrichment] in the alternative.

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[35] Syl. Pt. 3, *Prete v. Merchants Prop. Ins. Co. of Ind.*, 159 W. Va. 508, 223 S.E.2d 441 (1976).

Redstone contracted with J.F. Allen to construct the Wall, and there is no dispute that that contract—the Construction Subcontract—is valid.[36] Further, Redstone sought damages from J.F. Allen under the Construction Subcontract for additional work on the Wall and repairs made to it. Even though the business court found that Redstone offered neither testimony nor documentary evidence to support the amounts claimed in the related change orders, the court still offset J.F. Allen's contract damages against Redstone by the reasonable costs of Redstone's work to expand the Wall and the cost of repairs made to it that were not attributable to Redstone's defective work, as opined to by Mr. Willoughby. So, while the business court did not enter judgment in Redstone's favor on its breach of contract claim against J.F. Allen, the court *did* credit Redstone for what the court found to be the reasonable value of Redstone's unpaid work on the Wall. [37] For all of those reasons, we decline to grant Redstone's request to reverse the final judgment order and remand this case for additional findings of fact and conclusions of law on its quasi-contractual claims against MarkWest.

2. Professional Negligence

Redstone pursued a negligence claim against AMEC, the Project's design professional of record, based on the holdings in *Eastern Steel Constructors, Inc. v. City of Salem*.[38] The business court disposed of Redstone's negligence claim in the final judgment order, finding that "[a]s to Redstone's claim for negligence against AMEC, . . . AMEC has no duty to Redstone. Therefore, Redstone failed to meet its evidentiary burden necessary to establish that it is entitled to any damages against AMEC."

On appeal, Redstone argues that the business court's analysis of its negligence claim against AMEC does not comport with Rule 52(a). Additionally, Redstone argues that the business court's legal conclusion is erroneous and that it is owed a duty by AMEC based on this Court's holdings in *Eastern Steel*. AMEC responds that the court's legal conclusion that it did not owe a duty of care to Redstone was correct, and that Redstone has already been compensated for the economic injuries it claims to have sustained due to design deficiencies.[39]

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[36] *See* Syl. Pt. 2, *Gulfport Energy Corp. v. Harbert Priv. Equity Partners, LP*, 244 W. Va. 154, 851 S.E.2d 817 (2020) ("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.").

[37] *See* Syl. Pt. 7, in part, *Harless v. First Nat'l Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982) ("A plaintiff may not recover damages twice for the same injury simply because he has two legal theories.").

[38] Syl. Pts. 6 and 7, *E. Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 549 S.E.2d 266 (2001).

[39] Redstone asserted in its brief that it suffered "money damages, including, but not limited to, work that it performed but for which it was not paid and repair work to correct [AMEC's] deficient design." In reply, Redstone re-asserts its position that the final judgment order does not

We concur with AMEC's second argument. As detailed above, Redstone claimed damages for additional work and repairs performed on the Wall based on three unpaid change orders related to beam splices and grout mobilization, anchor repair, installation of additional anchors installed in the north end of the Wall, cased length of anchors, beam splices due to slip and change in waler design and work necessary to build additional Wall square footage.[40] The business court credited Redstone with the value of that work in the calculation of the amount that J.F. Allen had overpaid Redstone on the Construction Subcontract.[41] Further, immediately after concluding that AMEC did not owe a duty to Redstone, the business court found that "Redstone seeks the costs for fixing the anchors that sheared, and the Court finds this was taken into account when Mr. Willoughby analyzed the overpayment on the Redstone contracts. Therefore, the [c]ourt finds the credits for work performed by Redstone have been taken into consideration."

"A plaintiff may not recover damages twice for the same injury simply because he has two legal theories."[42] Because the business court offset J.F. Allen's contractual overpayments by the reasonable value of the unpaid repairs and additional work performed by Redstone, Redstone cannot also recover for those unpaid repairs and additional work from AMEC via a negligence

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comply with Rule 52(a) in that there are no detailed conclusions of law regarding its negligence claim. But we do not see that Redstone addressed AMEC's argument directly or identified the money damages it (Redstone) seeks to recover via this negligence claim *other than* those identified by AMEC in its response.

[40] Redstone argued in its brief that "Amec further breached its duty to Redstone through faulty anchor design . . . lead[ing] to $981,673 in damages being awarded against Redstone to the benefit" of J.F. Allen. As discussed above, the business court awarded J.F. Allen $981,673 in contract damages against Redstone to compensate J.F. Allen for the cost to repair anchors installed by Redstone in May 2015 and that pulled out of the rock in July 2015. The business court explicitly found that those "pulled out" anchors did *not* fail due to a deficiency in AMEC's design and made multiple findings as to how Redstone's acts and omissions caused those anchors to fail. While Redstone broadly asserts that AMEC's negligence led "to $981,673 in damages being awarded against Redstone to the benefit of JFA," Redstone does not undertake to show that the business court's finding that "the anchor pull-outs were not the result of deficient design" is clearly erroneous. Further, and as discussed above, Redstone asserts elsewhere in its brief that those "anchors failed during testing due to an unforeseen geologically weak area in the hillside, and the presence of excessive groundwater."

[41] Additionally, J.F. Allen's expert, Mr. Willoughby opined that "Redstone had not proven entitlement to any compensation for overhead or inefficiency costs . . . ." Again, the business court found Mr. Willoughby's report "credible" and his "the values and calculations . . . reasonable."

[42] Syl. Pt. 7, in part, *Harless*, 169 W. Va. at 673, 289 S.E.2d at 692.

claim. So, we decline to reverse the business court's conclusion that Redstone is not entitled to relief on its negligence claim against AMEC.[43]

3. Construction Subcontract: Indemnification

Redstone argues the business court erroneously interpreted the Construction Subcontract to require it to indemnify J.F. Allen for $1,458,342.35—a portion of the lost profit/delay damages J.F. Allen owed MarkWest. Redstone argues that the judgment order does not contain an analysis of two contractual provisions that it contends render that portion of the judgment error. Substantively, Redstone argues that these contractual provisions negate any indemnification obligation it may have to J.F. Allen for consequential damages. J.F. Allen responds that the business court did not error in ordering Redstone to indemnify J.F. Allen for that part of MarkWest's delay damages (lost profits) which Redstone caused.

On Redstone's first point, "'[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.'"[44] The "interpretation of contract language is a question of law."[45] The record includes the Construction Subcontract, as well as Redstone's findings of fact and conclusions of law proposed to the business court regarding the contractual provisions it now argues. So, in these circumstances, we proceed to consider J.F. Allen's arguments in support of affirming judgment and Redstone's arguments in favor of reversal.

According to Redstone, the business court erred when it concluded that under the Design Subcontract, AMEC was not obligated to indemnify J.F. Allen for a portion of MarkWest's delay damages (lost profits) but did not reach the same conclusion as to Redstone's obligation to indemnify MarkWest under the Construction Subcontract.[46] Redstone also argues that J.F. Allen

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[43] *Cf.* Syl. Pt. 2, *Adkins v. Gatson*, 218 W. Va. 332, 624 S.E.2d 769 (2005) ("'This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.' Syllabus point 3, *Barnett v. Wolfolk,* 149 W.Va. 246, 140 S.E.2d 466 (1965).").

[44] *Id*.

[45] *Wood v. Acordia of W. Va., Inc.*, 217 W. Va. 406, 411, 618 S.E.2d 415, 420 (2005).

[46] We decline to address this argument in detail. The Design Subcontract stated

> AMEC and [J.F. Allen] shall not be responsible to each other for any special, incidental, indirect, or consequential damages (including lost profits) incurred by either AMEC or [J.F. Allen] or for which either party may be liable to any third party, which damages have been or are occasioned by Services performed or reports prepared or other work performed hereunder.

was barred from recovering from Redstone that portion of the delay damages (lost profits) attributable to Redstone's failings based on the following provision in the Construction Subcontract: "Redstone will not be liable for any additional costs, penalties, or back charges due to liquidated, actual, or consequential damages." J.F. Allen responds that the quoted language "does not relieve liability for consequential damages but only as to costs, penalties, or back charges *due to* such damages."[47]

J.F. Allen further responds to Redstone's argument with the following provision from the Construction Subcontract, entitled "Damages for Subcontractor Delay," which states:

> 3.03 Damages for Subcontractor Delay
>
> A. [J.F. Allen] and [Redstone] recognize that time is of the essence as stated in Paragraph 3.01[48] and that [J.F. Allen] may suffer financial loss if the Work is not completed within the times specified in Paragraph 3.02.A[49] above, plus any extensions thereof allowed in accordance with Article 11.02 of the General Conditions. [Redstone] shall pay to [J.F. Allen] its actual damages, including those damages paid to [MarkWest] or others by [J.F. Allen] attributable to [Redstone's] failure to timely perform.

"[I]nterpretation of contract language is a question of law."[50] "'When a written contract is clear and unambiguous its meaning and legal effect must be determined solely from its contents and it will be given full force and effect according to its plain terms and provisions.'"[51] Further, "[a] contract must be considered as a whole, effect being given, if possible, to all parts of the instrument."[52]

Redstone has not identified for the Court identical language in the Construction Subcontract.

[47] Emphasis added.

[48] Paragraph 3.01 states, "[a]ll times and time limits stated for Substantial Completion, completion, and readiness for final payment and Milestones, if any are of the essence of this Subcontract."

[49] Paragraph 3.02.A. states that "[t]he Work will be pursued in compliance with [J.F. Allen's] schedule as set forth in the Supplementary Conditions of the Subcontract and as it may from time to time be amended or changed by [J.F. Allen]." Elsewhere in the Construction Subcontract, it was specified that the Project was to be completed by March 31, 2015.

[50] *Wood*, 217 W. Va. at 411, 618 S.E.2d at 420.

[51] Syl. Pt. 8, *Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 810 S.E.2d 286 (2018) (quoting Syl. Pt. 3, in part, *Kanawha Banking & Trust Co. v. Gilbert*, 131 W. Va. 88, 46 S.E.2d 225 (1947)).

[52] Syl., *Clayton v. Nicely,* 116 W.Va. 460, 182 S.E. 569 (1935).

Applied to the contractual provisions quoted above, those principles do not mandate reversal of the $1,458,342.35 judgment for indemnification entered against Redstone in favor of J.F. Allen. First, as J.F. Allen argues, the language relied upon by Redstone relieves Redstone from an obligation to indemnify J.F. Allen "for any additional costs, penalties, or back charges *due to* liquidated, actual, or consequential damages"—not "consequential damages," generally, as Redstone contends.[53] More to the point, Section 3.03 expressly provides that "[Redstone] shall pay to [J.F. Allen] its actual damages, *including those damages paid to [MarkWest] or others by [J.F. Allen] attributable to [Redstone's] failure to timely perform*." Redstone disputes that the damages paid to MarkWest by J.F. Allen can be labelled J.F. Allen's "actual damages" to Redstone. The italicized portion of Section 3.03 belies that argument. Here, J.F. Allen was ordered to pay MarkWest $2,651,531.54 in delay damages in the form of lost profits. The court attributed to Redstone's untimely performance $1,458,342.35 of the $2,651,531.54 judgment entered against J.F. Allen in favor of MarkWest. It then entered judgment against Redstone in that amount in favor of J.F. Allen, i.e., the amount J.F. Allen owed MarkWest attributable to Redstone's untimely performance. In view of the plain language Section 3.03 and the facts of this case, we find no error on this point.

Redstone also argues that J.F. Allen was contractually obligated to waive indemnification from Redstone for $1,458,342.35 (attributable to Redstone's delayed performance) and contract damages for $981,673 (repair costs due to "pulled-out" anchors, *see above*) based on the following provision in Article 5 (Insurance) of the Construction Subcontract:

> B. [J.F. Allen] waives, and will cause [MarkWest] to waive, all rights against [Redstone] . . . for:
>
> 1. Loss due to business interruption, loss of use, or other consequential loss extending beyond direct physical loss or damage to [MarkWest's] or [J.F. Allen's] property or the Work *caused by, arising out of or resulting from fire or other peril*, whether or not insured by [MarkWest] or [J.F. Allen]; and
>
> 2. Loss or damage to the completed Project or part thereof caused by, arising out of, or resulting from fire or other insured peril or cause of loss *covered by any property insurance maintained on the completed project or part thereof by [MarkWest]* during partial utilization . . . .[54]

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[53] Below that provision, J.F. Allen's principal, Mr. Hadjis, interlineated the following: "JFA shall have the right to recover actual damages as a result of acts or omissions by Redstone International which result in financial loss to JFA." Redstone describes Mr. Hadjis's addition as "clarifying language" to the provision quoted above, then argues at length that the delay damages (lost profits) awarded to MarkWest are consequential damages. We do not see that Mr. Hadjis's interlineation negates the phrase "due to."

[54] Emphasis added.

We disagree with Redstone that those provisions required J.F. Allen to waive the claims identified above. Redstone does not consider the italicized language in those provisions. As already discussed, we see no clear error in the business court's finding that Redstone's deficient work (not a fire or other peril) caused J.F. Allen to incur $981,673 in repair costs due to failed anchors. And the court ordered Redstone to indemnify J.F. Allen for $1,458,342.35 because that was the amount of delay damages (lost profits) paid to MarkWest by J.F. Allen attributable to Redstone's delayed performance (not a fire or other peril). Moreover, Redstone did not reply to J.F. Allen's argument that there is no evidence in the record regarding the existence and scope of insurance coverage for the Project. For those reasons, we leave undisturbed the judgments against Redstone in favor of J.F. Allen in the amounts of $981,673 and $1,458,342.35.

IV. CONCLUSION

For the reasons stated above, we affirm the business court's order of October 15, 2021.

AFFIRMED.

Issued: June 13, 2023

CONCURRED IN BY:
Chief Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn