IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

THE THRASHER GROUP, INC.,

Plaintiff/Counterclaim Defendant,

v.

Civil Action No. 20-C-772
Presiding: Judge Reeder
Resolution: Judge Farrell

BEAR CONTRACTING, LLC

Defendant/Counterclaimant

and GREAT AMERICAN INSURANCE COMPANY,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR REVISION OF SUMMARY JUDGMENT ORDERS OR IN THE ALTERNATIVE TO CERTIFY THE JUDGMENT FOR IMMEDIATE APPEAL

This matter came before the Court pursuant to Plaintiff, The Thrasher Group, Inc.'s, *Motion for Revision of Summary Judgment Orders Or In The Alternative To Certify the Judgment for Immediate Appeal.* The Plaintiff, The Thrasher Group, Inc., by counsel, Ancil G. Ramey, Esq., Anders W. Lindberg, Esq., Adam S. Ennis, Esq. and John D. Pizzo, Esq., and Defendants, Bear Contracting, LLC and Great American Insurance Company, by counsel, Christopher A. Brumley, Esq. and Evan S. Aldrige, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court FINDS and ORDERS as follows:

FINDINGS OF FACT

1. This civil action arises from three construction projects in which Defendant Bear Contracting, LLC (hereinafter "Defendant" or "Bear") and Plaintiff The Thrasher Group, Inc. (hereinafter "Plaintiff" or "Thrasher") worked together, wherein Bear was to perform construction services and Thrasher was to provide engineering services. The Court notes the claims regarding one of the three projects were resolved by the Resolution Judge in this matter. Therefore, relevant to the instant motions, Thrasher and Bear worked on two projects: (i) West Virginia Department of Highway ("WVDOH") Project Number NFA-2117(019)D (U351-15-8.67 00) (also known as the "Diana Deck" project) and (ii) West Virginia Department of Highway ("WVDOH") Project Number NFA-2117(020)D (S309-23-8.20 00) (also known as the "Pike Fork" project). Collectively these projects may be referred to as the "Projects."

2. The parties' contracts related to the Projects are at the center of this matter. On March 8, 2023, this Court entered orders on cross-motions for summary judgment regarding the contractual dispute at the heart of this civil litigation. *See* Pl's Mot., p. 1. These Orders granted summary judgment in Bear's favor regarding Bear's motion for summary judgment on certain counterclaims, granted summary judgment in Bear's favor regarding Thrasher's claims, and denied Thrasher's motions for summary judgment on the same subject matter. *See* Def's Resp., p. 2.

3. On March 20, 2023, Plaintiff filed the instant motion under Rule 54(b) of the West Virginia Rules of Civil Procedure, seeking this Court to revise its March 8, 2023 summary judgment orders, or, alternatively, to "enter final judgment on the claims covered by the Orders pursuant to WVRCP 54(b) and certify the rulings for immediate appeal". *See* Pl's Mot., p. 1.

4. On or about March 24, 2023, Defendants filed their Response stating Plaintiff showed no clear error that would require the revision of the subject Orders, but stating that it did not oppose the entry of the requested final order, if this Court maintains its present decision on the motions for summary judgment, and noting that it would reserve its right to challenge the request if the Court made a partial revision of the Orders. *See* Def's Resp., p. 1.

5. On or about March 29, 2023, Plaintiff filed its Reply.

6. The Court finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

Plaintiff seeks revision of the March 8, 2023 summary judgment orders pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, or, in the alternative, certification of the Court's rulings for immediate appeal. The Court will analyze both requests for relief.

Request for Revision

Rule 54(b) provides:

> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

W. Va. R. Civ. P. 54.

Plaintiff cites *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 584 S.E.2d 176 (2003) in support of Rule 54(b)'s last sentence, that an "order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties". W. Va. R. Civ. P. 54. Plaintiff argues the summary judgment orders should be revised pursuant to Rule 54(b) because the Court erred in certain holdings. *See* Pl's Mot.

The West Virginia Supreme Court of Appeals provided the following analysis in *Hubbard*:

> We have previously recognized that "Rule 60(b) by its plain terms applies to a '*final* judgment, order, or proceeding.' " *State ex rel. Crafton v. Burnside,* 207 W.Va. 74, 77, 528 S.E.2d 768, 771 (2000). " 'Interlocutory orders and judgments are not within the provisions of 60(b), but are left to the plenary power of the court that rendered them to afford such relief from them as justice requires.' " *Caldwell v. Caldwell,* 177 W.Va. 61, 63, 350 S.E.2d 688, 690 (1986) (quoting 7 J. Moore, *Moore's Federal Practice* ¶ 60.20 (2d ed.1985)). Thus, we have held in the context of granting a new trial that "[i]n an ongoing action, in which no final order has been entered, a trial judge has the authority to reconsider his or her previous rulings .... [A] trial court has plenary power to reconsider, revise, alter, or amend an interlocutory order ...." Syl. pt. 2, in part, *Taylor v. Elkins Home Show, Inc.*, 210 W.Va. 612, 558 S.E.2d 611 (2001). Therefore, [Defendants'] "motion[s] may best be 'viewed as a routine request for reconsideration of an interlocutory ... decision .... Such requests do not necessarily fall within any specific ... Rule. They rely on the inherent power of the rendering ... court to afford such relief from interlocutory judgments ... as justice requires.' " *Id.* at 617, 558 S.E.2d at 616 (quoting *State ex rel. Crafton v. Burnside,* 207 W.Va. 74, 77, 528 S.E.2d 768, 771 (2000) (quoting *Greene v. Union Mutual Life Ins. Co. of America,* 764 F.2d 19, 22 (1st Cir.1985))).

Hubbard v. State Farm Indem. Co., 213 W. Va. 542, 551, 584 S.E.2d 176, 185 (2003).

The Supreme Court in *Hubbard* then looked to the federal courts' interpretation of revision of interlocutory orders for guidance. *Id.* Along those same lines, the Fourth Circuit of the United States Court of Appeals has noted that, "compared to motions to reconsider final judgments pursuant to Rule 59(e)…., Rule 54(b)'s approach involves broader flexibility to revise interlocutory orders before final judgment as the litigation develops and new facts or arguments come to light". *Carlson v. Bos. Sci. Corp.,* 856 F.3d 320, 325 (4th Cir. 2017). The Court in *Carlson* ruled that a court may revise an interlocutory order under the same circumstances in which it may depart from the law of the case: (1) a subsequent trial producing substantially different evidence; (2) a change in applicable law; or (3) clear error causing "manifest injustice". *Id.*

Here, there has been no subsequent trial or change in law, so the Court will analyze Thrasher's arguments as to whether there was clear error causing manifest injustice.

Thrasher contends this Court erred in its conclusions regarding the Projects' contracts and damages. First, regarding contract conclusions, Thrasher argues the Court erred by concluding that the contract language dictates that quality control services does not include inspection. *See* Pl's Mot., p. 2. Further, Thrasher argues the Court erred in declining to consider parol evidence/the parties' intent in concluding that professional services, as stated in Section 3 of the subject contract, included inspection. *Id.* at 4. Also, Thrasher argues the contract does not obligate Thrasher to perform design changes dictated by Bear, demolition plans, overhang calculations, erection plans, payment of the right of way consultant, or additional survey costs. *Id.* at 12-18. Finally, regarding damages, Thrasher argues the Court erroneously entered judgment for specific amounts, including amounts for markup, without adequate evidentiary

support, and that the Court should have applied a setoff of undisputed charges. *Id.* at 21-24. The Court will analyze the contract conclusions and the damages conclusions in turn.

Contract Conclusions

First, the Court considers Thrasher's arguments related to the March 8, 2023 Orders' contract conclusions. In the present case, none of the grounds for revision are present. The Court, after review of the pleadings and the court file, finds there are no clear errors causing manifest injustice to be corrected. It is apparent from review of the record that the Court considered all the matters before the Court, including the Subcontracts and pricing proposal documents. The Subcontracts included Section 3 which provided that Thrasher was responsible for "all engineering, design and professional services required by the Prime Contract." Established black letter law regarding contracts does not give the Court leave to alter, pervert, or destroy clear meaning or intent of parties as expressed in unambiguous language in their written agreements. The Subcontracts included merger clauses which state that any prior agreements are replaced and superseded any prior agreements. Freedom of contract is a fundamental legal concept and the parties are two sophisticated business entities who negotiated the terms of this contractual relationship, including Paragraph 3 which referenced the Prime Contract with WVDOH which identified project requirements, and there was no argument that Thrasher was asked to perform work unrelated to the Projects. *See* Ords. 3/8/23.

Plaintiff did not present new evidence not previously available to the Court which came to light after its decision, or any change in controlling law. Instead, in the instant motion, Plaintiff relied on many of the same averments it discussed in its underlying motion, and its Response to Bear's motion for summary judgment. Plaintiffs simply did not demonstrate a clear error upon which to revise the Orders regarding the Court's conclusion that it would interpret the

Subcontracts on their face, conclude their language (specifically Section 3) was clear and unambiguous and dictated that Thrasher provide all engineering, design and professional services as required by the Prime Contract. *See* Ord. Gr. Def's Mot. for Summ. J. Regarding Pl's Diana Deck and Pike Fork Project Claims and Denying Pl's Mot. for Partial Summ. J., 3/8/23, ¶¶27, 30.

For all of these reasons, the Court FINDS Plaintiff has presented no clear error in the Court's findings in its March 8, 2023 Orders regarding the unambiguousness of Section 3 and its coverage of Plaintiff's argued work/tasks. This Court rejected Plaintiff's arguments contained in the instant motion when ruling on the underlying motions for summary judgment. Although Plaintiff reiterates its position, Plaintiff's arguments in the instant motion simply do not demonstrate a clear error upon which to revise the March 8th Orders.

Accordingly, the Court declines to revise determinations regarding the Contracts and Section 3 contained in its March 8, 2023 Orders. Therefore, the Court finds the instant motion must be DENIED as to this request.

Damages Conclusions

Second, the Court considers Thrasher's arguments related to the March 8, 2023 Orders' damages conclusions. Both Plaintiff and Defendant sought certain amounts in damages in their respective motions for summary judgment, attributed to different charges related to completion of the Projects. *See* Ord., 3/8/23, ¶36 (listing the amounts of damages Thrasher sought to recover). While some line items seem to be directly attributable to work performed that the Court concluded is encompassed by Section 3, such as additional survey/construction layout costs (which the Court also notes were listed as included as included services on the pricing proposals as well), the Court considers its conclusions versus the amounts of damages proffered. While the Court stands by its conclusions that such line items are included in Section 3's language, the

Court considers Thrasher's arguments regarding the Court taking evidence on the damage amounts.

Compensatory damages recoverable by an injured party incurred through the breach of a contractual obligation must be proved with reasonable certainty. Syl. Pt. 3, *Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro*, 158 W. Va. 708, 709, 214 S.E.2d 823, 824 (1975).

In the instant motion, Thrasher avers Bear did not establish the alleged damages with reasonable certainty. *See* Pl's Mot., p. 22. Thrasher avers more invoice evidence is necessary to support its subsequent engineering firms' inspection services work, as well as that it should have offered more evidence for claims based on in-house completion of work. *Id.*

Further, the Court considers the issue of markup. Thrasher argues the Court erroneously accepted Bear's 16% markup, violating the black letter rule that a plaintiff is only entitled to such damages as would put him in the same position as if the contract had been performed. *See* Pl's Mot., p. 23. Instead, Thrasher contends Bear is only entitled to its out-of-pocket expenses and asks the Court to revise its Orders accordingly. *Id.*

Bear contends in its Response to the instant motion that Thrasher waived its right to challenge the damages figures because it never materially challenged the amounts in the briefing related to the underlying motions for summary judgment. *See* Def's Resp., p. 15-16. In making this contention, Bear does recognize that Thrasher did assert Bear was not entitled to a markup. *Id.* at 16, 18.

The Court recognizes that in deciding issues in the summary judgment motions, there remained some issues for a bench trial, the scope of which was to be, and was, discussed at the March 10, 2023 hearing before the undersigned. The Court, after reviewing the Orders and underlying damage assertions, finds it was error to find no genuine issue of material fact remains

as to damage amounts. The Court finds genuine issues of material fact remain as to the amounts of such damages, including whether a markup is appropriate and whether a setoff should be applied, and the proper remedy would be for both parties to present evidence on damages at a bench trial on all remaining issues. The Court notes Bear asserts that in the instant motion, Thrasher does not concede to any "obvious" damages, such as O.R. Colan's invoices. *See* Def's Resp., p. 17. The Court directs the parties to confer prior to any bench trial in this matter and stipulate to any damage amounts that are not in dispute.

Therefore, the Court finds the motion to revise is GRANTED IN PART and DENIED IN PART. The Court finds there is sufficient cause to revise the Orders as to its conclusions regarding damages, as outlined above. The damage amounts awarded shall be added to the remaining issues that are set for trial in this matter. The Court finds there is insufficient cause to revise the Orders as to its contract conclusions.

Request for 54(b) Certification

The Court next turns to Thrasher's request for alternative relief, its request for a Rule 54(b) certification. Specifically, Thrasher alternatively moves the Court to "enter final judgment on the claims covered by the Orders pursuant to WVRCP 54(b) and certify the rulings for immediate appeal". *See* Pl's Mot., p. 1. The Court notes that Defendants do not object to this request (in the event that the Court maintained its decision on the summary judgment orders/denied Thrasher's first request for relief). *See* Def's Resp., p. 1.

Rule 54(b) of the West Virginia Rules of Civil Procedure governs judgment upon multiple claims or involving multiple parties. Rule 54(b) provides, in pertinent part: "When more than one claim for relief is presented in an action...or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the

claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment". W. Va. R. Civ. Proc. 54.

Generally, an order qualifies as a final order when it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *Durm v. Heck's, Inc.*, 184 W. Va. 562, 401 S.E.2d 908 (1991). A judgment may properly be certified under subdivision (b) only if completely disposes of at least one substantive claim. *Province v. Province*, 196 W. Va. 473, 473 S.E.2d 894 (1996).

The following two-prong test applies to Rule 54(b) certifications: (1) whether the circuit court completely disposed of one or more claims; and (2) whether there is any just reason for delay. Syl. Pt. 1, *Province v. Province*, 196 W. Va. 473, 475, 473 S.E.2d 894, 896 (1996).

The West Virginia Supreme Court of Appeals "affords great deference to the intent of the circuit court in its determination of whether an order is final for purposes of Rule 54(b) certification[.]" *State ex rel. Consolidation Coal Co. v. Clawges*, 206 W. Va. 222, 228, 523 S.E.2d 282, 288 (1999); *see also Province,* 196 W.Va. 479 ("[T]he entire purpose of Rule 54(b) is to place this decision in the hands of the trial court who can best make this delicate balance."). There is also strong judicial policy disfavoring piecemeal appellate review. *Province*, 196 W. Va. at 480, n.14. As a result, use of Rule 54(b) "should not be routine and should be reserved only for the 'infrequent harsh case[.]'" *Id.* at 479 (quoting FED. R. CIV. P. 54 advisory committee's note.). "It should be granted only if there exists some danger of hardship or injustice through delay, that would be alleviated by immediate appeal." *Id.*

While the first element with regard to certification under Rule 54(b) is the issue of finality, the Court will analyze the second element, whether there is "no just reason for delay". Syl. Pt. 1, *Province v. Province*, 196 W. Va. 473, 475, 473 S.E.2d 894, 896 (1996).

The circuit court's determination of whether there is any just reason for delay is given "considerably more deference[.]" Syl. Pt. 1, *Province v. Province*, 196 W. Va. 473, 475, 473 S.E.2d 894, 896 (1996). "The circuit court's assessment that there is 'no just reason for delay' will not be disturbed unless the circuit court's conclusion was clearly unreasonable, because the task of balancing the contending factors is peculiarly one for the trial judge, who can explore all the facets of a case." *Id.* The Supreme Court of Appeals in *Province* explained the rationale on the limited review:

> Ordinarily, an appellate court cannot properly evaluate this prong without knowing how the circuit court feels about separating these issues for appellate purposes. Indeed, the entire purpose of Rule 54(b) is to place this decision in the hands of the trial court who can best make this delicate balance. . . Although it might be easier to decide each appeal in a series of multiple appeals in the same case than would be an appeal from a final judgment disposing of the entire lawsuit, the greater simplicity will usually be outweighed by the burden on this Court of having to reacquaint itself again and again with at least the basic facts of the case.

Province, 196 W. Va. at 480.

The following factors are considered: (1) any interrelationship or overlap among the various legal and factual issues involved in the decided and pending claims, and (2) any equities and efficiencies implicated by the requested piecemeal review. *Province*, 196 W. Va. at 480.

Here, the Court has determined above that it does not find that clear error occurred with regard to its conclusions regarding the clear and unambiguous contract decided as a matter of law. Additionally, it has determined that the issue of specific damage amounts, and the issue of the applicability of setoff, should be revised and as such, as issues of fact remain, are appropriate to be the remaining issues left in this civil action for trial. It is of the Court's opinion that resolving the remaining issues at trial rather than certifying the contract decisions for piecemeal review before trying the related damages issue serves judicial economy. For this reason, because

this second factor is not met, the Court concludes it will not exercise its discretion and certify the matter for immediate appeal. Instead, appeal of all the issues, including the contract issues and the damages that stem from it, should occur at one time, after the litigation the merits is complete.

For this reason, the instant request for Rule 54(b) certification is DENIED.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that The Thrasher Group's Motion for Revision of Summary Judgment Orders Or In The Alternative To Certify the Judgment for Immediate Appeal is hereby GRANTED IN PART AND DENIED IN PART. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

5/19/23

JUDGE JOSEPH K. REEDER
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

THE THRASHER GROUP, INC.,

Plaintiff/Counterclaim Defendant,

v.

Civil Action No. 20-C-772
Presiding: Judge Reeder
Resolution: Judge Farrell

BEAR CONTRACTING, LLC

Defendant/Counterclaimant

and GREAT AMERICAN INSURANCE COMPANY,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR REVISION OF SUMMARY JUDGMENT ORDERS OR IN THE ALTERNATIVE TO CERTIFY THE JUDGMENT FOR IMMEDIATE APPEAL

This matter came before the Court pursuant to Plaintiff, The Thrasher Group, Inc.'s, *Motion for Revision of Summary Judgment Orders Or In The Alternative To Certify the Judgment for Immediate Appeal.* The Plaintiff, The Thrasher Group, Inc., by counsel, Ancil G. Ramey, Esq., Anders W. Lindberg, Esq., Adam S. Ennis, Esq. and John D. Pizzo, Esq., and Defendants, Bear Contracting, LLC and Great American Insurance Company, by counsel, Christopher A. Brumley, Esq. and Evan S. Aldrige, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court FINDS and ORDERS as follows:

FINDINGS OF FACT

1. This civil action arises from three construction projects in which Defendant Bear Contracting, LLC (hereinafter "Defendant" or "Bear") and Plaintiff The Thrasher Group, Inc. (hereinafter "Plaintiff" or "Thrasher") worked together, wherein Bear was to perform construction services and Thrasher was to provide engineering services. The Court notes the claims regarding one of the three projects were resolved by the Resolution Judge in this matter. Therefore, relevant to the instant motions, Thrasher and Bear worked on two projects: (i) West Virginia Department of Highway ("WVDOH") Project Number NFA-2117(019)D (U351-15-8.67 00) (also known as the "Diana Deck" project) and (ii) West Virginia Department of Highway ("WVDOH") Project Number NFA-2117(020)D (S309-23-8.20 00) (also known as the "Pike Fork" project). Collectively these projects may be referred to as the "Projects."

2. The parties' contracts related to the Projects are at the center of this matter. On March 8, 2023, this Court entered orders on cross-motions for summary judgment regarding the contractual dispute at the heart of this civil litigation. *See* Pl's Mot., p. 1. These Orders granted summary judgment in Bear's favor regarding Bear's motion for summary judgment on certain counterclaims, granted summary judgment in Bear's favor regarding Thrasher's claims, and denied Thrasher's motions for summary judgment on the same subject matter. *See* Def's Resp., p. 2.

3. On March 20, 2023, Plaintiff filed the instant motion under Rule 54(b) of the West Virginia Rules of Civil Procedure, seeking this Court to revise its March 8, 2023 summary judgment orders, or, alternatively, to "enter final judgment on the claims covered by the Orders pursuant to WVRCP 54(b) and certify the rulings for immediate appeal". *See* Pl's Mot., p. 1.

4. On or about March 24, 2023, Defendants filed their Response stating Plaintiff showed no clear error that would require the revision of the subject Orders, but stating that it did not oppose the entry of the requested final order, if this Court maintains its present decision on the motions for summary judgment, and noting that it would reserve its right to challenge the request if the Court made a partial revision of the Orders. *See* Def's Resp., p. 1.

5. On or about March 29, 2023, Plaintiff filed its Reply.

6. The Court finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

Plaintiff seeks revision of the March 8, 2023 summary judgment orders pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, or, in the alternative, certification of the Court's rulings for immediate appeal. The Court will analyze both requests for relief.

Request for Revision

Rule 54(b) provides:

> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

W. Va. R. Civ. P. 54.

Plaintiff cites *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 584 S.E.2d 176 (2003) in support of Rule 54(b)'s last sentence, that an "order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties". W. Va. R. Civ. P. 54. Plaintiff argues the summary judgment orders should be revised pursuant to Rule 54(b) because the Court erred in certain holdings. *See* Pl's Mot.

The West Virginia Supreme Court of Appeals provided the following analysis in *Hubbard*:

> We have previously recognized that "Rule 60(b) by its plain terms applies to a '*final* judgment, order, or proceeding.' " *State ex rel. Crafton v. Burnside,* 207 W.Va. 74, 77, 528 S.E.2d 768, 771 (2000). " 'Interlocutory orders and judgments are not within the provisions of 60(b), but are left to the plenary power of the court that rendered them to afford such relief from them as justice requires.' " *Caldwell v. Caldwell,* 177 W.Va. 61, 63, 350 S.E.2d 688, 690 (1986) (quoting 7 J. Moore, *Moore's Federal Practice* ¶ 60.20 (2d ed.1985)). Thus, we have held in the context of granting a new trial that "[i]n an ongoing action, in which no final order has been entered, a trial judge has the authority to reconsider his or her previous rulings .... [A] trial court has plenary power to reconsider, revise, alter, or amend an interlocutory order ...." Syl. pt. 2, in part, *Taylor v. Elkins Home Show, Inc.*, 210 W.Va. 612, 558 S.E.2d 611 (2001). Therefore, [Defendants'] "motion[s] may best be 'viewed as a routine request for reconsideration of an interlocutory ... decision .... Such requests do not necessarily fall within any specific ... Rule. They rely on the inherent power of the rendering ... court to afford such relief from interlocutory judgments ... as justice requires.' " *Id.* at 617, 558 S.E.2d at 616 (quoting *State ex rel. Crafton v. Burnside,* 207 W.Va. 74, 77, 528 S.E.2d 768, 771 (2000) (quoting *Greene v. Union Mutual Life Ins. Co. of America,* 764 F.2d 19, 22 (1st Cir.1985))).

Hubbard v. State Farm Indem. Co., 213 W. Va. 542, 551, 584 S.E.2d 176, 185 (2003).

The Supreme Court in *Hubbard* then looked to the federal courts' interpretation of revision of interlocutory orders for guidance. *Id.* Along those same lines, the Fourth Circuit of the United States Court of Appeals has noted that, "compared to motions to reconsider final judgments pursuant to Rule 59(e)…., Rule 54(b)'s approach involves broader flexibility to revise interlocutory orders before final judgment as the litigation develops and new facts or arguments come to light". *Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017). The Court in *Carlson* ruled that a court may revise an interlocutory order under the same circumstances in which it may depart from the law of the case: (1) a subsequent trial producing substantially different evidence; (2) a change in applicable law; or (3) clear error causing "manifest injustice". *Id.*

Here, there has been no subsequent trial or change in law, so the Court will analyze Thrasher's arguments as to whether there was clear error causing manifest injustice.

Thrasher contends this Court erred in its conclusions regarding the Projects' contracts and damages. First, regarding contract conclusions, Thrasher argues the Court erred by concluding that the contract language dictates that quality control services does not include inspection. *See* Pl's Mot., p. 2. Further, Thrasher argues the Court erred in declining to consider parol evidence/the parties' intent in concluding that professional services, as stated in Section 3 of the subject contract, included inspection. *Id.* at 4. Also, Thrasher argues the contract does not obligate Thrasher to perform design changes dictated by Bear, demolition plans, overhang calculations, erection plans, payment of the right of way consultant, or additional survey costs. *Id.* at 12-18. Finally, regarding damages, Thrasher argues the Court erroneously entered judgment for specific amounts, including amounts for markup, without adequate evidentiary

support, and that the Court should have applied a setoff of undisputed charges. *Id.* at 21-24. The Court will analyze the contract conclusions and the damages conclusions in turn.

Contract Conclusions

First, the Court considers Thrasher's arguments related to the March 8, 2023 Orders' contract conclusions. In the present case, none of the grounds for revision are present. The Court, after review of the pleadings and the court file, finds there are no clear errors causing manifest injustice to be corrected. It is apparent from review of the record that the Court considered all the matters before the Court, including the Subcontracts and pricing proposal documents. The Subcontracts included Section 3 which provided that Thrasher was responsible for "all engineering, design and professional services required by the Prime Contract." Established black letter law regarding contracts does not give the Court leave to alter, pervert, or destroy clear meaning or intent of parties as expressed in unambiguous language in their written agreements. The Subcontracts included merger clauses which state that any prior agreements are replaced and superseded any prior agreements. Freedom of contract is a fundamental legal concept and the parties are two sophisticated business entities who negotiated the terms of this contractual relationship, including Paragraph 3 which referenced the Prime Contract with WVDOH which identified project requirements, and there was no argument that Thrasher was asked to perform work unrelated to the Projects. *See* Ords. 3/8/23.

Plaintiff did not present new evidence not previously available to the Court which came to light after its decision, or any change in controlling law. Instead, in the instant motion, Plaintiff relied on many of the same averments it discussed in its underlying motion, and its Response to Bear's motion for summary judgment. Plaintiffs simply did not demonstrate a clear error upon which to revise the Orders regarding the Court's conclusion that it would interpret the

Subcontracts on their face, conclude their language (specifically Section 3) was clear and unambiguous and dictated that Thrasher provide all engineering, design and professional services as required by the Prime Contract. *See* Ord. Gr. Def's Mot. for Summ. J. Regarding Pl's Diana Deck and Pike Fork Project Claims and Denying Pl's Mot. for Partial Summ. J., 3/8/23, ¶¶27, 30.

For all of these reasons, the Court FINDS Plaintiff has presented no clear error in the Court's findings in its March 8, 2023 Orders regarding the unambiguousness of Section 3 and its coverage of Plaintiff's argued work/tasks. This Court rejected Plaintiff's arguments contained in the instant motion when ruling on the underlying motions for summary judgment. Although Plaintiff reiterates its position, Plaintiff's arguments in the instant motion simply do not demonstrate a clear error upon which to revise the March 8th Orders.

Accordingly, the Court declines to revise determinations regarding the Contracts and Section 3 contained in its March 8, 2023 Orders. Therefore, the Court finds the instant motion must be DENIED as to this request.

Damages Conclusions

Second, the Court considers Thrasher's arguments related to the March 8, 2023 Orders' damages conclusions. Both Plaintiff and Defendant sought certain amounts in damages in their respective motions for summary judgment, attributed to different charges related to completion of the Projects. *See* Ord., 3/8/23, ¶36 (listing the amounts of damages Thrasher sought to recover). While some line items seem to be directly attributable to work performed that the Court concluded is encompassed by Section 3, such as additional survey/construction layout costs (which the Court also notes were listed as included as included services on the pricing proposals as well), the Court considers its conclusions versus the amounts of damages proffered. While the Court stands by its conclusions that such line items are included in Section 3's language, the

Court considers Thrasher's arguments regarding the Court taking evidence on the damage amounts.

Compensatory damages recoverable by an injured party incurred through the breach of a contractual obligation must be proved with reasonable certainty. Syl. Pt. 3, *Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro*, 158 W. Va. 708, 709, 214 S.E.2d 823, 824 (1975).

In the instant motion, Thrasher avers Bear did not establish the alleged damages with reasonable certainty. *See* Pl's Mot., p. 22. Thrasher avers more invoice evidence is necessary to support its subsequent engineering firms' inspection services work, as well as that it should have offered more evidence for claims based on in-house completion of work. *Id.*

Further, the Court considers the issue of markup. Thrasher argues the Court erroneously accepted Bear's 16% markup, violating the black letter rule that a plaintiff is only entitled to such damages as would put him in the same position as if the contract had been performed. *See* Pl's Mot., p. 23. Instead, Thrasher contends Bear is only entitled to its out-of-pocket expenses and asks the Court to revise its Orders accordingly. *Id.*

Bear contends in its Response to the instant motion that Thrasher waived its right to challenge the damages figures because it never materially challenged the amounts in the briefing related to the underlying motions for summary judgment. *See* Def's Resp., p. 15-16. In making this contention, Bear does recognize that Thrasher did assert Bear was not entitled to a markup. *Id.* at 16, 18.

The Court recognizes that in deciding issues in the summary judgment motions, there remained some issues for a bench trial, the scope of which was to be, and was, discussed at the March 10, 2023 hearing before the undersigned. The Court, after reviewing the Orders and underlying damage assertions, finds it was error to find no genuine issue of material fact remains

as to damage amounts. The Court finds genuine issues of material fact remain as to the amounts of such damages, including whether a markup is appropriate and whether a setoff should be applied, and the proper remedy would be for both parties to present evidence on damages at a bench trial on all remaining issues. The Court notes Bear asserts that in the instant motion, Thrasher does not concede to any "obvious" damages, such as O.R. Colan's invoices. *See* Def's Resp., p. 17. The Court directs the parties to confer prior to any bench trial in this matter and stipulate to any damage amounts that are not in dispute.

Therefore, the Court finds the motion to revise is GRANTED IN PART and DENIED IN PART. The Court finds there is sufficient cause to revise the Orders as to its conclusions regarding damages, as outlined above. The damage amounts awarded shall be added to the remaining issues that are set for trial in this matter. The Court finds there is insufficient cause to revise the Orders as to its contract conclusions.

Request for 54(b) Certification

The Court next turns to Thrasher's request for alternative relief, its request for a Rule 54(b) certification. Specifically, Thrasher alternatively moves the Court to "enter final judgment on the claims covered by the Orders pursuant to WVRCP 54(b) and certify the rulings for immediate appeal". *See* Pl's Mot., p. 1. The Court notes that Defendants do not object to this request (in the event that the Court maintained its decision on the summary judgment orders/denied Thrasher's first request for relief). *See* Def's Resp., p. 1.

Rule 54(b) of the West Virginia Rules of Civil Procedure governs judgment upon multiple claims or involving multiple parties. Rule 54(b) provides, in pertinent part: "When more than one claim for relief is presented in an action…or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the

claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment". W. Va. R. Civ. Proc. 54.

Generally, an order qualifies as a final order when it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *Durm v. Heck's, Inc.*, 184 W. Va. 562, 401 S.E.2d 908 (1991). A judgment may properly be certified under subdivision (b) only if completely disposes of at least one substantive claim. *Province v. Province*, 196 W. Va. 473, 473 S.E.2d 894 (1996).

The following two-prong test applies to Rule 54(b) certifications: (1) whether the circuit court completely disposed of one or more claims; and (2) whether there is any just reason for delay. Syl. Pt. 1, *Province v. Province*, 196 W. Va. 473, 475, 473 S.E.2d 894, 896 (1996).

The West Virginia Supreme Court of Appeals "affords great deference to the intent of the circuit court in its determination of whether an order is final for purposes of Rule 54(b) certification[.]" *State ex rel. Consolidation Coal Co. v. Clawges*, 206 W. Va. 222, 228, 523 S.E.2d 282, 288 (1999); *see also Province,* 196 W.Va. 479 ("[T]he entire purpose of Rule 54(b) is to place this decision in the hands of the trial court who can best make this delicate balance."). There is also strong judicial policy disfavoring piecemeal appellate review. *Province*, 196 W. Va. at 480, n.14. As a result, use of Rule 54(b) "should not be routine and should be reserved only for the 'infrequent harsh case[.]'" *Id.* at 479 (quoting FED. R. CIV. P. 54 advisory committee's note.). "It should be granted only if there exists some danger of hardship or injustice through delay, that would be alleviated by immediate appeal." *Id.*

While the first element with regard to certification under Rule 54(b) is the issue of finality, the Court will analyze the second element, whether there is "no just reason for delay". Syl. Pt. 1, *Province v. Province*, 196 W. Va. 473, 475, 473 S.E.2d 894, 896 (1996).

The circuit court's determination of whether there is any just reason for delay is given "considerably more deference[.]" Syl. Pt. 1, *Province v. Province*, 196 W. Va. 473, 475, 473 S.E.2d 894, 896 (1996). "The circuit court's assessment that there is 'no just reason for delay' will not be disturbed unless the circuit court's conclusion was clearly unreasonable, because the task of balancing the contending factors is peculiarly one for the trial judge, who can explore all the facets of a case." *Id.* The Supreme Court of Appeals in *Province* explained the rationale on the limited review:

> Ordinarily, an appellate court cannot properly evaluate this prong without knowing how the circuit court feels about separating these issues for appellate purposes. Indeed, the entire purpose of Rule 54(b) is to place this decision in the hands of the trial court who can best make this delicate balance. . . Although it might be easier to decide each appeal in a series of multiple appeals in the same case than would be an appeal from a final judgment disposing of the entire lawsuit, the greater simplicity will usually be outweighed by the burden on this Court of having to reacquaint itself again and again with at least the basic facts of the case.

Province, 196 W. Va. at 480.

The following factors are considered: (1) any interrelationship or overlap among the various legal and factual issues involved in the decided and pending claims, and (2) any equities and efficiencies implicated by the requested piecemeal review. *Province*, 196 W. Va. at 480.

Here, the Court has determined above that it does not find that clear error occurred with regard to its conclusions regarding the clear and unambiguous contract decided as a matter of law. Additionally, it has determined that the issue of specific damage amounts, and the issue of the applicability of setoff, should be revised and as such, as issues of fact remain, are appropriate to be the remaining issues left in this civil action for trial. It is of the Court's opinion that resolving the remaining issues at trial rather than certifying the contract decisions for piecemeal review before trying the related damages issue serves judicial economy. For this reason, because

this second factor is not met, the Court concludes it will not exercise its discretion and certify the matter for immediate appeal. Instead, appeal of all the issues, including the contract issues and the damages that stem from it, should occur at one time, after the litigation the merits is complete.

For this reason, the instant request for Rule 54(b) certification is DENIED.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that The Thrasher Group's Motion for Revision of Summary Judgment Orders Or In The Alternative To Certify the Judgment for Immediate Appeal is hereby GRANTED IN PART AND DENIED IN PART. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

5/19/23

JUDGE JOSEPH K. REEDER
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION

Date: 5/22/2023
Certified copies sent to:
✓ counsel of record
— parties
— other Bus Ct
(please indicate)
By:
✓ certified/1st class mail
— fax
— hand delivery
— interdepartmental
Other directives accomplished:
Deputy Circuit Clerk

A. Ramey
A. Ennis
J. Dizio
C. Brumley